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;

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 B.C. COUPLES, INTERVENERS
Dawn and Elizabeth Barbeau, Peter Cook and Murray Warren, and Jane Hamilton and Joy Masuhara

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Kathleen A. Lahey
Barrister and Solicitor
86 Beverley Street
Kingston, Ont. K7L 3Y6
Tel: (613)545-0828
Fax: (613)533-6509
Email: kal2@post.queensu.ca
Counsel for the Interveners, the B.C. Couples

Marie-France Major
Lang Michener
50 O'Connor (Suite 300)
Ottawa, Ont. K1P 6L2
Tel: (613/232-7171
Fax: (613)231-3191
Email: mmajor@langmichener.ca
Agent for the Interveners, the B.C. Couples

TO: THE REGISTRAR

AND TO:

Peter W. Hogg, Q.C. and Michael Morris
Department of Justice Canada
130 King St. West (Suite 3400)
Toronto, Ont. M5X 1K6
Tel: (416)973-9704
Fax: (416)952-0298
Email: michael.morris@justice.gc.ca
Counsel for the Attorney General of Canada

Christopher Rupar
Department of Justice Canada
234 Wellington St. (12th floor)
Ottawa, Ont. K1A 0H8
Tel: (613)941-2351
Fax: (613)954-1920
Email: chris.rupar@justice.gc.ca
Agent for the Attorney General of Canada

AND TO:

Alain Gingras
Ministère de la Justice
1200, route de l'Église, 2ème étage
Sainte Foy, Québec
G1V 4M1
Tel: (418)643-5140
Fax: (418)646-6449

Counsel for Attorney General of Québec

Sylvie Roussel
Noël & Associés
Barristers and Solicitors
111 Champlain Street
Hull, Québec H8X 3R1
Tel: (819)771-7393
Fax: (819)771-5397
Email: s.roussel@noelassocies.com
Agent for the Intervener, the Attorney General of Québec

Robert G. Richards, Q.C.
MacPherson Leslie & Tyerman
1874 Scarth St. (No. 1500)
Regina, SK
S4P 4E9
Tel: (306)347-8000
Fax: (306)352-5250

Counsel for the Attorney General of Alberta

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
Barristers and Solicitors
160 Elgin Street (26th floor)
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Email: henry.brown@gowlings.com
Agent for the Intervener, the Attorney General of Alberta

Martha A. McCarthy
Epstein, Cole
401 Bay St (32d flr)
Toronto, Ont. M5H 2Y4
Tel: (416)862-9888 ext. 231
Fax: (416862-2142
Counsel for the Ontario and Quebec Couples

Henry S. Brown, Q.C.
Gowling, Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Interveners, the Ontario and Quebec Couples

R. Douglas Elliott
Roy Elliott Kim O'Connor LLP
10 Bay St. St 1400
Toronto, Ont. M5J 2R8
Tel: (416)362-1989
Fax: (416)362-6204
Counsel for Metropolitan Community Church of Toronto

Marie-France Major
Lang Michener
50 O'Connor St St. 300
Ottawa, Ont. K1P 6L2
Tel: (613)232-7171
Fax: (613)231-3191
Agent for the Intervener, Metropolitan Community Church of Toronto

Cynthia Petersen
Sack Goldblatt Mitchell
20 Dundas St. W No. 1130
Toronto, Ont. M5G 2G8
Tel: (416)979-6440
Fax: (416)591-7333
Counsel for Egale Canada

Pamela J. MacEachern
Nelligan O'Brien Payne LLP
66 Slater St (No. 1900)
Ottawa, Ont. K1P 5H1
Tel: (613)231-8220
Fax: ((613)788-3698
Agent for the Intervener, Egale Canada

Kenneth W. Smith
Smith & Hughes 1
4088 Cambie St. St 102
Vancouver, B.C. V5Z 2X8
Tel: (604)683-4176
Fax: (604)683-2621
Counsel for Canadian Unitarian Council

Pamela J. MacEachern
Nelligan O'Brien Payne LLP
66 Slater St (No. 1900)
Ottawa, Ont. K1P 5H1
Tel: (613)231-8220
Fax: ((613)788-3698
Agent for the Intervener, Canadian Unitarian Council

Leslie A. Reaume
Canadian Human Rights Commission
344 Slater St.
Ottawa, Ont. K1A 1E1
Tel: (613)943-9159
Fax: (613)993-3089
Email: leslie.reaume@chrc-ccdp.ca

Cathryn Pike
Ontario Human Rights Commission
180 Dundas St. W. 8th flr
Toronto, Ont. M7A 1Z8
Tel: (416)326-9876
Fax: (416)326-9867
Counsel for Ontario Human Rights Commission

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, Ontario Human Rights Commission

Aaron L. Berg
Manitoba Human Rights Commission
415 Broadway Ave. St 730
Winnipeg, Man. R3C 3L6
Tel: (204)945-2851
Fax: (204)948-28826
Counsel for Manitoba Human Rights Commission

Brian A. Crane, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, Manitoba Human Rights Commission

James L. Lebo, Q.C.
McLennan Ross
500- 3rd Ave. SW, St 1600
Calgary, Alta. T2P 3C4
Tel: (403)303-9111
Fax: (403)543-9150
Counsel for the Canadian Bar Association

Colin S. Baxter
McCarthy Tetrault LLP
40 Elgin St. St 1400
Ottawa, Ont. K1R 5K6
Tel: (613)238-2000
Fax: (613)238-9836
Agent for the Intervener, the Canadian Bar Association

Elliott M. Myers, Q.C.
Bull, Housser and Tupper
1055 W. Georgia St. St 3000
Vancouver, B.C. V6E 3R3
Tel: (604)687-6575
Fax: (604)641-4949
Counsel for British Columbia Civil Liberties Association

Paul Champ
Raven, Allen, Cameron and Ballantyne
220 Laurier Ave. W. St 1600
Ottawa, Ont. K1P 5Z9
Tel: (613)567-2901
Fax: (613)567-2921
Agent for the Intervener, British Columbia Civil Liberties Association

John O'Sullivan
WeirFoulds LLP
130 King St. W St 1600
Toronto, Ont. M5J 1J5
Tel: (416)365-1110
Fax: (416)365-1876
Counsel for United Church of Canada

Marie-France Major
Lang Michener
50 O'Connor St St. 300
Ottawa, Ont. K1P 6L2
Tel: (613)232-7171
Fax: (613)231-3191
Agent for the Intervener, United Church of Canada

Ed Morgan
Faculty of Law
University of Toronto
84 Queen's Park Cres.
Toronto, Ont. M5S 2C5
Tel: (416)946-4028
Fax: (416)946-5069
Email: ed.morgan@utoronto.ca
Counsel for the Canadian Coalition of Liberal Rabbis

Eduard J. Van Bemmel
Gowling Lafleur Henderson
Barristers and Solicitors
160 Elgin St. Ste 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869

Agent for the Canadian Coalition of Liberal Rabbis

Linda M. Plumpton
Torys
Box 270, TD Centre
Toronto, Ont. M5K 1N2
Tel: (416)865-0040
Fax: (416)865-7380
Counsel for Foundation for Equal Families

Marie-France Major
Lang Michener
50 O'Connor St St. 300
Ottawa, Ont. K1P 6L2
Tel: (613)232-7171
Fax: (613)231-3191
Agent for the Intervener, Foundation for Equal Families

Noël Saint-Pierre
Saint-Pierre, Grenier
460, rue Sainte-Catherine Ouest br 410
Montréal, Que. H3B 1A7
Tel: (514)866-5599
Fax: (514)866-3151
Counsel for Coalition pour le mariage civil des couples de même sexe

Luc Alarie
Alarie, Legault, Beauchemin, Paquin,
Jobin, Brisson & Philpot
1259, rue Berri 10e etage
Montreal, Q.C. H2L 4C7
Tel: (514)844-6216
Fax: (514)844-8129
Counsel for Mouvement laïque québécois

Richard Gaudreau
Bergeron, Gaudreau, Laport
167, rue Notre-Dame-de-I'lle
Gatineau, Q.C.
J8X 3T3
Tel: (819)770-7928
Fax: (819)7770-1424
Agent for the Intervener, Mouvement laïque québécois

Peter R. Jervis
Lerners LLP
130 Adelaide St. W St 2400
Toronto Ont, M5H 3P5
Tel: (416)867-3076
Fax: (416)867-9192
Counsel for the Interfaith Coalition

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, the Interfaith Coalition

Mark R. Frederick
Miller Thomson
20 Queen St. W. St 2500
Toronto, Ont. M5H 3S1
Tel: (416)595-8175
Fax: (416)595-8695
Counsel for the Church of Jesus Christ of Latter Day Saints

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, the Church of Jesus Christ of Latter Day Saints

Barry W. Bussey
1148 King St. East
Oshawa, Ont.
L1H 1H8
Tel: (905)433-0011
Fax: (905)433-0982
Counsel for Seventh-Day Adventist Church in Canada

Jeffrey W. Beedell
Lang Michener
50 O'Connor St St. 300
Ottawa, Ont. K1P 6L2
Tel: (613)232-7171
Fax: (613)231-3191
Agent for the Intervener, Seventh-Day Adventist Church in Canada

Peter D. Lauwers
Miller Thomson
60 Columbia Way St 600
Markham, Ont. L3R 0C9
Tel: (905)415-6470
Fax: (905)415-6777
Counsel for Ontario Conference of Catholic Bishops

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, the Ontario Conference of Catholic Bishops

Gerald D. Chipeur
Chipeur Advocates
440 2nd Ave. S.W. St. 2380
Calgary, Alta. T2P 5E9
Tel: (403)537-6536
Fax: (403)537-6538
Counsel for The Hon. Anne Cools and Roger Gallaway

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Interveners, TheHon. Anne Cools and Roger Gallaway

David M. Brown
Stikeman, Elliott
199 Bay St. St 5300 W.
Toronto, Ont. M5L 1B9
Tel: (416)869-5602
Fax: (416)947-0866
Counsel for Association for Marriage and the Family in Ontario

Nicholas Peter McHaffie
Stikeman, Elliott
50 O'Connor St. St 1600
Ottawa, Ont. K1P 6L2
Tel: (613)234-4555
Fax: (613)230-8877
Agent for the Intervener, Association for Marriage and the Family in Ontario

W. J. Sammon
Barnes, Sammon
200 Elgin St., Ste 400
Ottawa, Ont. K2P 1L5
Tel: (613)594-8000
Fax: (613)235-7578
Counsel for Canadian Conference of Catholic Bishops

Geoffrey Cowper, Q.C.
Fasken Martineau DuMoulin
1075 Georgia St. W. St 2100
Vancouver, B.C. V6E3G2
Tel: (604)632-3131
Fax: (604)632-3232
Counsel for Working Group on Civil Unions

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
160 Elgin St. St 2600
Ottawa, Ont. K1P 1C3
Tel: (613)233-1781
Fax: (613)563-9869
Agent for the Intervener, Working Group on Civil Unions

