

IN THE SUPREME COURT OF CANADA

**IN THE MATTER OF SECTION 53 OF THE SUPREME COURT ACT, R.S.C., 1985, C.
S-26**

**IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING
THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS OF LEGAL CAPACITY
FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN ORDER IN COUNCIL P.C. 2003-
1055, DATED THE 16TH OF JULY 2003**

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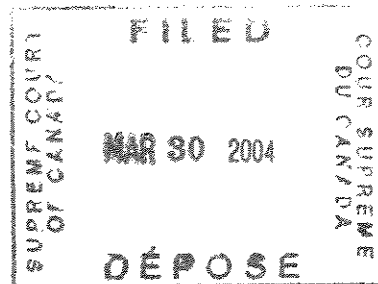
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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. Marriage is widely understood as an institution that is monogamous in nature, based on intimacy, companionship, recognition, economic benefits and obligations. It also has the goal of being permanent and providing a stable foundation for the raising of children. Marriage for civil purposes continues to evolve over time in accordance with the values of Canadians. In 21st century Canada, the unions of same-sex couples fall within this current understanding of the essence of marriage. Courts that have recently considered this matter have accepted this evolved understanding, and determined that it is not only consistent with, but requires legal recognition, as a result of the *Charter*. The Attorney General of Canada accepts and agrees with the Courts' determinations: the opposite-sex requirement for marriage is no longer consistent with the equality rights guarantee set out in s. 15(1) of the *Charter*. This supplementary factum addresses this issue, in answer to the fourth question posed to this Court on January 28, 2004.

B. SUMMARY OF THE FACTS

2. On January 28, 2004, the Governor in Council filed a Notice of Amended Reference amending this Reference by asking a fourth question on whether the opposite-sex requirement for marriage is consistent with the *Charter*.

3. The law defining civil marriage is now different across Canada. An opposite-sex requirement for marriage was set out in the 1866 English decision of *Hyde v. Hyde*.¹ The decision concerned whether a polygamous marriage had to be recognized. Marriage was defined as “the voluntary union for life of one man and one woman, to the exclusion of all others”. This definition has not been judicially changed in the common law jurisdictions of Canada other than British Columbia and Ontario.² In British Columbia and Ontario, each province's Court of Appeal has ruled that the common-law definition of marriage as the “union of one man and one woman” unjustifiably infringes equality rights and is therefore unconstitutional.³

¹*Hyde v. Hyde* (1866), [1866 – 73] All E.R.Rep. 175, Supplementary Authorities of the Attorney General of Canada [“AGC Supplementary Authorities”], Tab 3 at 177

²See, for example, this Court's decision in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 [“*Walsh*”], AGC Supplementary Authorities, Tab 8, per Gonthier, J., concurring at 421, para. 196.

³*EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (C.A.) [“*EGALE*”], AGC Authorities, Vol. I, Tab 8; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.) [“*Halpern*”], AGC Authorities, Vol. I, Tab 12

4. Parliament has never legislated a statutory bar to the recognition of same-sex unions as marriages in common law Canada.⁴ In Québec, Parliament has legislated a statutory bar⁵ and the opposite-sex requirement was also reflected in the province's civil law until June 24, 2002.⁶ On September 6, 2002, the Québec Superior Court declared that the statutory opposite-sex requirement for marriage in that province infringes s. 15(1) of the *Charter*, but suspended the declaration of invalidity for two years.⁷ A party other than the Attorney General of Canada appealed that decision, but that appeal was struck and the suspension lifted by the Québec Court of Appeal on March 19, 2004.⁸

PART II – POINTS IN ISSUE

5. The additional Reference question asks:

(4) 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?

PART III – ARGUMENT

A. THE OPPOSITE-SEX REQUIREMENT FOR MARRIAGE INFRINGES S. 15(1) OF THE *CHARTER*

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

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

7. In *Law v. Canada*, this Court held that a s. 15(1) infringement will only be found where an impugned law is in conflict with the purpose of s. 15(1). The determination of whether such a

⁴An opposite-sex requirement for marriage was reflected in the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1 (AGC Authorities, Vol. III, Tab 50). This, however, was an interpretive clause that was limited in its effect to that legislation only.

⁵A limitation was set out in the *Federal Law – Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5, a federal statute applicable only in Québec (AGC Authorities, Vol. III, Tab 51).

⁶Article 365 (para. 2) of the *Civil Code of Québec*, S.Q., 1991, c. 64 (AGC Authorities, Vol. V, Tab 87) which was repealed by *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 22 (AGC Authorities, Vol. V, Tab 91).

⁷*Hendricks c. Québec (Procureur général)*, [2002] J.Q. 3816 (Sup.Crt) [*"Hendricks"*], AGC Authorities, Vol. 1, Tab 14; this decision, together with *EGALE* and *Halpern*, are canvassed in the AGC's factum filed October 30, 2003.

conflict exists must be approached in a purposive and contextual manner.⁹ There are three broad inquiries that are required to determine whether an infringement of s. 15(1) of the *Charter* has occurred:¹⁰

(a) Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?

(b) Was the claimant subject to differential treatment on the basis of one or more of the enumerated or analogous grounds?

(c) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of subsection 15(1) of the *Charter*?

i. The evolution of marriage in Canada

8. To conduct a purposive and contextual s. 15(1) *Charter* analysis of the opposite-sex requirement for marriage in Canada, it is necessary to first consider the nature of marriage as it has evolved and is currently understood in Canada.