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PART I -- STATEMENT OF FACTS

A THE B.C. COUPLES

1. Dawn and Elizabeth Barbeau, Jane Hamilton and Joy Masuhara, and Peter Cook and Murray Warren, the B.C. Couples, are lesbian and gay couples who were denied marriage licenses by the Province of British Columbia. In 2000, they filed complaints with the B.C. Human Rights Commission relating to that denial, were named in the Attorney General of B.C.'s petition for judicial review of the federal prohibition on same-sex marriage (later withdrawn), and then filed their own application for judicial review. Their application resulted in the decisions of the B.C. Court of Appeal permitting them to marry in B.C. as of July 8, 2003.[1]

2. Dawn and Elizabeth Barbeau and Jane Hamilton and Joy Masuhara were married in Ontario in June, 2003, before the suspension was lifted in B.C. The recognition of their marriages throughout Canada and in other countries is of great personal significance to them and to Jane and Joy's two daughters.[2] Peter Cook and Murray Warren's plans to marry in Murray's hometown in Newfoundland in the summer of 2004 had to be cancelled when they learned that the Newfoundland government would not issue their marriage license until after this Reference is heard and the proposed legislation has been enacted.[3]

B SUMMARY OF THE FACTS

3. Since the colonial period, marriage laws in Canada have reflected the cultural diversity of Canadian society. When marriage was geographically unavailable to Europeans who moved west of European communities, customary marriages were common, and were recognized for legal purposes by the courts even when not subsequently solemnized..[4]

4. People who would now be described as lesbian, gay, transgender, or bisexual have always been part of Canadian society. Until 1969, they were rarely visible because self-identification

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[1] *Barbeau et al.* v. *Canada (A.-G.)*, [2003] BCCA 251 [*sub nom. Egale Canada Inc.* v. *Canada (A.-G.)* (2003), 13 B.C.L.R. (4th) 1, (2003), 225 D.L.R. 4th 472 (C.A.)], supplementary reasons *Barbeau et al.* v. *Canada (A.-G.)*, [2003] BCCA 409 [*sub nom Egale Canada Inc.* v. *Canada (A.-G.)* (2003), 228 D.L.R. 4th 416, B.C. Couples Book of Authorities, Tab 1.

[2] Affidavit of Dawn and Elizabeth Barbeau,sworn November 24, 2003, at paras. 9-11, 17-19 ('Barbeau Affidavit'), B.C Couples Record, Tab 1, pp.3-5; Affidavit of Jane Hamilton and Joy Masuhara, sworn November 24, 2003, at paras. 13, 34 ('Hamilton and Masuhara Affidavit'), B.C. Couples Record, Tab 3, pp. 41, 50.

[3] Affidavit of Peter Cook and Murray Warren, sworn November 24, 2003, at paras. 5-8 ('Cook and Warren Affidavit'), B.C. Couples Record, Tab 2, pp.15, 16.

[4] *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q. 45 (Que. S.C.), *aff'd Johnstone* v. *Connolly*, 17 R.J.R.Q. 266 (Que. Q.B.), B.C. Couples Authorities, Tab 4.

could easily attract criminal charges. Decriminalization of private consensual adult same-sex sex in 1969 made it possible for people to become more open about their sexualities, relationships, and families. At the same time, same-sex couples began seeking social and legal recognition in Canadian law.[5] The Charter of Rights and Freedoms have supported those claims. Since 2001, same-sex couples have borne the same tax burdens as married couples under federal and provincial law,[6] and have received growing number of legal rights and obligations as well.

5. Experts in marriage and the family have long known that same-sex couples have successful, loving and committed relationships and share the same reasons for seeking to marry as do heterosexual couples -- the desire for 'emotional closeness, intimacy and monogamy' and the wish to establish a framework for a 'long-term relationship that has personal significance for them' that is 'recognized by society.'[7] Dawn and Elizabeth Barbeau found after they married in June 2003 that even though one of their parents had strong religious objections to their relationship, the fact that Dawn and Elizabeth were actually married helped the parents relate more supportively to them.[8] Although Jane Hamilton and Joy Masuhara know that their marriage is not yet recognized everywhere that they go, they feel a greater sense of personal and family security in knowing that they are legally married.[9]

6. Same-sex couples have been raising children in growing numbers for decades in Canada.[10] Many of these children, such as Joy Masuhara and Jane Hamilton's and Peter Cook and Murray Warren's daughters and son, are already young adults. Some couples, such as Dawn and Elizabeth Barbeau, have begun planning their families since marrying. Although same-sex couples and their children still live with social stigma and still lack full rights and recognition, children with same-sex parents develop no differently than those with opposite-sex parents.[11]

7. With the *Halpern*, *Barbeau*, and *Hendricks* decisions,[12] Canada became the third country

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[5] Affidavit of Dr. Barry D. Adam, sworn November 15, 2000, paras. 7-17 ('Adam Affidavit'), Evidence before the British Columbia Court of Appeal in *Egale Canada* [CDROM] ('BCCA Evidence').

[6] Affidavit of Andrew R. Mitchell, sworn December 18, 2000, paras. 7-9 ('Mitchell Affidavit'), BCCA Evidence. Mitchell demonstrates that for most low- and middle-income same-sex couples, there is a 'tax on marriage' in the form of higher net taxes on the couple than if they were treated as single individuals. The tax benefits of being treated as married are limited largely to high-income and single-income couples.

[7] Affidavit of Dr. Katherine Arnup, sworn November 15, 2000, paras. 53-130 ('Arnup Affidavit'), BCCA Evidence.

[8] Barbeau Affidavit, paras. 12-13, B.C. Couples Record, Tab 1, p. 5.

[9] Hamilton and Masuhara Affidavit, paras.28, 29, B.C. Couples Record, Tab 3, p. 48.

[10] Arnup Affidavit, paras. 71-74, BCCA Evidence.

[11] Affidavit of Dr. Judith Stacey, sworn May 14, 2001, at paras. 6, 7, BCCA Evidence.

[12] *Halpern* v. *Canada*, (2003), 65 O.R. (4th) 161, (2003), 225 D.L.R. (4th) 529 (C.A.), AGC Authorities; *Hendricks* v. *Quebec*, [2002] R.J.Q. 2506 (C.S.Q.), AGC Authorities.

to extend marriage to same-sex couples, after the Netherlands in 2001 and Belgium in 2004. The Massachusetts Supreme Court relied on these decisions when it ordered that marriage be extended to same-sex couples in that state as of May 17, 2004; in February 2004, counties in California, Oregon, New York, New Jersey, and New Mexico began performing same-sex marriages; and Sweden, Spain, and Cambodia have announced that they are following suit.[13]

PART II -- POINTS IN ISSUE

8. The interveners agree with the AGC's statement of the Reference questions.

PART III -- ARGUMENT

A Question I: The Proposed Legislation is within the Exclusive Legislative Authority of Parliament

9. The B.C. Couples submit that as a sovereign state, there are no 'gaps' in Canada's jurisdiction over marriage. Any gaps that may have existed in the prior history of the English state concerning marriage were eliminated long before English legislative authority over marriage was transferred to Canada.[14] Canada has no less legislative authority over matters concerning capacity to marry than do the governments of the Netherlands, Belgium, Massachusetts, and other jurisdictions in the U.S. that have legislated or ruled in relation to same-sex marriage.[15]

10. 'Marriage' as used in section 91(26) of the *B.N.A. Act, 1867* does not directly entrench or incorporate any particular common-law or civil law 'definition' of marriage in the constitution. From the outset, Canada has been made up of peoples of diverse cultural and legal traditions.[16] Thus 'marriage' in this clause is understood as giving Parliament jurisdiction over whatever social-religious-moral conceptions of marriage may be recognized at any particular point in time in Canada, and not as entrenching one technical legal contruct to the exclusion of others.[17] Parliament has legislative authority to extend marriage to couples of the same legal sex.[18]

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[13] Affidavit of Nancy Maxwell, sworn May 6, 2004, para. 20 ('Maxwell Affidavit'), B.C. Couples Record, Tab 4, p. 55.

[14] Mark D. Walters, 'Incorporating Common Law into the Constitution of Canada: *Egale* v. *Canada* and the Status of Marriage' (2003), 41 *Osgoode Hall L. J.* 1:75-113, at 95-100, B.C. Couples Authorities, Tab 28; John Paul II, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (Vatican, Rome: Offices of the Congregation for the Doctrine of the Faith, 2003), B.C. Couples Authorities, Tab 27.

[15] Maxwell Affidavit, paras. 8-11, B.C. Couples Record, Tab 4, pp. 57-50a.

[16] The legal traditions include English common law, French civil law, and Aboriginal customary laws. See Walters, 'Incorporating Common Law,' at 90-95, B.C. Couples Authorities, Tab 28.

[17] Walters, 'Incorporating Common Law,' at 100-104, B.C. Couples Authorities, Tab 28.

[18] *Barbeau*, [2003] BCCA 251, paras. 106-113 . Note that before 1969, Parliament chose to regulate same-sex relationships through criminal regulation of sexual behaviours.

11. The courts in Canada are responsible for adapting the law relating to fundamental legal constructs such as 'marriage' to evolving social, legal, and economic conditions. In the *'Persons'* case, the Privy Council outlined the factors that are to guide the courts as they give the words of the constitution 'large, liberal, and comprehensive' meanings that can encompass such evolutionary changes. The positive factors include changes in the legal context; changes in the extrinsic social context; changes in social values; and existence of new situations not contemplated at the time of confederation. The Privy Council also identified several factors that are *not* relevant to such determinations: the meaning of words in Roman civil law, early English common law, or the law of 1867; the fact that the term may be used in conjunction with express language that may appear to be inconsistent with a proposed interpretation; the fact that English common law doctrine on a particular point might have been adopted widely; and the fact that the changed scope could be addressed by way of formal amendment to the constitution.[19] The B.C. Couples submit that each of the four positive factors are more than amply satisfied in relation to the issue of the capacity of same-sex couples to civilly marry, while the arguments contra fall within these four negative factors.

B Question II: Clause I of the Proposed Legislation is Consistent with the Charter of Rights and Freedoms

12. The B.C. Couples agree with and adopt the Attorney General of Canada's and the Ontario and Quebec Couples' submissions on Question II, and make the following further submissions regarding sections 15, 28, 2, 7, and 6 of the Charter.[20]

13. **Section 15:** When Thurgood Marshall, who later became a Justice of the U.S. Supreme Court, appeared on behalf of Linda Brown in *Brown* v. *Board of Education*, described the meaning of 'equality' in these terms: 'Equal means getting the same thing, at the same time, and in the same place.'[21] Section 1 of the proposed legislation is drafted in this spirit of 'true equality'[22]: 'Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.' It does not invite same-sex couples into marriage by naming them separately, by creating segregated marriage rights, or by calling for segregated documentation -- this language is completely integrative and non-discriminatory.