9. As accepted by those Canadian courts that have considered the constitutionality of the opposite-sex requirement for marriage,¹¹ marriage in Western Europe and North America has traditionally been understood as "a union of a man and a woman, for purposes of procreation, rearing of children by both natural parents, companionship, and the uniting of the two opposite sexes."¹² The understanding of marriage as an opposite-sex relationship has been, until recently, a widely accepted norm.¹³

10. Marriage, however, has not been a static institution within society. It has evolved as social values and conceptions about marriage have changed.¹⁴ Different faiths and cultures have emphasized different aspects of marriage at different times and for different reasons. In

⁸*La Ligue catholique pour les droits de l'homme c. Hendricks et al.*, [2004] (No. 500-09-012719-027) (Qué. C.A.) (March 19, 2004), AGC Supplementary Authorities, Tab 4

⁹*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 ["*Law v. Canada*"], AGC Supplementary Authorities, Tab 5 at 525, para. 41

¹⁰*Law v. Canada*, AGC Supplementary Authorities, Tab 5 at 547-552, para. 88

¹¹See for example: *Halpern v. Canada (A.G.)* (2002) 60 O.R. (3d) 321 (Div. Ct.), ["*Halpern (Div. Ct.)*"], AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 334, para. 6 and at 345-346, paras. 39-42 and at 349, para. 48; see also: *EGALE*, AGC Authorities, Vol. 1, Tab 8 at 24, para. 86.

¹²Affidavit of John Witte, Jr., Record of the Attorney General of Canada ["AGC Record"], Vol. II, Tab 25 at 341, para. 1

¹³*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2 at 345, para. 40

¹⁴*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2 at 349, para. 49

the *Halpern* case in the Ontario Divisional Court, Blair, R.S.J. relied on the following passage from Professor Witte's affidavit to demonstrate that, in the 20th century in particular, there has been a "sea-change in laws and attitudes relating to marriage and the family":¹⁵

In the early part of the twentieth century, sweeping new laws were passed to govern marriage formalities, divorce, alimony, marital property, wife abuse, child custody, adoption, child support, child abuse, juvenile delinquency, education of minors, among other subjects. Such sweeping legal changes had several consequences. Marriages became easier to contract and easier to dissolve. Wives received greater independence in their relationships outside the family. Children received greater protection from the abuses and neglect of their parents, and greater access to benefit rights [sic]. *And the state eclipsed the church as the principal external authority governing marriage and family life. The Catholic sacramental concept of the family governed principally by the church and the Protestant concepts of the family governed by the church and broader Christian community began to give way to a new privatist concept of the family whereby the wills of the marital parties became primary. Neither the church, nor the local community, nor the paterfamilias could override the reasonable expressions of will of the marital parties themselves.*

...

In the past three decades, the Enlightenment call for the privatization of marriage and the family has come to greater institutional expression. Prenuptial contracts, determining in advance the respective rights and duties of the parties during and after marriage, have gained prominence. No-fault unilateral divorce statutes are in place in virtually every state. Legal requirements of parental consent and witnesses to marriage have become largely dead letters. *The functional distinction between the rights of the married and the unmarried has been narrowed by a growing constitutional law of sexual autonomy and privacy. Homosexual, bisexual, and other intimate associations have gained increasing acceptance at large, and at law.* [emphasis of Blair, R.S.J.]

11. Canada's changing demography and society has also affected societal views on the institution of marriage. While marriage currently remains the predominant family structure in Canada, the proportion of married couples has decreased in relation to other family types since the 1980s.¹⁶ This change has taken place amidst a growing acceptance of a wide variety of family forms, including households comprised of common-law opposite-sex couples and same-sex couples (including same-sex parents), leading to much greater visibility and social

¹⁵*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2 at 353-354, para. 56, citing the Affidavit of John Witte, Jr., AGC Record, Vol. II, Tab 25 at 371-372, paras. 60-61. This portion is also cited in *EGALE*, AGC Authorities, Vol. 1, Tab 8 at 24-25, para. 86.

¹⁶*Affidavit of Jim Sturrock*, sworn October 6, 2003, ("*Affidavit of Jim Sturrock*"), AGC Record, Vol. I, Tab 6 at 17-18, paras. 15-17

recognition of other family forms.¹⁷ These social changes have led the Government of Canada to extend to common-law same-sex couples virtually all of the benefits and obligations for which common-law opposite-sex couples are eligible.¹⁸ Furthermore, the change in social attitudes toward same-sex unions has not been restricted to Canada.¹⁹

12. In the face of these social changes, the Attorney General of Canada now agrees that it has become difficult to accept that the physical sexual component of the union remains, as Blair, R.S.J. put it, such a “compelling and central aspect of marriage in 21st century post-*Charter* Canadian society that it - and it alone - gives marriage its defining characteristic and justifies the exclusion of same-sex couples from that institution.”²⁰ Instead, considering the evolving understanding of marriage, Blair, R.S.J. found:²¹

...if marriage is viewed through a looking glass with a broader focus – and not conceived as a social, cultural, religious and legal edifice built upon heterosexual procreation as its fundamental infrastructure – the s. 15(1) analysis is directly engaged. In this approach to marriage, same-sex couples are not precluded from participating by reason of its innate characteristic. They are precluded simply because of their sexual orientation. The evidence is clear: same-sex couples can and do live in long-term, caring, loving and conjugal relationships – including those involving the rearing of children (and, in a modern context, even the birth of children). In short, their relationships are characterized by all the indicia of marriage, as traditionally understood, save for classic heterosexual intercourse, and they live in unions that are marriage-like in everything but name.