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[19] *Reference re: Meaning of the word 'Persons' in Section 24 of the British North America Act*, [1930] A.C. 124, AGC Authorities.

[20] Justice Prowse of the B.C. Court of Appeal made it clear that the court did not rule out the application of one or more of sections 2, 6, 7, or 28 of the Charter to the denial of same-sex marriage, but did not reach those issues. See *Barbeau* v. *Canada (A.-G.)*, [2003] BCCA 251, para. 100, B.C. Couples Authorities, Tab 1.

[21] 'Brown 50 Years Later' (2004), *American School Board J.* (April) 56, at 63, B.C. Couples Authorities, Tab 26.

[22] *Barbeau*, [2003] BCCA 251, para. 147, B.C. Couples Authorities, Tab 1.

14. The B.C. Couples submit that the language of section 1 of the proposed legislation is consistent with section 15 of the Charter. Section 1 codifies the judicial orders in the *Halpern*, *Hendricks*, and *Barbeau* cases, all of which replaced older judicial and statutory references to 'the union of a man and a woman' with 'the union of two persons' in order to render them consistent with section 15 of the Charter. Section 1 is employs the same kind of gender- and sexuality-neutral language that was employed by this Court in *M.* v. *H.* to integrate same-sex couples into the category of deemed spouse.[23] Especially when read against the backdrop of *Halpern*, *Hendricks*, and *Barbeau*, it is clear that the reference to 'two persons' in section 1 of the proposed legislation is inclusive, non-segregating, and non-discriminatory.[24]

15. **Section 28:** Because section 1 of the proposed legislation uses the neutral phrase 'two persons,' it is consistent with section 28 of the Charter, which states that all the rights and freedoms guaranteed by the Charter are 'guaranteed equally to male and female persons.'[25] Section 28 is intended to eliminate reliance on biological classifications on the basis of sex in the laws of Canada as well as the use of sexist stereotypes, myths, and 'traditional values' to justify sex-based discrimination.[26] Section 1 is consistent with section 28 because it makes it clear that limitations on capacity to marry that are based on sex-role stereotypes or beliefs about the necessity for 'complementary' male and female 'roles' in marital relationships are no longer constitutionally permissible, and no longer permits the state to deny the right to marry on the basis of a spouse's legal 'sex.'[27] It also guarantees all other Charter rights and freedoms equally on the basis on sex.

16. **Section 2:** Section 2 of the Charter guarantees the fundamental freedoms of conscience and belief, association, and religion. Section 1 is consistent with all those aspects of section 2. Freedom of association, it is submitted, includes freedom to marry. Kerans J.A. first

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

[24] It is also consistent with the application of constitutional equality guarantees in the Netherlands and the U.S. to extend marriage to same-sex couples. Maxwell Affidavit, paras. 13-18, B.C. Couples Record, Tab 4; Affidavit of Dr. Caroline Forder, sworn May 4, 2004, paras. 21-32, 42 ('Forder Affidavit'), B.C. Couples Record, Tab 5.

[25] Section 28 of the Charter provides that 'notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.'

[26] *Reference re Family Benefits Act (N.S.), Section 5* (1986), 75 N.S.R. (2d) 338, at 353, 354 (N.S.C.A.), leave to appeal ref'd [1987] 1 S.C.R. xiii, B.C. Couples Authorities, Tab 20.

[27] For example, *Baehr* v. *Lewin*, 852 P. 2d 44 (Haw., 1993), at 67-68, Exhibited in Affidavit of Stanford Katz, BCCA Evidence, based its ruling in favour of same-sex marriage on state constitutional prohibitions on sex discrimination similar to section 28 of the Charter. That court reasoned that when a lesbian or gay couple is prevented from marrying, each person in the couple is denied the right to marry the person she or he loves solely on the basis of his or her sex. *See also R.* v. *Hess*, [1990] 2 S.C.R. 906, at 932, B.C. Couples Authorities, Tab 17.

made the point that freedom of association includes freedom to marry in 1986,[28] and this Court has approved that point in the *PSERA* decision in 1987, in which two of the three opinions in that case agreed that 'a legislative enactment which prohibited marriage for certain classes of people' might violate section 2(d), 'particularly in combination with other rights and freedoms.'[29] More recently, this Court in *Dunmore* held that while section 15 is engaged when exclusion affects human dignity, section 2 is engaged when exclusion interferes with the ability to exercise fundamental freedoms.[30] Section 2 is also engaged when denial of the right to marry is considered to interfere with the right to intimate association, which formed one of the grounds for the U.S. Supreme Court decision in *Loving* v. *Virginia*.[31]

17. Section 1 of the proposed legislation makes it clear that same-sex couples can chose to marry or not, can chose to marry through civil offices or through religious organizations that extend religious marriage ceremonies to same-sex couples, and can live with the assurance that their freedom of conscience, belief, religion, association, intimate association, and expressive association are protected by the text of the proposed legislation on capacity to marry.

18. **Section 7:** Section 7 of the *Charter* provides that everyone has the right to life, liberty, and security of the person except in accordance with the principles of fundamental justice. This Court has repeatedly emphasized that section 7 is intended to protect those inherently personal and fundamental life choices that go to the core of individual dignity. As Justice Wilson summed it up in *Morgentaler*, section 7 builds a 'fence' around the core of personal functioning to create a sphere of personal self-responsibility and autonomy to mark the limits of state authority.[32] The Supreme Court of Canada recognized that marriage must fall within this class of protected liberties in *Miron* v. *Trudel*, stating that the decision 'to live life with the mate of one's choice in the fashion of one's choice...is a matter of defining importance to

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[28] *Black* v. *Law Society of Alberta*, [1986] 3 W.W.R. 590, at 612 (Alta. C.A.) Kerans J.A., leave to appeal den. [1989] 1 S.C.R. 591, B.C. Authorities, Tab 3, quoted with approval by Dickson C.J.C. (in dissent with Wilson J.) in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 401, B.C. Couples Authorities, Tab 21.

[29] *PSERA*, at para. 81, per Dickson C.J. and Wilson J.; para. 173, per McIntyre J., B.C. Couples Authorities, Tab 21.

[30] *Dunmore* v. *Ontario (A.-G.)*, 2001 SCC 94, [2001] S.C.R. No. 87, paras. 15-17, 20-24, 28 (QL), B.C. Couples Authorities , Tab 6.

[31] *Loving* v. *Virginia*, 388 U.S. 1 (1967), B.C. Couples Authorities, Tab 12, relied on in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 130, at 169, per Wilson J., B.C. Couples Authorities, Tab 16, fll'd *Godbout* v. *Longueuil (City)*, [1997] 3 S.C.R. 844, at 893, para. 66, B.C. Couples Authorities, Tab 8.

[32] *Morgentaler*, [1988] 1 S.C.R., at 163–172, B.C. Couples Authorities, Tab 16; *Godbout*, [1997] 3 S.C.R., at 893, para. 66, B.C. Couples Authorities, Tab 8.

individuals.'[33] This echoes the U.S. Supreme Court, which in *Loving* v. *Virginia* described the freedom to make this particular type of personal commitment 'essential to the happiness of man,' and the Massachusetts Supreme Judicial Court, which in *Goodridge* v. *Massachusetts* held that denial of the right to marry denies both liberty and equality.[34]

19. The appellate courts in *Halpern*, *Hendricks*, and *Barbeau* did not reach these issues, they are all implicated in the right to marry. The B.C. Couples submit that despite Pitfield J.'s conclusion that neither sections 2 nor 7 of the Charter are engaged by the denial of the right to marry,[35] the weight of this Court's opinions on issues of liberty, security, and privacy indicate that they are engaged. The B.C. Couples submit that by codifying same-sex couples' capacity to marry, section 1 would protect them against such potential infringements of their rights.

20. **Section 6:** The legal status of lesbian and gay couples and their families is a 'patchwork' of inconsistent rights and obligations that vary widely from one province to another. Appendix B enumerates all the federal, provincial, and territorial statutes (but not regulations) that confer rights or obligations on couples who are legally married. While the numbers and types of statutes concerning civil marriage vary from one jurisdiction in Canada to another, there is no doubt that when a married couple is in Saskatchewan, for example, they will be treated as married for purposes of all Saskatchewan laws and regulations that concern married couples while they are in Saskatchewan. When they go over the border to Alberta, the specific legal incidents of marriage there may vary as to detail, but again, the couple will know that every single such law will apply fully to them. Not so same-sex couples, who will continue to exist in a state of extreme legal chaos until such time as all provinces and territories agree to recognize same-sex marriages. Not only does the actual designation given to unmarried same-sex relationships vary from jurisdiction to jurisdiction,[36] but the relative numbers as well as the subjectmatter of the legal provisions that will apply to their relationships varies quite

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[33] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, at 471, para. 95, B.C. Couples Authorities, Tab 13.

[34] *Loving*, 388 U.S. 1, paras. 10-12, B.C. Couples Authorities, Tab 12; *Goodridge* v. *Dept. of Public Health (Massachusetts)*, 798 N.E. 2d 941 (Mass. S.J.C., 2003), B.C. Couples Authorities, Tab 9.

[35] *Egale Canada* v. *Canada (A.-G.)*, [2001] B.C.J. No. 1995, paras. 61-78, B.C. Couples Authorities, Tab 7.

[36] A couple deemed to be 'spouses' through cohabitation in B.C. or the NWT would travel through no fewer than 9 other legal categories as they cross the country: In Alberta, they would be classified as either 'unmarried conjugal interdependent adults' or 'nonconjugal interdependent adults'; in Saskatchewan they would be deemed to be 'spouses' again but become 'common law partners' in Manitoba, then 'same-sex partners' in Ontario and either 'de facto spouses' or 'civil union partners' in Quebec, depending on whether they filed a civil union; then in the east they would move from 'common law partner' or 'registered domestic partner' in Nova Scotia (depending on formalities) to 'partners' in Newfoundland, and '2 persons living together' in New Brunswick. Federally they would remain 'common law partners' throughout the journey and would become so once again provincially if they were to reach PEI. See Appendix A.

dramatically from one jurisdiction to another. Even the question of *what* a couple's relationship is can be difficult to identify, because the recognition of non-marital relationships depends on complex factual assessments that are best carried out in hindsight, can be intrusive, indeterminate, and discretionary, and are not susceptible to simple brightline tests such as 'please provide a copy of your marriage certificate.'[37]

21. Parent-child relationships in same-sex families are also submerged in legal chaos. Because most provinces and territories recognize the legal parentage of unmarried same-sex couples only if they go through formal second-parent adoption, the status of being married will trigger parentage under statutory presumptions that spouses are both parents of the children born to them. The status quo is fraught with uncertainty, expense, contradictions, and risks not faced by opposite-sex cohabitants, entailing further potential Charter infringements.[38]

22. The AGC has pointed out in his factum that this 'patchwork' is contrary to the intent of the framers of the constitution, who assigned exclusive jurisdiction over marriage was assigned to the federal government in order to secure uniformity of capacity throughout Canada.[39] As provincial and territorial governments bring their solemnization mechanisms into line with federal common law on the capacity of same-sex couples to marry, section 1 of the proposed legislation will assist in bringing this legal chaos and uncertainty to an end as rapidly as possible. Section 1 of the proposed legislation would also enhance international recognition of the same-sex marriages of Canadians.