13. Based on all the evidence before him, Blair, R.S.J. concluded that marriage can be:²²

...more fully characterized...by its pivotal child-rearing role, and by a long-term conjugal relationship between two individuals – with its attendant obligations and offerings of mutual care and support, of companionship and shared social activities, of intellectual and moral and faith-based stimulation as a couple, and of shared shelter and economic and psychological interdependence – and by love. These are the indicia of the purpose of marriage in modern Canadian society.

¹⁷Affidavit of Margrit Eichler (“Ontario affidavit”), Evidence in *Halpern and Egale*, Vol. II, at 197-198, paras. 3 and 4; cited in *Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 354-355, para. 58

¹⁸*Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, AGC Authorities, Vol. III, Tab 50; see also: Affidavit of Margarit Eichler (“BC Affidavit”) Evidence in *Halpern and Egale*, Vol. XXIX, at 4021, para. 4.

¹⁹In the Netherlands and Belgium, capacity to marry for civil purposes has been “opened up” to same-sex couples through legislative amendment. Other countries may follow. As well, seven other European countries have enacted other institutions to recognize same-sex relationships: *Affidavit of Cornelis Waaldijk*, sworn October 4, 2003, AGC Record, Vol. I, Tab 9 at 56-57, 66-67, 72-76, paras. 13-16, 41-43 and 58-67.

²⁰*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 355, para. 61

²¹*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 356, para. 65

²²*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 358, para. 71

14. As the Court of Appeal in *Halpern* held, procreation and childrearing are not the only purposes of marriage. Instead, “[i]ntimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry”.²³ Furthermore, gay and lesbian families share in a broader rationale for marriage, including the rearing of children²⁴ and the fostering and nurturing of stable family units. As a result, the failure to include the union of same-sex couples within the definition of civil marriage becomes more difficult to justify.

ii. **The opposite-sex requirement for marriage draws a formal distinction between opposite-sex and same-sex couples**

15. While many benefits and obligations have been extended to common-law couples (both opposite-sex and same-sex),²⁵ in most instances, benefits and obligations do not attach until the couple has been cohabiting for a specified period of time, while married couples have access to all benefits and obligations immediately upon marriage.²⁶ However, unlike opposite-sex couples who can marry and obtain immediate access to such benefits, same-sex couples who cannot marry (outside British Columbia, Ontario and Québec) do not have this option. Gaps also remain in provincial laws in relation to benefits and obligations that apply only to married couples, such as the equalization of net family property upon breakdown of a relationship.²⁷

16. In *Nova Scotia (Attorney General) v. Walsh*,²⁸ this Court considered a s. 15(1) challenge to a provincial enactment that entitled only married couples to equalization upon the breakdown of a relationship. No discrimination was found. The majority held that opposite-sex couples all enjoy the right of choice - to decide whether to marry or not. The state had to respect that choice and not impose a statutory regime of benefits and obligations on couples that chose not to enter the institution of marriage. The important point for the present case is that the opposite-sex requirement for marriage denies to same-sex couples the right to make that very fundamental and personal choice to marry.²⁹ Only that choice provides entry to the full range of marriage benefits and obligations.

²³ *Halpern*, AGC Authorities, Vol. I, Tab 12 at 187, para. 94

²⁴ *Halpern*, AGC Authorities, Vol. I, Tab 12 at 187, para. 93

²⁵ See for example: *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, AGC Authorities, Vol. III, Tab 50. This Act amended 68 statutes to give common-law same-sex couples the same benefits and obligations as common-law opposite-sex couples.

²⁶ *Halpern*, AGC Authorities, Vol. I, Tab 12 at 189, para. 104

²⁷ *Halpern*, AGC Authorities, Vol. I, Tab 12 at 189, para. 105

²⁸ AGC Supplementary Authorities, Tab 8

²⁹ *Walsh*, AGC Supplementary Authorities, Tab 8 at 355, paras. 42-43

17. Even more importantly, marriage is a foundational social institution that represents “society’s highest acceptance of the self-worth and the wholeness of a couple’s relationship, and, thus, touches their sense of human dignity at its core”.³⁰ The opposite-sex requirement for marriage excludes same-sex couples, denying them access to the social institution of marriage and the value and worth of their unions that is bestowed by marriage.

iii. The opposite-sex requirement for marriage differentiates on the analogous ground of sexual orientation

18. The opposite-sex requirement for marriage creates a distinction that is based on sexual orientation, a ground recognized as analogous in four previous decisions of this Court.³¹

iv. The opposite-sex requirement for marriage discriminates in a substantive sense

19. In order to find that a measure discriminates in a substantive sense, it is necessary that human dignity be impaired. As this Court found in *Law v. Canada*:³²

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

20. This Court has set out four contextual factors to assist in determining whether human dignity is impaired, although the list is not exhaustive.³³ The four factors are examined in the paragraphs that follow.