C Question III: Clause 2(a) of the Charter Protects Religious Officials from being Compelled to Perform Marriages Between Same-Sex Couples

23. Same-sex couples have been marrying in the Netherlands since April 1, 2001, in Belgium and Ontario since June 2003, in B.C. since July 2003, and in numerous locations in five U.S. states since February 2004. There has been no indication in any of these jurisdictions that any same-sex couples have made any attempt to seek court orders compelling religious officials to perform their marriages. While a number of faiths extend religious marriage to same-sex couples,[40] this is a choice made by the religious organization and its adherents, and not something that has been imposed on them by the state.

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[37] See Appendix A for a summary of the main incidents of unmarried same-sex cohabitation in each jurisdiction in Canada.

[38] See Appendix A for details of this legislation.

[39] AGC Factum, paras. 24-30.

[40] This point is amply documented by many of the other interveners in this Reference.

24. In the Netherlands, which has the longest experience of same-sex marriage, the only issues that have arisen concerning same-sex marriage and religious belief have involved state employees, not religious officiants. In the resolution of those issues, the religious beliefs of state employees have been carefully balanced in order to protect religious beliefs of employees and equality rights of same-sex couples. Municipal offices ensure that they have enough employees to maintain services to same-sex couples even when some employee may religiously object to performing or registering civil same-sex marriages.[41] State officials have however refused to offer civil officiants who have never been 'tainted' by performing any same-sex marriages. These objections have not been accommodated, the government's reasoning being that to do so would be to involve the state in discriminatory actions.[42]

D Question IV: Whether an 'Opposite-Sex Requirement for Marriage' is 'Consistent with the Charter'

25. The first three Reference questions all concern the proposed legislation concerning capacity to marry that was initially the occasion for this Reference. The fourth question, which was added after the Reference had been filed, does not relate to the proposed legislation, but seeks an advisory opinion on whether 'the opposite-sex requirement for marriage for civil purposes' is 'consistent with' the Charter:

> 'Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Québec in s. 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?'

26. The B.C. Couples submit that this question cannot be answered without qualification because it is misleading and illogical, is premised on an incorrect view of the nature of the federal common law and of federal law-civil law harmonization legislation, and seeks to relitigate the final decisions in *Halpern*, *Hendricks*, and *Barbeau* on exactly the same issues that have already changed federal common law and rendered harmonization legislation irrelevant.

27. The B.C. Couples submit that even though a reference question may be justiciable in the 'reference' sense outlined in *Reference re Secession of Quebec*,[43] this Honourable Court is not compelled to answer the question as it is framed if it considers it to be misleading, illogical, or to

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[41] Forder Affidavit, paras. 38, 43-48, B.C. Couples Record, Tab 5, pp. 135, 137-139. The Eringa case was eventually resolved in favour of the objecting employee, although the issue has not been completely resolved.

[42] Forder Affidavit, para. 45, B.C. Couples Record, Tab 5, p. 138.

[43] [1998] 2 S.C.R. 217, paras. 27-29, AGC Authorities.

require qualification or interpretation.[44] The B.C. Couples further submit that this Court is not compelled to answer a question that would involve relitigation of issues to which the finality doctrines of res judicata, issue estoppel, collateral attack, or abuse of process apply.

(1) Question IV is misleading and illogical

28. The B.C. Couples submit that question 4 is misleading and illogical. The question purports to request an advisory opinion on 'the opposite-sex requirement for marriage for civil purposes, as established by the common law....' By stating this question in the present tense, the Attorney General of Canada has requested that the Court answer it on the unstated but quite obvious premise that that there is presently in place in Canadian law an 'opposite-sex requirement' for civil marriage. Similarly, the request for an advisory opinion on 'the opposite-sex requirement for marriage for civil purposes, ... set out for Québec in s. 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*...,' which is also stated in the present tense, appears to require that the Court answer the question on the premise that an 'opposite-sex requirement' is validly and presently set out 'for Quebec' in section 5 of the federal *Harmonization Act*.

29. The B.C. Couples submit that this framing of the question is illogical and misleading because any 'opposite-sex requirement for marriage' that may have existed in Canadian common law or that may have been interpreted into bijural civil code concepts and terminalogy for Quebec in section 5 of the federal *Harmonization Act* has already been declared to be constitutionally invalid and of no force and effect. It is further misleading because the Attorney General of Canada himself expressly acquiesced in those declarations, announced Canada to be bound by them, signified their binding quality by filing formal consents in the *Barbeau* and *Hendricks* cases, embarked upon the process of codifying those rulings in the legislation that is being reviewed by this Court in this Reference, and has acknowledged all of these facts in the within Reference.[45]

30. The declarations of constitutional invalidity that were issued in Ontario, Quebec, and B.C. were not merely prospective or to be held in abeyance until some future date -- marriages in each of Ontario, B.C., and Quebec have been occurring literally since the moment each of those declarations were issued. Thousands of couples from across Canada have taken the very serious step of marrying in those provinces since the Attorney General of Canada acquiesced in the

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[44] [1998] 2 S.C.R. 217, para. 31, AGC Authorities.

[45] AGC Factum, paras. 1-10; AGC Supplementary Factum, paras. 1, 4.

Halpern and *Barbeau* decisions in the summer of 2003.[46] Lives have been altered as the result of the new reality created by these decisions. Same-sex couples have all acquired new status in Canadian society -- the status of adults who are permitted by their society to marry. Those who have married have gained concrete rights and obligations in relation to each other as well as in relation to their children, other members of their families, their communities, and the state.[47] Children have already been born into this new reality and are being raised in a context of greater social acceptance and legal security. The status of same-sex couples in Canada has changed fundamentally, materially, and permanently as the result of these decisions.

31. Accordingly, question 4 is misleading as to the legal status of any supposed 'opposite-sex requirement for civil marriage.' On the doctrine of *stare decisis*, no such requirement exists at the present time in Canada. The question is also illogical because it asks for an advisory opinion on the status of legal doctrine that has already been declared to be of no force and effect. Any advisory opinion that cannot be answered without ignoring the present state of the law cannot be described as being logical. But most importantly, public policy is not served by the reconsideration of the merits that such a process would necessitate.

(2) Same-sex couples already have capacity to marry under federal common law

32. Ever since the first same-sex marriage case was filed in Canada, it has been agreed by the AGC that capacity to marry falls within exclusive federal jurisdiction under section 91(26) of the B.N.A. Act, 1867.[48] The Attorney General of Canada has always taken the position that because the federal government has never enacted legislation regarding capacity to marry a person of the same legal sex, that issue is governed by the English decision in *Hyde* v. *Hyde*. Until 2002, the courts have agreed with that position. Until the Ontario Division Court issued its decision in *Halpern* in 2002, the courts have repeatedly held that *Hyde* v. *Hyde* has defined Canadian federal common law on the capacity of same-sex couples to marry.[49]

33. The B.C. Couples submit that having adapted federal common law to contemporary

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[46] Maxwell Affidavit, para. 20, B.C. Couples Record, Tab 4, p. 55.

[47] The legal dimensions of this change can best be appreciated by comparing the contents of Appendix A, which outlines the legal status of same-sex couples before marriage became available, and Appendix B, which enumerates all the laws (but not regulations) touching and concerning marriage in effect in Canadian federal, provincial, and territorial law (as at April 29, 2004). The legal change in the status of same-sex couples who are permitted to marry is monumental.

[48] *Re North et al. and Matheson* (1974), 52 D.L.R. (3d) 280 (Co.Ct. Winn.), B.C. Couples Authorities, Tab 19; *Re Marriage Act (Canada)*, [2001] B.C.J. No. 38 (B.C.S.C.), para. 1, B.C. Couples Authorities, Tab 18.

[49] The most recent of these rulings having been that of Pitfield J. in *Egale Canada* v. *Canada (A.-G.)*, paras. 82-83, B.C. Couples Authorities, Tab 7.

social conditions, the *Halpern*, *Barbeau*, and *Hendricks* decisions now govern Canadian common law on the capacity of same-sex couples to marry. The interveners submit that question 4 is logically coherent only if the Court assumes that *Hyde* v. *Hyde* and the cases that have followed it are treated as having remained in effect despite these appellate rulings.

34. The Attorney General of Canada appears to be aware of this inconsistency, but has attempted to circumvent it with the novel suggestion that federal common law can be different in different parts of Canada at the same point in time. The AGC asserts that 'The law defining civil marriage is now different across Canada' and purports to answer question 4 only in relation to 'the common law jurisdictions of Canada other than British Columbia and Ontario.'[50] The AGC proposes that the federal common law on capacity to marry as found in B.C. and Ontario be severed from the federal common law that applies to the rest of the country, with the apparent consequence that the federal common law has to be established anew within the boundaries of each province in Canada as legal doctrine evolves.

35. The B.C. Couples submit that this view of the nature of federal common law is deeply inconsistent with the nature of exclusive federal jurisdiction. On the one hand, the AGC appears to be suggesting that the federal common law is not unitary, but merely exists as the accumulation of separate bits of legal doctrine all kept in different geographic compartments. On the other hand, the AGC has argued that the federal government has been given exclusive legislative authority over capacity to marry because of 'the desirability of a uniform law of marriage across the country,' and the importance of avoiding 'a patchwork situation with its concomitant problems of recognition and enforcement of marriages.'[51] The B.C. Couples submit that the AGC has an obligation to safeguard the unitary nature of federal common law, and is not free to disavow it or claim that it is actually fragmented when it is convenient to do so.

36. The B.C. Couples submit that this Court's decision in *Helens* v. *Densmore*,[52] which the AGC has relied upon in support of his explanation of why Parliament has unitary federal jurisdiction over capacity to marry, is dispositive of the nature of the federal common law upon which Parliament has relied as establishing many of the rules relating to capacity to marry:

> 'That being the provincial law before Confederation, became thereafter the law as

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[50] Supplementary Factum of the Attorney General of Canada, para. 3.
[51] Factum of the Attorney General of Canada, para. 29.
[52] [1957] S.C.R. 768 at 784, per Rand J., AGC Authorities.

> if enacted by Parliament. As paramount law, it would determine the capacity for marriage of the person affected throughout Canada; and there could be no question of a Province not giving it recognition. Apart from questions of solemnization, with one source of law for marriage and divorce, personal capacity or incapacity is the same throughout the nation.'[53]

37. The B.C. Couples submit that as the law of a unitary jurisdiction, federal common law relating to capacity to marry is also unitary and cannot be divided along provincial lines. If an issue concerns capacity to marry, it is a matter of federal law, and federal common law applies nationally: '[I]t is undoubted that prohibition cannot extend beyond the boundaries of the jurisdiction where it exists as law. The significant quality is that of capacity or incapacity, and for this there is no boundary.'[54]

38. The body of federal common law concerning capacity to marry is no less unitary and national in scope than other bodies of federal common law applicable to matters within exclusive federal jurisdiction, such as the common law of Aboriginal title, the Crown's fiduciary obligations to Aboriginal persons, and maritime law.[55] Even when some issues such as age of consent to marry can go both to capacity to marry within federal jurisdiction and to the validity of solemnization of marriage, which is within provincial jurisdiction, federal common law on age as it relates to capacity to marry will apply nationally within the unitary federal jurisdiction so long as federal legislation remains silent on that point.[56] Once such elements of capacity to marry are established through common law rulings, that doctrine is considered to be applicable 'beyond the boundaries of the jurisdiction' in which the initial ruling was made.

39. If the doctrine of *stare decisis* is to have any credibility, the *Halpern*, *Barbeau*, and *Hendricks* decisions must be given full effect as final appellate rulings on the federal common law question of the capacity of same-sex couples to marry. For decades, the 1866 decision of a Judge Ordinary in the English matrimonial court system has been considered by the courts and the federal government in Canada to regulate the capacity to marry of every single same-sex couple in Canada since confederation -- even though *Hyde* was not even a case about same-sex marriage. Even though *Hyde* has been distinguished, not followed, overruled, or questioned

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[53] Factum of the Attorney General of Canada, para. 30.

[54] *Christensen* v. *Rowbottom* (1965), 52 D.L.R. (2d) 477 (B.C.S.C.), per Ruttan J., B.C. Couples Authorities, Tab 5.

[55] *Eg., Roberts* v. *Canada*, [1989] 1 S.C.R. 322, paras. 29-30, per Wilson J., B.C. Couples Authorities, Tab 22.

[56] *Eg., Legebokoff* v. *Legebokoff* (1982), 136 D.L.R. (3d) 566 (B.C.S.C.), per MacKinnon J., B.C. Couples Authorities, Tab 11.

numerous times in all other contexts, until as recently as 2003, the federal government was still taking the position that it was bound by *Hyde* everywhere that federal law on capacity to marry applies. The B.C. Couples submit that the AGC's continued insistence that *Hyde* and its progeny still have greater weight than *Halpern*, *Barbeau*, and *Hendricks* -- decisions that are contemporary, domestic, appellate, directly on point, and fully reasoned -- flies in the face of the doctrine of *stare decisis*.

40. There are further reasons to reject the AGC's view that federal common law on capacity to marry is geographically fragmented and cannot change without further litigation or legislation. First, in this particular situation, the AGC has made it absolutely clear at every step of the way that he has accepted the binding status of the three appellate decisions, and that he took consistent steps to ensure that they remained uncontested until they became final. Second, this is an asymmetrical view of how the law on capacity to marry can change: If the AGC is correct, all it takes to create a bar to same-sex marriage for 130 years is to find a a lowly trial court decision buried in the annals of English matrimonial law that refers to marriage as a 'union of a man and a woman' -- but the combined weight of three carefully-reasoned contemporary appellate decisions directly on point is not sufficient to displace that bar. Third, this view undercuts the status of the Charter as national law which, like federal statutes, regulations, and common law, is to be interpreted consistently for greater certainty and to avoid bringing the constitutional litigation process into disrepute.[57] *Halpern*, *Barbeau*, and *Hendricks* are not Charter cases on provincial solemnization issues -- they are Charter cases on federal common law capacity issues.

(3) Harmonization legislation is merely interpretive

41. Nor is it necessary to obtain an advisory opinion on the status of section 5 of the Federal Law-Civil Law Harmonization Act. As this Court has held in *Schreiber*, the bijural bilingual harmonization of Canada's two European legal traditions is a process the purpose of which is to better interpret to each legal tradition the concepts of the other (bijural interpretation) and to simultaneously translate those bijural concepts into both English and French (bilingual bijuralism). As such, section 5 is not an independent or substantive source of federal law, but merely purports to interpret to the civil code system the English common law understanding of capacity to marry so that it can be provided to readers in Quebec not as an independent source of

[57] *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929, para. 14, per Iacobucci J., B.C. Couples Authorities, Tab 25.

law, but as part of a text organized in a fashion that is conceptually familiar to civilian lawyers.[58] Once federal common law ceased to impose an alleged opposite-sex requirement on civil marriage, harmonization legislation that may have purported to bijurally interpret that concept to the civil code system will not independently maintain that requirement for those governed by the civil code. Instead, it will simply cease to have any interpretive effect it may have had before.[59]

(4) Question IV attempts to relitigate final appellate Charter rulings

42. The *Halpern* and *Barbeau* decisions are fully final appellate rulings that were deliberately not appealed because the government took the position that they were correctly decided and that it agreed with their result. The AGC took the further affirmative step of consenting to the lifting of the period of suspension initially ordered in *Barbeau*, and later took the same step in relation to *Hendricks*.[60] At no time did the AGC give any indication of any intention to relitigate or reopen any of these rulings, and it is plain on the face of the proposed legislation that originally occasioned this Reference that there was never any intention but to implement codifying legislation consistent with those three rulings.

43. Because *Halpern*, *Barbeau*, and *Hendricks* have changed the federal common law on the capacity of same-sex couples to marry, a change that will remain in effect even if the proposed legislation is never enacted, the interveners submit that question 4 is really an attempt to relitigate these rulings in the guise of seeking an advisory opinion on the proposed legislation. If this Honourable Court were to accede to the AGC's request for an answer to question 4 as it is framed, it is theoretically possible that the Court could answer question 4 in the affirmative. If this were to happen, this Court's advisory opinion could conceivably roll back the effects of the *Halpern*, *Barbeau*, and *Hendricks* decisions and dissuade the federal government from enacting the proposed legislation. This would deprive the original couples who personally initiated this litigation of the benefit of those final rulings, as well as all those whose status in law has changed because of them. Such an advisory opinion would also no doubt result in further litigation.

44. Under these circumstances, the interveners submit that the Court should refrain from answering question 4 no matter how it might be reframed, on the basis that to do so would be to

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[58] This view is confirmed in *Schreiber* v. *Canada (A.-G.)*, [2002] SCC 62, [2002] S.C.J. No. 63, paras. 69-72, per LeBel J., B.C. Couples Authorities, Tab 23.

[59] In *Hendricks*, Lemelin J. stopped short of holding that section 5 constituted a bar on same-sex marriage. However, she appeared to be somewhat ambivalent about its precise effect. See *Hendricks*, [2002] J.Q. No. 3816, paras. 102-104, 133, 153, AGC Authorities.

[60] AGC Factum, paras. 8, 10.

violate judicial policy that final judicial dispositions not be relitigated except under very narrow circumstances. The interveners rely on this Court's doctrine of abuse of process by relitigation as elaborated by Arbour J. in *Toronto (City)* v. *Canadian Union of Public Employees*,[61] but submit that this view is also supported by the doctrines of collateral attack, res judicata, and issue estoppel and agree with the Ontario and Quebec couples' submissions on these points.[62]

45. In her majority opinion in *CUPE*, Justice Arbour has outlined the policies that are reflected in the doctrine of abuse of process by relitigation: There should be an end to litigation; no one should be 'twice vexed by the same cause'; the doctrine preserves the resources of both the courts and litigants; it upholds the integrity of the legal system by avoiding inconsistent results; and it 'protects the principle of finality so crucial to the proper administration of justice.'[63] Justice Arbour recognized that the doctrine of abuse of process by religitation is closely related to the doctrines of issue estoppel and res judicata, and can also encompass the separate doctrine of collateral attack:

> 'The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent urisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'[64]

46. The interveners submit that question 4 of this Reference runs afoul of the doctrine of abuse of process by relitigation because it attempts to impeach the validity of the three final appellate dispositions in *Halpern*, *Barbeau*, and *Hendricks*. This impeachment takes the specific form of suggesting that unlike other federal common law rulings, these three decisions, all of which adapt the common law on capacity to marry to contemporary society as governed by the Charter of rights, apply only partially or perhaps not at all outside the provinces in which they were decided. Any analysis that proceeds on that assumption violates the integrity of the judicial process. As Arbour J. pointed out, no matter what the outcome of the relitigation, it is the *fact* that relitigation takes place at all that undermines the integrity of the entire judicial process:

> 'First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial

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[61] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, B.C. Couples Authorities, Tab 24.
[62] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, paras.22-58, B.C. Couples Authorities, Tab 24 .
[63] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, para. 38, B.C. Couples Authorities, Tab 24 .
[64] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, para. 40, B.C. Couples Authorities, Tab 24 .

> resources as well as an unnecessary expense for the parties and possibly an additional hardship for some.... Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim.'[65]

47. The interveners submit that this Reference does not raise any circumstances in which religitation would 'enhance, rather than impeach, the integrity of the judicial system.'[66] The AGC has not demonstrated that there have been any changes in circumstances between July 2003, when this Reference was first filed, and January 2004, when question 4 was added, that would necessitate any review of the correctness of the *Halpern*, *Barbeau*, and *Hendricks* decisions. Nor has the AGC made any showing of fraud, dishonesty, or new evidence that would materially alter the outcome.[67] On the contrary, the interveners submit that question 4 raises the spectre that the marriages of couples from across Canada could be called into question by this Court's answer. Further, even if question 4 were to be answered in the negative, they will have been placed in the onerous position of having to address all of the elements of the Charter analysis carried out by the Ontario, B.C., and Quebec courts all over again, with less opportunity to place the full merits of their positions before the Court, without having the status of parties, and with none of the procedural rights and safeguards associated with the trial process.

48. The interveners' concern over the impact of question 4 on the appellate decisions in *Halpern*, *Barbeau*, and *Hendricks* is not merely abstract or theoretical. The Attorney General of Canada's submissions on question 4 diverge quite materially from the *rationes decidendi* in *Halpern*, *Barbeau*, and *Hendricks* on numerous points. For example, by relying so heavily on passages from Blair R.S.J.'s Divisional Court decision in *Halpern*,[68] the AGC has represented that procreation continues to play a far more prominent role in the judicial description of contemporary marriage than is warranted either by the actual evidence before the Ontario and B.C. courts in *Halpern* and *Barbeau* or by the full reasons for decision given in any of the trial court and appellate decisions in Ontario, B.C., and Quebec. To give another example, the AGC does not address the question of how section 15 or section 1 relate to common law issues, despite the very careful way in which all three sets of courts approached the distinction between adapting the common law in light of Charter values *versus* applying section 15 directly to supposed common law rules, the proper role of section 1 in such an analysis, and the detailed description of

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[65] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, para. 51, B.C. Couples Authorities, Tab 24 .
[66] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, para. 52, B.C. Couples Authorities, Tab 24 .
[67] [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, para. 52, B.C. Couples Authorities, Tab 24 .
[68] AGC Supplementary Factum, paras. 10, 12, 13.

the nature of the interests affected by denial of the right to marry.