³⁰*Halpern (Div. Ct.)* AGC Supplementary Authorities, Tab 2, *per* Blair, R.S.J. at 361, para. 83

³¹*Egan v. Nesbit*, [1995] 2 S.C.R. 513 [“*Egan v. Nesbit*”], AGC Supplementary Authorities, Tab 1, *per* Cory and Iacobucci, J.J. at 601-602, para. 175, and *per* L’Heureux-Dubé, J. at 566-567, para. 89; *Vriend v. Alberta* [1998] 1 S.C.R. 493 [“*Vriend v. Alberta*”], AGC Supplementary Authorities, Tab 11, *per* Cory, J. at 546, para. 90; *M. v. H.*, [1999] 2 S.C.R. 3 [“*M. v. H.*”], AGC Supplementary Authorities, Tab 7, *per* Cory and Iacobucci, J.J. at 52-53, para. 64; *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120, AGC Supplementary Authorities, Tab 6 at 1186-1187, para. 118

³²*Law v. Canada*, AGC Supplementary Authorities, Tab 5, *per* Iacobucci, J. at 530, para. 53

³³*Law v. Canada*, AGC Supplementary Authorities, Tab 5, *per* Iacobucci, J. at 534, para. 62

(i) Pre-existing disadvantage

21. Historical disadvantage does not automatically lead to a finding of discrimination, although it weighs in favour of that finding. Gay and lesbian individuals “form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage”.³⁴ The failure to accord same-sex unions legal recognition as marriages denies same-sex couples a fundamental choice about whether to enter into one of society’s foundational institutions. It reinforces inaccurate understandings of the merits, capabilities and worth of lesbian and gay relationships within Canadian society, perpetuating their disadvantage.

(ii) Correspondence between the grounds and the claimants’ actual needs, capacities or circumstances

22. Same-sex couples can and do live in long-term, caring, loving and conjugal relationships – including those involving the rearing of children. Denying same-sex couples the choice of having their unions legally recognized as marriages perpetuates the view that they are not capable of forming intimate relationships of economic interdependence and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.³⁵ Gay and lesbian families and their children are as deserving of access to foundational societal institutions, legal protection and support as married families. Their exclusion from the institution of marriage does not correspond to their actual needs, capacities and circumstances.

(iii) Ameliorative purpose or effects on more disadvantaged individuals or groups in society

23. This contextual factor has little relevance in this case. If an ameliorative purpose of the legal recognition of civil marriage is to support parents in childrearing, there is no reason to exclude same-sex couples, as they may also have childrearing responsibilities.

(iv) Nature of interest affected

24. As the majority of this Court noted in *M. v. H.*:³⁶

The discriminatory calibre of differential treatment cannot be fully appreciated without considering whether the distinction in question restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society, or constitutes a complete non-recognition of a particular group.

³⁴*Egan v. Nesbit*, AGC Supplementary Authorities, Tab 1, per Cory and Iacobucci, JJ. at 602, para 175

³⁵*M. v. H.*, AGC Supplementary Authorities, Tab 7, per Cory and Iacobucci, JJ. at 57-58, para 73

³⁶*M. v. H.*, AGC Supplementary Authorities, Tab 7, per Cory and Iacobucci, JJ. at 57, para. 72

25. The restriction of marriage to opposite-sex couples denies gay and lesbian individuals and their families a basic aspect of full membership in Canadian society. This affects their interests in a profound way.

26. For all these reasons, the opposite-sex requirement for marriage has the effect of impairing the dignity of gay and lesbian individuals.

B. SECTION 1 – THE S.15(1) BREACH IS UNJUSTIFIED

27. The infringement of s. 15(1) cannot be justified under s. 1. The threshold test in the *Oakes*³⁷ assessment requires that the impugned law further a “pressing and substantial” objective. The opposite-sex requirement for marriage for civil purposes does not further any pressing and substantial objective.

28. In the case of an under-inclusive rule, the analysis must focus upon the objective of the impugned limit on the right. This requires an assessment of the purpose of the omission (if any) as well as the purpose of the scheme as a whole.³⁸

29. The objective of the opposite-sex requirement for marriage is rooted in the physical sexual component of the union and the resulting potential for procreation as its central, or even sole, defining characteristic; in the modern context, this aspect of marriage is only one of the institution’s characteristics,³⁹ and not one that is common to all marriages. Any evidence supporting the importance of the opposite-sex requirement for marriage falls far short of the “pressing and substantial” standard. No evidence suggests that providing equal access to marriage for civil purposes to same-sex couples would adversely affect the institution of marriage for opposite-sex couples, or that opposite-sex marriages would no longer take place if the opposite-sex requirement for marriage were not retained.⁴⁰

30. Moreover, the objective of encouraging the formation of stable family units for the benefit of children and Canadian society at large is hindered by the exclusion of same-sex couples from marriage.

31. The lack of access by same-sex couples to marriage denies them the ability to create and formalize one of the most meaningful relationships of life. The denial does not serve a

³⁷*R. v. Oakes* [1986] 1 S.C.R. 103, AGC Supplementary Authorities, Tab 10 at 138-140

³⁸*M. v. H.*, AGC Supplementary Authorities, Tab 7, at 70-71, paras. 100-101

³⁹*Halpern (Div. Ct.)*, AGC Supplementary Authorities, Tab 2, per Blair, R.S.J. at 355, para. 61

⁴⁰*Halpern*, AGC Authorities, Vol. I, Tab 12, at 192-3, para. 121

purpose that is sufficiently important to warrant overriding a constitutionally protected right.⁴¹ As a result, it cannot be justified as being proportional, and there is no need to apply the remainder of the s. 1 test.