49. The B.C. Couples submit that any substantive answer to question 4 that engages these and the many other issues that formed part of the rulings in the *Halpern*, *Barbeau*, and *Hendricks* cases would require them and the other original parties who brought these cases to make far more detailed and extensive submissions to this Court than is feasible within the confines of this Reference. For example, this is the B.C. Couples' submission regarding the question of whether procreation continues to be *any* factor in contemporary concepts of marriage: Contemporary courts have shown little tolerance for this narrow 'procreative' justification for restricting marriage to heterosexual couples. LaForme J. of the Ontario Divisional Court not only found that denying same-sex couples the choice to marry withholds important benefits and imposes substantial burdens on them, but also that states did not begin to assert their interest in the alleged 'procreative potential' or 'natural procreative capacity' of heterosexual couples until they were forced to explain these policies in court by same-sex couples seeking to marry. As he pointed out, any suggestion that procreation is essential to the validity of marriage (originally an ecclesiastical requirement) has been firmly rejected by common-law courts for decades. He even went so far as to describe it as a 'ruse' to ward off same-sex marriage.[69] This is by no means a new or unusual view of the role of physical procreation in marriage law in Canada. This Honourable Court recognized in *Moge* over a decade ago that so-called 'procreation' is primarily the social process of 'nurturing the young of our society' which encompasses as just one feature any concept of physical procreation. In *Moge*, this Court concluded that even this expanded concept of social nurturance of young people is but one of half a dozen important functions and characteristics of marriage. Further, in *M.* v. *H.*, this Court expressly rejected the contention that lesbian and gay couples do not have 'reproductive capabilities.' As the courts have given due weight to evidence of the nature and function of both marriage and same-sex relationships in contemporary society, they have soundly rejected the narrow understanding of the 'procreation' view of marriage as justifying the exclusion of lesbian and gay couples from fundamental social institutions.[70]

50. The inclusion of the trial court records from the B.C. and Ontario cases in the AGC's Reference record does not solve the many problems that are raised by the AGC's substantive

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[69] *Halpern* v. *Canada (A.-G.)* (2002), 60 O.R. (3d) 321, paras. 406-410 (Div. Ct.), AGC Supp. Authorities, Tab 2; see also *Hendricks*, [2002] R.J.Q. 2506, AGC Authorities; *Baker* v. *State*, 744 A.2d 864, at 881, 882 (Vt. C.A., 1999); *Baehr* v. *Lewin*, 852 P.2d 44, 75 (Haw. C.A., 1993); *Brause* v. *Bureau of Vital Statistics*, 1998 WL 88743, at 5, para. 31 (Alaska Superior Ct., 1998), Katz Affidavit, BCCA Evidence.

[70] *Moge* v. *Moge*, [1992] 3 S.C.R. 813, at 848, paras. 42-43, B.C. Couples Authorities, Tab 14; *M.* v. *H.*, [1999] 2 S.C.R. 3, 75, para. 114, per Iacobucci J, AGC Authorities.

submissions on question 4. No matter how much time or space the original parties might be given in which to make their submissions, at the end of the Reference, the *rationes* of the three appellate decisions would all remain henceforth open to question to the extent that this Court might prefer some statement in one over another, might slightly restate one holding or another, or might place different emphasis on specific items of evidence that were before the courts. In other words, each of those three appellate decisions would be in the anomalous position of having to be read not only by reference to each other within the doctrine of *stare decisis*, but this Court's answer to question 4 would also play a role in any subsequent interpretation of the status and effect of each of those three decisions in later litigation. Indeed, the sheer weight accorded decisions of this Court could well induce future litigants to ignore any *ratio* in *Halpern*, *Barbeau*, or *Hendricks* that is not expressly adopted by this Court in its answer to question 4.

(5) If Question IV is answered, it should be answered in the negative

51. In the alternative, if this Court concludes that it will answer 4, the B.C. Couples submit that the existing authority of the *Halpern*, *Barbeau*, and *Hendricks* decisions would best be protected and even enhanced by a simple answer like this:

> 'Limiting civil marriage to opposite-sex couples would be inconsistent with the Charter of Rights.'

52. The B.C. Couples adopt the submissions of the Ontario and Quebec couples on the substantive reasons for this position, and point further to the growing body of judicial authority that has held that denying same-sex couples the right to marry is inconsistent with the fundamental constitutional values of equality, liberty, privacy, intimate association, religious belief, freedom of conscience, security of the person, and mobility rights are relevant to answering this question. The submissions made in relation to those provisions of the Charter in connection with question 2 of this Reference are relied upon in support of this submission.

(6) Replacing marriage with civil unions would not justify superceding the *Halpern*, *Barbeau*, and *Hendricks* decisions

53. The Working Group on Civil Unions has submitted that this Court should consider whether replacing marriage with 'civil unions' would affect the unconstitutionality of heterosexual-only marriage. The B.C. Couples submit that this proposal would in effect privatize the existing status of marriage, leaving it exclusively in the hands of those religious organizations that perform marriages and effectively marriage to all who prefer to marry civilly. This alternative is similar to the strategy of closing of swimming pools, schools, parks, and other

public facilities in the U.S. south to create 'private' alternatives (often by simply buying the same pools, parks, or schools) in order to circumvent racial desegregation orders. If marriage were privatized in this way, it would be in name only, because the state has been completely entangled in the creation and shaping of the institution of marriage as it exists now.[71]

PART IV -- SUBMISSIONS CONCERNING COSTS

54. The interveners request an order for their costs in this Reference, including disbursements, on an increased scale.

PART V -- NATURE OF ORDER SOUGHT

. The questions of the Reference should be answered as follows:

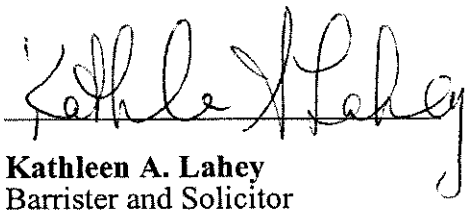
(a) Questions 1, 2, and 3 should be answered 'yes.'

(b) Question 4 should not be answered.

(c) In the alternative, question 4 be answered 'Limiting civil marriage to opposite-sex couples would be inconsistent with the Charter of Rights.'

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 10th day of May, 2004



Kathleen A. Lahey
Barrister and Solicitor
86 Beverley Street
Kingston, Ont. K7L 3Y6
Tel: (613)545-0828
Fax: (613)533-6509
Email: kal2@post.queensu.ca

Counsel for the Interveners Dawn and Elizabeth Barbeau, Jane Hamilton and Joy Masuhara, and Peter Cook and Murray Warren

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[71] *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231-232 (U.S.S.C., 1964), B.C. Couples Authorities, Tab 10; *Hendricks*, *supra*, paras. 133-134, quoting *Egan* v. *Canada*, [1993] F.C.A. 401, dissenting ; see also *Opinions of the Justices to the Senate*, 802 N.E. 2d 565, paras. (Mass. Supreme Court, 2004), B.C. Couples Authorities, Tab 15.

PART VI -- TABLE OF AUTHORITIES

Cases:	**Cited at Paragraph**
Helens v. *Densmore*, [1957] S.C.R. 768 [in AGC Authorities]	36
Hendricks v. *Quebec*, [2002] R.J.Q. 2506 (C.S.Q.) [in AGC Authorities]	7, 19, 29, 30, 33, 39, 40, 41, 53
Legebokoff v. *Legebokoff* (1982), 136 D.L.R. (3d) 566 (B.C.S.C.)	38
Loving v. *Virginia*, 388 U.S. 1 (U.S.S.C., 1967)	16, 18
M. v. *H.*, [1999] 2 S.C.R. 3 [in AGC Authorities]	14, 49
Miron v. *Trudel*, [1995] 2 S.C.R. 418	18
Moge v. *Moge*, [1992] 3 S.C.R. 813	49
Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. Supreme Court, 2004)	53
R. v. *Morgentaler*, [1988] 1 S.C.R. 30	16, 18
R. v. *Hess*, [1990] 2 S.C.R. 906	15
Re Marriage Act (Canada), [2001] B.C.J. No. 38 (B.C.S.C.)	32
Re North et al. and Matheson (1974), 52 D.L.R. (3d) 280 (Co.Ct. Winn.)	32
Reference re Family Benefits Act (N.S.), Section 5 (1986), 75 N.S.R. (2d) 338 (N.S.C.A.), leave to appeal ref'd [1987] 1 S.C.R. xiii	15
Reference re: Meaning of the word 'Persons' in Section 24 of the British North America Act, [1930] A.C. 124 (P.C.) [in AGC Authorities]	11
Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313	16
Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [in AGC Authorities]	27
Roberts v. *Canada*, [1989] 1 S.C.R. 322	38
Schreiber v. *Canada (A.-G.)*, [2002] SCC 62, [2002] S.C.J. No. 63	41
Toronto (City) v. *Canadian Union of Public Employees*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64	45, 46, 47, 48
Weber v. *Ontario Hydro*, [1995] 2 S.C.R. 929	37

Secondary Authorities:	**Cited at Paragraph**
'Brown 50 Years Later' (2004) *American School Board J.* April: 56	13
John Paul II, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (Vatican, Rome: Offices of the Congregation for the Doctrine of the Faith, 2003)	9
Mark D. Walters, 'Incorporating Common Law into the Constitution of Canada: *Egale* v. *Canada* and the Status of Marriage' (2003), 41 *Osgoode Hall L. J.* 1:75-113	9, 10

PART VII -- STATUTES RELIED ON

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11:

Section 2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication.

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Section 6. (1) Every citizen of Canada has the right to enter, remain in, and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15. (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

APPENDIX A
LEGAL STATUS OF SAME-SEX COUPLES IN CANADA

	British Columbia	Alberta	Saskatchewan	Manitoba
Marriages	Yes	No[1]	No	No
Term for recognized cohabitants	Same-sex cohabitants deemed "spouses"[2]	"Adult interdependent partner"[3]	"Cohabiter"[4]	"Common law partners"[5]
Cohabitation period	2 years, or child[6]	3 years, or child.[7]	2 years[8]	3 years, or 1 with child[9]
Alternative legal status				
Human rights protection for that status	Unclear[10]	No.[11]	Unclear[12]	
Intestate succession	Yes[13]	Yes[14]	Yes[15]	Unclear[16]
Dependent's relief	Yes, both dependents and workers compensation[17]	Yes, both dependents and workers compensation[18]	Yes, both dependents and workers compensation[19]	Yes, if they meet the common-law partner criteria.[20]
Matrimonial home	Yes[21]	No, only married couples[22]	Yes[23]	No, only married couples[24]
Other matrimonial property	Yes[25]	No.[26]	Yes[27]	No[28]
Spousal Support	Yes[29]	Yes[30]	Yes[31]	Yes[32]
Child support	Unclear[33]	Unclear[34]	Unclear[35]	Yes[36]
Parent-child relationship	Both same-sex couples may have their names on their child's birth certificate[37]	No[38]	No[39]	Unclear.[40]

As at April 29, 2004 (QL).