PART IV – SUBMISSIONS CONCERNING COSTS

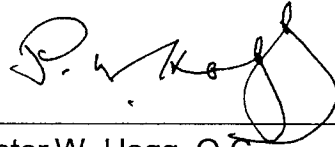
32. The Attorney General of Canada seeks no order as to costs.

PART V – NATURE OF ORDER SOUGHT

33. Question 4 on the Reference should be answered “no, because it is inconsistent with s. 15(1) and cannot be justified under s. 1 of the *Charter of Rights and Freedoms*”.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 30th day of March, 2004.



Peter W. Hogg, Q.C.



Michael H. Morris
Of Counsel for the Attorney General of Canada

⁴¹*R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, AGC Supplementary Authorities, Tab 9 at 352

PART VI – TABLE OF AUTHORITIES

Cases:	Cited at Paragraphs
<i>EGALE Canada Inc. v. Canada (Attorney General)</i> (2003), 13 B.C.L.R. (4 th) 1 (C.A)	3, 9, 10
<i>Egan v. Nesbit</i> , [1995] 2 S.C.R. 513	18, 21
<i>Halpern v. Canada (Attorney General)</i> (2002), 60 O.R. (3d) 321 (Div. Ct.)	9, 10, 11, 12, 13, 17, 29
<i>Halpern v. Canada (Attorney General)</i> , (2003) 65 O.R. (3 rd) 161 (C.A.)	3, 14, 15, 23, 29
<i>Hendricks c. Québec (Procureur général)</i> , [2002] J.Q. No. 3816 (Sup. Crt)	4
<i>Hyde v. Hyde</i> (1866), [1861 – 73] All E.R. Rep. 175	3
<i>La Ligue catholique pour les droits de l'homme c. Hendricks et al.</i> , [2004] (No. 500-09-012719-027) (Qué. C.A.) (March 19, 2004)	4
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	7, 19, 20
<i>Little Sisters Book and Art Emporium v. Canada</i> , [2002] 2 S.C.R. 1120	18
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	18, 22, 24, 28
<i>Nova Scotia (Attorney General) v. Walsh</i> , [2002] 4 S.C.R. 325	3, 16
<i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	31
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	27
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493	18, 28

PART VII – STATUTES RELIED ON

Tab

1. *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, s. 15
2. *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1
3. *Federal Law - Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5
4. *Civil Code of Québec*, S.Q. 1991, c. 64, Article 365 (para. 2)
5. *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 22

TAB 1

prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdit , ont droit   l'assistance d'un interpr te.

Interpr te

Equality Rights

Droits   l' galit 

Equality before and under law and equal protection and benefit of law

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

15. (1) La loi ne fait acception de personne et s'applique  galement   tous, et tous ont droit   la m me protection et au m me b n fice de la loi, ind pendamment de toute discrimination, notamment des discriminations fond es sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l' ge ou les d ficiences mentales ou physiques.

 galit  devant la loi,  galit  de b n fice et protection  gale de la loi

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activit s destin s   am liorer la situation d'individus ou de groupes d favoris s, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur  ge ou de leurs d ficiences mentales ou physiques.

Programmes de promotion sociale

[Note: This section became effective on April 17, 1985. See subsection 32(2) and the note thereto.]

[Note: Cet article n'a pris effet que le 17 avril 1985. Voir le paragraphe 32(2) et la note correspondante.]

Official Languages of Canada

Langues officielles du Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16. (1) Le fran ais et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privil ges  gaux quant   leur usage dans les institutions du Parlement et du gouvernement du Canada.

Langues officielles du Canada

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(2) Le fran ais et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privil ges  gaux quant   leur usage dans les institutions de la L gislation et du gouvernement du Nouveau-Brunswick.

Langues officielles du Nouveau-Brunswick

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

(3) La pr sente charte ne limite pas le pouvoir du Parlement et des l gislatures de favoriser la progression vers l' galit  de statut ou d'usage du fran ais et de l'anglais.

Progression vers l' galit 

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

17. (1) Chacun a le droit d'employer le fran ais ou l'anglais dans les d bats et travaux du Parlement.

Travaux du Parlement

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

(2) Chacun a le droit d'employer le fran ais ou l'anglais dans les d bats et travaux de la L gislation du Nouveau-Brunswick.

Travaux de la L gislation du Nouveau-Brunswick

TAB 2

48-49 ELIZABETH II

48-49 ELIZABETH II

CHAPTER 12

CHAPITRE 12

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

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

[Assented to 29th June, 2000]

[Sanctionnée le 29 juin 2000]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Modernization of Benefits and Obligations Act*.

1. *Loi sur la modernisation de certains régimes d'avantages et d'obligations.*

Titre abrégé

INTERPRETATION

RÈGLE D'INTERPRÉTATION

Interpretation

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

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

Règle d'interprétation

1997, c. 20

AGRICULTURAL MARKETING PROGRAMS ACT

LOI SUR LES PROGRAMMES DE COMMERCIALISATION AGRICOLE

1997, ch. 20

2. (1) Subparagraph 3(2)(a)(ii) of the *Agricultural Marketing Programs Act* is replaced by the following:

2. (1) Le sous-alinéa 3(2)a(ii) de la *Loi sur les programmes de commercialisation agricole* est remplacé par ce qui suit :

(ii) marriage, in the sense that one is married to the other or to a person who is connected with the other by blood relationship or adoption,

(ii) ils sont unis par les liens du mariage, c'est-à-dire que l'un est marié à l'autre ou à une personne qui est unie à l'autre par les liens du sang ou de l'adoption,

(ii.1) common-law partnership, in the sense that one is in a common-law partnership with the other or with a person who is connected with the other by blood relationship or adoption, or

(ii.1) ils sont unis par les liens d'une union de fait, c'est-à-dire que l'un vit en union de fait avec l'autre ou avec une personne qui est unie à l'autre par les liens du sang ou de l'adoption,

(2) Subsection 3(3) of the Act is replaced by the following:

(2) Le paragraphe 3(3) de la même loi est remplacé par ce qui suit :

(3) For the purposes of subsection (2),

(3) Les définitions qui suivent s'appliquent au paragraphe (2).

Definitions

"common-law partnership"
« union de fait »

"common-law partnership" means the relationship between two persons who are cohabiting in a conjugal relationship, having so cohabited for a period of at least one year;

« groupe » Producteur qui est une coopérative, une société de personnes n'ayant pas la personnalité morale ou une autre association de personnes.

Définitions

« groupe »
"group of persons"

"group of persons"
« groupe »

"group of persons" means a producer that is a partnership, cooperative or other association of persons.

« union de fait » Relation qui existe entre deux personnes qui vivent ensemble dans une relation conjugale depuis au moins un an.

« union de fait »
"common-law partnership"

TAB 3

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

que chaque version linguistique tienne compte des traditions de droit civil et de common law,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Federal Law—Civil Law Harmonization Act, No. 1.*

1. *Loi d'harmonisation n° 1 du droit fédéral avec le droit civil.*

Titre abrégé

PART I

PARTIE I

FEDERAL LAW AND CIVIL LAW OF THE PROVINCE OF QUEBEC

DROIT FÉDÉRAL ET DROIT CIVIL DE LA PROVINCE DE QUÉBEC

Title

Titre

Title

2. This Part may be cited as the *Federal Law and Civil Law of the Province of Quebec Act.*

2. Titre de la présente partie : *Loi sur le droit fédéral et le droit civil de la province de Québec.*

Titre

Civil Code of Lower Canada

Code civil du Bas Canada

Provisions repealed

3. (1) The provisions of the *Civil Code of Lower Canada*, adopted by chapter 41 of the Acts of 1865 of the legislature of the Province of Canada, entitled *An Act respecting the Civil Code of Lower Canada*, are repealed in so far as they relate to subjects that fall within the legislative competence of Parliament and have not been expressly repealed.

3. (1) Sont abrogées les dispositions du *Code civil du Bas Canada*, adopté par le chapitre 41 des Lois de 1865 de la législature de la province du Canada intitulé *Acte concernant le Code civil du Bas Canada*, qui portent sur une matière relevant de la compétence du Parlement et qui n'ont pas fait l'objet d'une abrogation expresse.

Abrogation de dispositions

Interpretation Act

(2) The *Interpretation Act* applies to the repeal referred to in subsection (1).

(2) La *Loi d'interprétation* s'applique à l'abrogation prévue au paragraphe (1).

Application de la Loi d'interprétation

Marriage

Mariage

Substitution

4. Sections 5 to 7, which apply solely in the Province of Quebec, are to be interpreted as though they formed part of the *Civil Code of Québec.*

4. Les articles 5 à 7, qui s'appliquent uniquement dans la province de Québec, s'interprètent comme s'ils faisaient partie intégrante du *Code civil du Québec.*

Application

Consent required

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

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

Nécessité du consentement

Minimum age

6. No person who is under the age of sixteen years may contract marriage.

6. Nul ne peut contracter mariage avant d'avoir atteint l'âge de seize ans.

Âge minimal

Monogamy

7. No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null.

7. Nul ne peut contracter un nouveau mariage avant que tout mariage antérieur ait été dissous par le décès ou le divorce ou frappé de nullité.

Monogamie

TAB 4

NATIONAL ASSEMBLY
Thirty-fourth Legislature, first session

1991, chapter 64
CIVIL CODE OF QUÉBEC

Bill 125

Introduced by Mr Gil Rémillard, Minister of Justice

Introduced 18 December 1990

Passage in principle 4 June 1991

Passage 18 December 1991

Assented to 18 December 1991

Coming into force: on the date to be fixed by the Government, in accordance with the provisions of the legislation respecting the implementation of the Civil Code reform

Acts replaced:

Civil Code of Lower Canada

Act to establish a new Civil Code and to reform family law (1980, chapter 39)

Act to add the reformed law of persons, successions and property to the Civil Code of Québec (1987, chapter 18)



BOOK TWO

THE FAMILY

TITLE ONE

MARRIAGE

CHAPTER I

MARRIAGE AND SOLEMNIZATION OF MARRIAGE

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

Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent.

366. Every clerk or deputy clerk of the Superior Court designated by the Minister of Justice is competent to solemnize marriage.

In addition, every minister of religion authorized to solemnize marriage by the religious society to which he belongs is competent to do so, provided that he is resident in Québec, that he carries on the whole or part of his ministry in Québec, that the existence, rites and ceremonies of his confession are of a permanent nature and that he is authorized by the Minister.