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	Ontario	Quebec	New Brunswick	Nova Scotia
Marriages	Yes[41]	Yes[42]	No[43]	No
Term for recognized cohabitants	"Same-sex partner"[44]	"Civil union,"[45] or "de facto union"[46]	None in legislation	"Domestic partnership"[47]
Cohabitation period	3 years, or 1 with child[48]	N/A,[49] if "de facto union" then cohabit for 1 year or parents of a child[50]	3 years, or with child[51]	No cohabitation period, must make a domestic-partnership declaration in the prescribed form[52]
Alternative legal status				
Human rights protection for that status	Yes[53]	Sexual orientation only[54] Married or civil union spouses have the same rights and obligations.[55]	Sexual orientation only[56]	Sexual orientation only[57]
Intestate succession	At the court's discretion[58]	No[59]	No[60]	Yes[61]
Dependent's relief	Yes, both dependents and workers compensation[62]	Yes, including workers' compensation,[63] Same-sex partner may qualify for pension benefits[64]	Yes, both dependents and workers compensation[65]	
Matrimonial home	No[66]	No, only "spouses"[67]	No[68]	Yes, domestic partners share an equal interest in the matrimonial home[69]
Other matrimonial property	No[70]	No, only "spouses"[71]	See above	Yes[72]
Spousal Support	Yes[73]	No, court will only make order for support of spouses[74]	Yes[75]	Yes[76]
Child support	Yes, if same-sex partner is a "parent"[77]	No, only pertains to parents who are spouses[78]	Yes[79]	Unclear for non-biological parent[80]
Parent-child relationship	See above	No[81]	See above	No[82]

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	P.E.I	Newfoundland and Labrador
Marriages	No[83]	No
Term for recognized cohabitants	"Common-law partner"[84]	"Partner"[85]
Cohabitation period	3 years, or child's natural/adoptive parents[86]	2 years, or 1 if natural/adoptive parents of a child[87]
Alternative legal status	Yes, cohabitation agreement[88]	
Human rights protection for that status	Sexual orientation only[89]	Sexual orientation only[90]
Intestate succession	No[91]	No[92]
Dependent's relief	No[9394]	No[95]
Matrimonial home	No[96]	Yes, if in cohabitation agreement[97]
Other matrimonial property		See above
Spousal Support		Yes[98]
Child support	Yes[99]	Yes, if cohabitation agreements makes provisions for child support[100]
Parent-child relationship	None[101]	

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	Yukon	Northwest Territorites	Nunavut
Marriages	No[102]	No	No[103]
Term for recognized cohabitants	No[104]	Same-sex cohabitants deemed "spouses"[105]	Same-sex cohabitants deemed "spouses"[106]
Cohabitation period	n/a	2 years, or less if couple are child's natural/adoptive parents[107]	Two years or less if couple is natural/adoptive parents of a child[108]
Alternative legal status			
Human rights protection for that status	Federal re sexual orientation[109]	Federal re sexual orientation[110]	Federal re sexual orientation[111]
Intestate succession	No[112]	No[113]	Yes, if deemed "spouses"[114]
Dependent's relief	No support available for same-sex dependent on death of their partner.[115] Workers compensation available only to spouses and immediate dependent family[116]	Yes, also workers compensation if cohabited for three years or 1 year with child[117]	Yes, including workers compensation[118]
Matrimonial home	No[119]	Yes, if "spouses"[120]	Yes, if "spouses"[121]
Other matrimonial property	No[122]	See above[123]	See above[124]
Spousal Support	No	Yes, if "spouses"[125]	Yes, if "spouses"[126]
Child support	No	Unclear[127]	Unclear[128]
Parent-child relationship	None	Unclear[129]	Unclear[130]

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Notes

[1] *Adult Interdependent Relationships Act*, SA 2002, c. A-45, Preamble.
[2] Deemed "spouse" if living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender for 35 statutes. Selected statutes: *Adult Guardianship Act*, RSBC 1996, Chap. 6; *Employment and Assistance Act*, SBC 2002, Chap. 40, ss. 1-2 (same-sex couples considered 'family units'); *Family Relations Act*, RSBC 1996, Chap. 128, s. 1; *Family Maintenance Enforcement Act*, RSBC 1996, Chap. 127, Part 1; *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, Chap. 181, Part 1; *Medicare Protection Act*, RSBC 1996, Chap. 286, s. 7(1) ('spouse' may be enrolled as a beneficiary); *Pension Benefits Standards Act*, RSBC 1996, Chap. 352, ss. 35-5 (surviving 'spouse' can receive pension benefits).
[3] *Adult Interdependent Relationships Act*, SA 2002, c. A-45, s. 3(1).
[4] *Family Property Act*, S.S. 1997, c. F-6.3, s. 1.
[5] *Family Maintenance Act*, C.C.S.M. c. F20, s. 1.
[6] *Family Relations Act*, RSBC 1996, Chap. 128, s. 1.
[7] *Family Property Act*, S.S. 1997, c. F-6.3, s. 1.
[8] *Family Maintenance Act*, C.C.S.M. c. F20, s. 1.
[9] *Family Relations Act*, RSBC 1996, Chap. 128, s. 1.
[10] *Human Rights Code*, RSBC 1996, Chap. 210, ss. 7(1), 8(1), 9(1), 10(1), 11(1), 13(1)&(3)(b), 14(1), 41: Marital status deemed "spouses".
[11] *Alberta Bill of Rights*, RSA 2000, c. A-14.
[12] *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 1: no explicit mention of same-sex protection.
[13] *Estate Administration Act*, RSBC 1996, Chap. 122, Part 1, ss. 6(1), 83-85, 96, 121: "Common law spouses" together for 2-years, including same-sex, can inherit and adminster on intestate succession (including unpaid wages, matrimonial home, and household furnishings).
[14] *Intestate Succession Act*, RSA 2000, c. I-10, ss. 2-3.1: entitled to deceased partner's estate.
[15] *Intestate Succession Act*, 1996, S.S. 1996, c. I-13.1, ss. 2, 8.
[16] *Intestate Succession Act*, C.C.S.M. c.185: only "spouses" are explicitly mentioned, not common-law partners.
[17] *Family Relations Act*, RSBC 1996, Chap. 128, s. 89; *Workers Compensation Act*, RSBC 1996, Chap. 492, ss. 16-19.
[18] *Dependant's Relief Act*, RSA 2000, c. D-10.5, s. 1; *Workers' Compensation Act*, RSA 2000, c. W-15, ss. 49, 70.
[19] *Dependants' Relief Act*, 1996, S.S. 1996, c. D-25.01, ss. 1, 6-7; Workers' *Compensation Act*, 1979, S.S. 1979, c. W-17.1, ss. 1, 82, 88.
[20] *Dependants Relief Act*, C.C.S.M. c. D37; *Workers Compensation Act*, C.C.S.M. c. W200, s. 29-30.
[21] *Family Relations Act*, RSBC 1996, Chap. 128, ss. 56, 58, 65: equal or 'fair' interest for each spouse upon separation.
[22] *Matrimonial Property Act*, RSA 2000, c. M-8, s. 1.
[23] *Family Property Act*, S.S. 1997, c. F-6.3, ss. 4-19.
[24] *Marital Property Act*, C.C.S.M. c. M45.
[25] *Family Relations Act*, RSBC 1996, Chap. 128, ss. 56, 58, 65: equal or 'fair' interest for each spouse upon separation: generally, all property owned by both spouses or used for a family purpose is considered a family asset divisible upon separation.
[26] *Matrimonial Property Act*, RSA 2000, c. M-8, s. 1.
[27] *Family Property Act*, S.S. 1997, c. F-6.3, ss. 20-9.
[28] *Marital Property Act*, C.C.S.M. c. M45.
[29] *Family Relations Act*, RSBC 1996, Chap. 128, ss. 89, 121-22.
[30] *Domestic Relations Act*, RSA 2000, c. D-14, s. 17.1.
[31] *Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, ss. 1, 5.
[32] *Family Maintenance Act*, C.C.S.M. c. F20, ss. 4-7.
[33] *Family Relations Act*, RSBC 1996, Chap. 128, ss. 88, 121-22; *Child, Family and Community Service Act*, RSBC 1996, Chap. 46, s. 97: parents, including "a person with whom a child resides and who stands in place of the child mother or father", are responsible for supporting their children.
[34] *Parentage and Maintenance Act*, RSA 2000, c. P-1, s. 1.
[35] *Maintenance Act*, 1997, S.S. 1997, c. F-6.2, ss. 1, 3.

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[36] *Family Maintenance Act*, C.C.S.M. c. F20, ss. 36-7.
[37] *Gill v. Murray* [2001] B.C.H.R.T.D. No. 34; *Vital Statistics Act*, RSBC 1996, Chap. 479, s. 36(3).
[38] *Vital Statistics Act*, RSA 2000, c. V-4, s. 8.
[39] *Vital Statistics Act, 1995*, S.S. 1995, c. V-7.1, s. 5: heterosexual presumption.
[40] *Vital Statistics Act*, C.C.S.M. c. V60, ss. 3(6.0-6.2): A common-law partner may be registered on the birth certificate if the birth was by artificial insemination.
[41] *Halpern v. Canada (Attorney General)*, [2003] O.J. 2268.
[42] *Federal Law--Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5.1 and *Modernization of Benefits and Obligations Act*, S.C. 2000, c.12, s. 1.1: both sections stipulating marriage in Quebec is between a man and a woman was struck down in *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] J.Q. no. 2593. *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 365: marriage now includes same-sex couples.
[43] *Family Services Act*, S.N.B. 1980, c. F-2.2, s.11: definition of "spouse".
[44] *Succession Law Reform Act*, R.S.O. 1990, s.26.
[45] *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 521.8: same rights and obligations are marriage.
[46] The term "de facto union" appears in the following legislation and deems cohabiting same-sex couples cohabiting for no less than a year to be spouses for the purposes of that legislation: *Legal Aid Act*, R.S.Q., c. A-14, s.1.1(3), *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, s.2; *An Act respecting financial assistance for education expenses*, R.S.Q., c. A-13.3, s.2; *Automobile Insurance Act*, R.S.Q., c. A-25, s.2; *Cooperatives Act*, R.S.Q., c. C-67.2, s.69; *An Act respecting the conditions of employment and the pension plan of the Members of the National Assembly*, R.S.Q., c. C-52.1, s.39; *Interpretation Act*, R.S.Q., c. I-16, s.61.1; *An Act respecting labour standards*, R.S.Q., c. N-1.1, s.1(3); *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, s.91; *An Act respecting income support, employment assistance and social solidarity*, R.S.Q., c. S-32.001, s.19; and *Courts of Justice Act*, R.S.Q., c. T- 16, s.224.14(2).
[47] *Vital Statistics Act*, R.S.N.S. 1989, c. 494, ss.53(1), 54(2): individuals in a registered domestic partnership will have the same rights as "spouses" in certain NS statutes. Includes: *Fatal Injuries Act, Health Act, Hospitals Act, Insurance Act, Intestate Succession Act, Maintenance and Custody Act, Matrimonial Property Act, Members Retiring Allowances Act, Municipal Government Act, Pension Benefits Act, Probate Act, Provincial Court Act, Public Service Superannuation Act, Teachers' Pension Act, Testators' Family Maintenance Act, Wills Act, Worker Compensation Act.*
[48] *Succession Law Reform Act*, R.S.O. 1990, s.57, definition of "same-sex partner;" also see s.29 "same-sex partner,"; *Family Law Act*, R.S.O 1990, c.F.3.
[49] *Civil Code of Quebéc*, S.Q. 1991, c.64 ss. 121, 521.1-2: civil union must be registered.
[50] [50] *Legal Aid Act*, R.S.Q., c. A-14, s.1.1(2), (3)
[51] *Family Services Act*, S.N.B. 1980, c. F-2.2, s.112(3).
[52] *Vital Statistics Act*, R.S.N.S. 1989, c. 494.
[53] *Ontario Human Rights Code*, R.S.O. 1990, c. H.19: cannot discriminate with respect to the provision of goods and services, employment, accommodation based on same-sex partnership status.
[54] *Charter of Human Rights and Freedoms*, R.S.Q. 2004 C-12, s.10
[55] *Charter of Human Rights and Freedoms*, R.S.Q. 2004 C-12, s. 47.
[56] *Human Rights Act*, R.S.N.B. 1973, c. H-11: sexual orientation is a prohibited ground of discrimination..
[57] *Human Rights Act*, R.S.N.S. 1989, c. 214, s.5(1).
[58] *Succession Law Reform Act*, R.S.O. 1990, ss. 44, 58(1). See s.57 definition of "dependent" includes same-sex partner.
[59] *Civil Code of Quebéc*, S.Q. 1991, c.64 ss. 624,653-54, 666 : definition of spouse not extended to same-sex cohabiting couples in the *Civil Code*, succession only granted to married persons or those in civil union.
[60] *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s.22-26.
[61] *Intestate Succession Act*, R.S.N.S. 1989, c. 236, ss.4,5,6.
[62] *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16, Schedule A, ss. 48(7), 57 (the Workplace Safety and Insurance Board has discretion to grant benefits to a separated same-sex partner of a deceased person even if a judicial order for support or maintenance does not exist).
[63] *Workers' Compensation Act*, R.S.Q. A-3, s.2(1)(e): same-sex couples living in a de facto union are deemed spouses for the purposes of this act. See also: ss. 35-6.
[64] *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, s.102.10.3(a): same-sex partners may qualify as a "surviving spouse" for purposes of accessing the pension of a deceased same-sex partner.
[65] *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, ss.1(b) definition of "dependant," 2.1.
[66] *Family Law Act*, R.S.O 1990, c.F.3, ss.4, 5: Family property only applies to "spouses"

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[67] *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 409.
[68] *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, s.35(1); see also s.18(1): only spouses have an interest in division of marital assets, including the matrimonial home. Opposite-sex cohabiting couples may enter into a domestic contracts to determine matrimonial property rights, unclear if same-sex couples are legally capable of entering into domestic contracts.
[69] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s.6(1).
[70] *Family Law Act*, R.S.O 1990, c.F.3 s.1(1): division of family property is only available to "spouses" defined as a married man and woman.
[71] *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 410.
[72] *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s.6(1).
[73] *Family Law Act*, R.S.O 1990, c.F.3, s.30.
[74] *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 521.17: court may make spousal support order.
[75] *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, s.112(1): same-sex cohabitants are deemed "spouses" for support purposes in the *Family Services Act* and face a legal obligation to support each other.
[76] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.3.
[77] *Family Law Act*, R.S.O 1990, c.F.3, s.1(1) definition of "parent" is one who demonstrates a settled intention to treat the child as a part of their family, whereas s.31(1) requires all "parents" to support their children.
[78] *Civil Code of Quebéc*, S.Q. 1991, c.64 s. 521.17: court may make child support order.
[79] *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3, ss. 1(b) definition of "parent", 113(1): aperson who shows a settled intention to treat the child as a family member and with whom the child ordinarily resides will be treated as a parent for support purposes
[80] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.8: unclear whether a domestic partner who is not a natural or adoptive parent would be under an obligation to provide support for that child.
[81] *Civil Code of Quebéc*, S.Q. 1991, c.64 ss. 50-4: heterosexual presumption.
[82] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.3: does not extend the definition of spouse to legislation governing child support and the parent-child relationship,
[83] *Human Rights Act*, R.S.P.E.I. 1988, c.H-12, s.1(1)(h.2): marital status refers to a conjugal relationship with the opposite sex.
[84] *Family Law Act*, R.S.P.E.I. 1988, c.F-2, ss.1(g), 29(1): *two persons* who cohabit outside marriage.
[85] *Family Law Act*, R.S.N.L. 1990 c.F-2, s.35(c): refers to either of two people cohabiting outside of marriage.
[86] *Family Law Act*, R.S.P.E.I. 1988, c.F-2.
[87] *Family Law Act*, R.S.N.L. 1990 c.F-2, s.35(c)(i),(ii).
[88] *Family Law Act*, R.S.P.E.I. 1988, c.F-2, s.52(1): two persons who are cohabiting can enter into a cohabitation agreement determining ownership/division of property, support obligations.
[89] *Human Rights Act, supra note 1*, s.1(1)(d).
[90] *Human Rights Code*, R.S.N.L. 1990 c.H-14.
[91] *Probate Act*, R.S.P.E.I. 1988, c.P-21 ss.87, 91, 92.
[92] *Intestate Succession Act*, R.S.N.L. 1990 c.I-21, ss.4, 7, 9, 10.
[93] *Dependents of a Deceased Person Relief Act*, R.S.P.E.I. 1988, c.D-7, s.1(d); *Fatal Accidents Act*, R.S.P.E.I. 1988, c.F-5, s.1(f)(vi).
[94] *Income Tax Act*, R.S.P.E.I. 1988, c.I-1, ss.9(1), 15(1): tax benefits for common-law partners.
[95] *Family Relief Act*, R.S.N.L. 1990 c.F-3, s.2(c).
[96] *Family Law Act*, R.S.P.E.I. 1988, c.F-2: the term "spouse" only applies to family property, common-law partners are not entitled to net family equalization or an interest in the matrimonial home.
[97] *Family Law Act*, R.S.N.L. 1990 c.F-2, s.18, 63(1): provisions dealing with the division of family property and the matrimonial home only refer to spouses.
[98] *Family Law Act*, R.S.N.L. 1990 c.F-2, s.36: partners are obligated to support one another.
[99] *Family Law Act*, R.S.P.E.I. 1988, c.F-2, s.38.1(1): child support orders take precedence over common-law spouse support orders.
[100] *Family Law Act*, R.S.N.L. 1990 c.F-2, ss.63(1), 37(1): cohabitation agreements can make provisions for child support, but there are no obligations for partners without a cohabitation agreement to support a non-natural or adoptive child.
[101] *Family Law Act*, R.S.P.E.I. 1988, c.F-2, s.1(e): gender-neutral terms; *Child Status Act*, R.S.P.E.I. 1988, c.C-6, ss.18, 19: PEI will recognize extra-provincial determination of paternity (leaves open the possibility that same-sex paternity will be honoured if made in another jurisdiction), otherwise the statue is silent.

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[102] *Family Property and Support Act*, Vol. 2, Chap. 63, s. 1; *Marriage Act*, Vol. 3, Chap. 110: all statutes cited presume married or common law couples are heterosexual. No specific provisions for same-sex partners exist..
[103] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18; *Marriage Act*, R.S.N.W.T. 1988, c. M-4, s. 48(1)(c): presumption of heterosexual couple.
[104] *Family Property and Support Act*, Vol. 2, Chap. 63, s. 1; *Marriage Act*, Vol. 3, Chap. 110, s. 58(1): "Cohabiter" limited to a man and a woman.
[105] *Family Law Act*, S.N.W.T. 1997, c. 18; *Maintenance Orders Enforcement Act*, R.S.N.W.T. 1988, c. M-2.
[106] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18; *Maintenance Orders Enforcement Act*, R.S.N.W.T. 1988, c. M-2.
[107] *Family Law Act*, S.N.W.T. 1997, c. 18.
[108] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18, s. 4(1): subject to cohabitation agreement.
[109] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 2-3, 63: grounds include marital status and sexual orientation.
[110] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 2-3, 63: grounds include marital status and sexual orientation.
[111] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 2-3, 63: grounds include marital status and sexual orientation.
[112] *Intestate Succession Act*, Vol. 2, Chap. 95.
[113] *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 1: statute explicitly defines "spouse" in terms of a heterosexual couple.
[114] *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, ss. 1-4.
[115] *Dependants Relief Act*, Vol. 1, Chap. 44, s. 1.
[116] *Workers Compensation Act*, Vol. 4, Chap. 180, s. 1.
[117] *Dependant Relief Act*, R.S.N.W.T. 1988, c. D-4, ss. 1-2; *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, s. 28(1).
[118] *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, ss. 1-2; *Workers' Compensation Act (Nunavut)*, R.S.N.W.T. 1988, c. W-6, ss. 1, 27-8.
[119] *Family Property and Support Act*, Vol. 2, Chap. 63, s. 4.
[120] *Family Law Act*, S.N.W.T. 1997, c. 18, ss. 48-57.
[121] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18, ss. 48-57.
[122] *Family Property and Support Act*, Vol. 2, Chap. 63, s. 4.
[123] *Family Law Act*, S.N.W.T. 1997, c. 18, ss. 33-47.
[124] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18, ss. 33-47.
[125] *Family Law Act*, S.N.W.T. 1997, c. 18, ss. 15-6.
[126] *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18, ss. 14-15.
[127] *Children's Law Act*, S.N.W.T. 1997, c. 14, ss. 57-9: parent "includes a person who stands in the place of a parent" and they must provide child support.
[128] *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, ss. 57-9: parent "includes a person who stands in the place of a parent" and they must provide child support.
[129] *Vital Statistics Act*, R.S.N.W.T. 1988, c. V-3: heterosexual presumption.
[130] *Vital Statistics Act*, R.S.N.W.T. 1988, c. V-3: heterosexual presumption.

APPENDIX B
NUMBER OF STATUTES CONCERNING MARRIED STATUS

Jurisdiction	Number of statutes concerning married couples in jurisdiction
British Columbia	104
Alberta	82
Saskatchewan	112
Manitoba	90
Ontario	89
Quebec	123
New Brunswick	79
Nova Scotia	76
P.E.I	56
Newfoundland and Labrador	69
Northwest Territories	20
Yukon	41
Nunavut	55

Total province/territory 996
Total federal 83

Overall total 1,079