Any minister of religion not resident but living temporarily in Québec may also be authorized to solemnize marriage in Québec for such time as the Minister determines.

367. No minister of religion may be compelled to solemnize a marriage to which there is any impediment according to his religion and to the discipline of the religious society to which he belongs.

368. Before the solemnization of a marriage, publication shall be effected by means of a notice posted up, for twenty days before the date fixed for the marriage, at the place where the marriage is to be solemnized.

At the time of the publication or of the application for a dispensation, the spouses shall be informed of the advisability of a premarital medical examination.

liquidation; il les conserve pour une plus longue période si les livres et registres sont requis en preuve dans une instance.

Par la suite, il en dispose à son gré.

363. À moins que le liquidateur n'obtienne une prolongation du tribunal, le curateur public entreprend ou poursuit la liquidation qui n'est pas terminée dans les cinq ans qui suivent le dépôt de l'avis de dissolution.

Le curateur public a alors les mêmes droits et obligations qu'un liquidateur.

364. La liquidation de la personne morale est close par le dépôt de l'avis de clôture au même lieu que l'avis de dissolution. Le cas échéant, le dépôt de cet avis opère radiation de toute inscription concernant la personne morale.

LIVRE DEUXIÈME

DE LA FAMILLE

TITRE PREMIER

DU MARIAGE

CHAPITRE PREMIER

DU MARIAGE ET DE SA CÉLÉBRATION

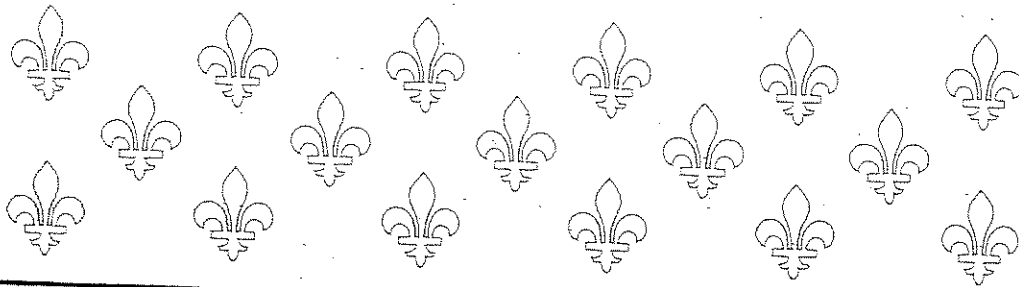
365. Le mariage doit être contracté publiquement devant un célébrant compétent et en présence de deux témoins.

Il ne peut l'être qu'entre un homme et une femme qui expriment publiquement leur consentement libre et éclairé à cet égard.

366. Sont des célébrants compétents pour célébrer les mariages, les greffiers et greffiers-adjoints de la Cour supérieure désignés par le ministre de la Justice.

Le sont aussi les ministres du culte habilités à le faire par la société religieuse à laquelle ils appartiennent, pourvu qu'ils résident au Québec et que le ressort dans lequel ils exercent leur ministère soit situé en tout ou en partie au Québec, que l'existence, les rites et les cérémonies de leur confession aient un caractère permanent et qu'ils soient autorisés par le ministre.

TAB 5



NATIONAL ASSEMBLY

SECOND SESSION

THIRTY-SIXTH LEGISLATURE

Bill 84
(2002, chapter 6)

**An Act instituting civil unions and
establishing new rules of filiation**

Introduced 25 April 2002
Passage in principle 7 May 2002
Passage 7 June 2002
Assented to 8 June 2002

Québec Official Publisher
2002

Bill 84

AN ACT INSTITUTING CIVIL UNIONS AND ESTABLISHING NEW RULES OF FILLIATION

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

AMENDMENTS TO THE CIVIL CODE

1. Article 15 of the Civil Code of Québec (1991, chapter 64) is amended

- (1) by replacing "his consent" in the English text by "consent";
- (2) by replacing "spouse or, if he" by "married, civil union or *de facto* spouse or, if the person";
- (3) by replacing "his" wherever it appears in the English text by "his or her".

2. Article 56 of the said Code is amended

- (1) by replacing "his" in the English text of the first paragraph by "his or her";
- (2) by replacing "his spouse" in the second paragraph by "his or her married or civil union spouse".

3. Article 61 of the said Code is amended

- (1) by replacing "his reasons and gives the name of his father and mother" in the English text of the first paragraph by "the reasons for the application and gives the names of his or her father and mother";
- (2) by replacing "the name of his spouse and of his children" in the first paragraph by "the name of his or her married or civil union spouse and children";
- (3) by replacing "his children's" in the English text of the first paragraph by "the children's";
- (4) by replacing "his" in the English text of the second paragraph by "the".

4. Article 82 of the said Code is amended by replacing "Spouses" by "Married or civil union spouses".

"Upon notification of a notarized joint declaration or a judgment dissolving a civil union, the registrar shall make a notation of the declaration or judgment in the computerized version of the acts of birth and civil union of each of the persons concerned.";

(2) by inserting "or civil union" after "nullity of marriage" in the last paragraph;

(3) by inserting "or civil union" after "act of marriage" in the last paragraph.

20. Article 146 of the said Code is amended

(1) by replacing the first paragraph by the following paragraph:

146. A certificate of civil status sets forth the person's name, sex, place and date of birth and, if the person is deceased, the place and date of death. It also sets forth, if applicable, the place and date of marriage or civil union and the name of the spouse.";

(2) by inserting ", civil union" after "marriage" in the second paragraph.

21. Article 258 of the said Code is amended

(1) by replacing "himself or of administering his property by reason, in particular, of illness, deficiency or debility due to age which impairs his mental faculties or his physical ability to express his will" in the English text of the first paragraph by "himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will";

(2) by replacing "his spouse" in the second paragraph by "his or her married or civil union spouse".

22. Article 365 of the said Code is amended by striking out the second paragraph.

23. Article 366 of the said Code, amended by section 28 of chapter 21 of the statutes of 1996 and section 20 of chapter 53 of the statutes of 1999, is again amended

(1) by inserting ", every notary authorized by law to execute notarized acts and, within the territory defined in the instrument of designation, any other person designated by the Minister of Justice among such officials as mayors, members of municipal or borough councils and municipal officers" after "Minister of Justice" in the first paragraph;

(2) by inserting ", that he solemnizes marriages in places which conform to those rites or to the rules prescribed by the Minister of Justice" after "permanent nature" in the second paragraph.



Chapitre 6

LOI INSTITUANT L'UNION CIVILE ET ÉTABLISSANT DE NOUVELLES RÈGLES DE FILIATION

[Sanctionnée le 8 juin 2002]

LE PARLEMENT DU QUÉBEC DÉCRÈTE CE QUI SUIT :

MODIFICATIONS AU CODE CIVIL

- 1991, c. 64, a. 15,
mod.
- 1.** L'article 15 du Code civil du Québec (1991, chapitre 64) est modifié :
- 1° par le remplacement, dans le texte anglais, des mots « his consent » par le mot « consent » ;
 - 2° par l'insertion, après les mots « par le conjoint », de ce qui suit : « , qu'il soit marié, en union civile ou en union de fait, » ;
 - 3° par le remplacement, dans le texte anglais, du mot « his », partout où il se trouve, par les mots « his or her ».
- 1991, c. 64, a. 56,
mod.
- 2.** L'article 56 de ce code est modifié :
- 1° par le remplacement, dans le texte anglais, au premier alinéa, du mot « his » par les mots « his or her » ;
 - 2° par le remplacement, au deuxième alinéa, des mots « son conjoint » par les mots « la personne à laquelle il est marié ou uni civilement ».
- 1991, c. 64, a. 61,
mod.
- 3.** L'article 61 de ce code est modifié :
- 1° par le remplacement, dans le texte anglais, au premier alinéa, des mots « his reasons and gives the name of his father and mother » par les mots « the reasons for the application and gives the names of his or her father and mother » ;
 - 2° par le remplacement, au premier alinéa, des mots « celui de son conjoint, de ses enfants » par les mots « le nom de la personne à laquelle il est marié ou uni civilement, celui de ses enfants » ;
 - 3° par le remplacement, dans le texte anglais, au premier alinéa, des mots « his children's » par les mots « the children's » ;
 - 4° par le remplacement, dans le texte anglais, au deuxième alinéa, du mot « his » par le mot « the ».

1991, c. 64, a. 135,
mod.

19. L'article 135 de ce code, modifié par l'article 10 du chapitre 47 des lois de 1999, est de nouveau modifié :

1° par l'insertion, après le premier alinéa, du suivant :

« Il doit, sur notification d'une déclaration commune notariée ou d'un jugement de dissolution d'une union civile, en faire mention sur l'exemplaire informatif des actes de naissance et d'union civile de chacune des personnes concernées. » ;

2° par l'insertion, au dernier alinéa et après les mots « la nullité de mariage », des mots « ou d'union civile » ;

3° par l'insertion, au dernier alinéa et après les mots « acte de mariage », de ce qui suit : « , d'union civile ».

1991, c. 64, a. 146,
mod.

20. L'article 146 de ce code est modifié :

1° par le remplacement du premier alinéa par le suivant :

« **146.** Le certificat d'état civil énonce les nom, sexe, lieu et date de naissance de la personne et, si elle est décédée, les lieu et date du décès. Il énonce également, le cas échéant, les lieu et date de mariage ou d'union civile et le nom du conjoint. » ;

2° par l'insertion, au deuxième alinéa et après les mots « de mariage », de ce qui suit : « , d'union civile ».

1991, c. 64, a. 258,
mod.

21. L'article 258 de ce code est modifié :

1° par le remplacement, dans le texte anglais, au premier alinéa, des mots « himself or of administering his property by reason, in particular, of illness, deficiency or debility due to age which impairs his mental faculties or his physical ability to express his will » par les mots « himself or herself or of administering property by reason, in particular, of illness, deficiency or debility due to age which impairs the person's mental faculties or physical ability to express his or her will » ;

2° par le remplacement, au deuxième alinéa, des mots « son conjoint » par les mots « son époux ou conjoint uni civilement ».

1991, c. 64, a. 365,
mod.

22. L'article 365 de ce code est modifié par la suppression du deuxième alinéa.

1991, c. 64, a. 366,
mod.

23. L'article 366 de ce code, modifié par l'article 28 du chapitre 21 des lois de 1996 et par l'article 20 du chapitre 53 des lois de 1999, est de nouveau modifié :