

**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 16<sup>TH</sup> OF JULY 2003**

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## INDEX

	<u>PAGE NO.</u>
<b>PART I STATEMENT OF FACTS</b>	1
<b>PART II POINTS IN ISSUE</b>	1
<b>PART III THE ARGUMENT</b>	
<b>First Issue: The traditional definition of marriage is constitutional</b>	
1. Overview	1 - 2
2. Traditional Definition of Marriage	2 - 3
3. Relational Equality	3 - 4
4. The State Interest in Marriage	4 - 5
5. Statistics Support the State Interest	5 - 7
6. <i>Halpern</i> - Unwarranted Judicial Activism	8 - 9
7. Civil Rights Analogy Misguided	9 - 10
8. Properly Framing the Issue	10 - 11
9. The Traditional Definition of Marriage is Not Discriminatory	12 - 13
<b>Second Issue: The definition of marriage contained in section 1 of the proposal is unconstitutional</b>	
10. Proposed Definition is Discriminatory	13 - 16
11. Proposed Definition Breaches Freedom of Conscience and Religion	16 - 18
<b>Third Issue: Section 2 of the proposal is not only ambiguous on its face, but it does not go far enough in protecting religious freedom</b>	
	18 - 19
<b>PART IV CONCLUSION</b>	19 - 20
<b>PART V ORDER REQUESTED</b>	20
<b>PART VI TABLE OF AUTHORITIES</b>	21 - 29

## **PART 1 - Statement of Facts**

3. The Canadian Conference of Catholic Bishops (the CCCB)<sup>1</sup> founded sixty years ago, is the national association of Catholic Bishops in Canada whose membership consists of bishops from seventy-one Catholic dioceses in Canada. The individual bishops, who are responsible for the pastoral care of approximately 13 million Catholics, are assisted in this work by the clergy, members of religious orders and lay people in a variety of settings including religious, health care and educational institutions.
4. The Catholic Church teaches that marriage is both a vocation and a sacrament and exists solely between a man and a woman for the common good of society. The controversial and divisive issues raised on this reference are of fundamental importance to the CCCB and the Catholic community it represents given the Church's position on marriage.

## **PART II - Points in Issue**

5. The issues raised in this reference that will be argued by this intervener are as follows:
  - 1) *The traditional definition of marriage is constitutional;*
  - 2) *The definition of marriage contained in section 1 of the proposal is unconstitutional;*
  - 3) *Section 2 of the proposal is not only ambiguous, but does not go far enough in protecting religious freedom.*

## **PART III - The Argument**

(1) **FIRST ISSUE:**      **The traditional definition of marriage is constitutional.**

(i) **Overview**

4. The Roman Catholic Church teaches that homosexual persons must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.

*Catechism of the Catholic Church*, Sec. 2358
5. While promoting human rights and preventing discrimination are laudable goals, they should not be employed, as the Ontario Court of Appeal did in *Halpern*, to contravene *Charter* rights of others, or undermine an institution that has proven its worth over time,

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<sup>1</sup> The CCCB, either on its own or in association with other groups, has been active in advocating its position before this Court in the following cases: *Jacobi v Griffiths* [1999] 2 S.C.R. 570; *Bazley v Curry* [1999] 2 S.C.R. 534; *Dobson v Dobson* [1999] 2 S.C.R. 753 [hereinafter *Dobson*]; *Winnipeg Child and Family Services (Northwest Area) v G.(D.F.)* [1997] 3 S.C.R. 925 [hereinafter *D.F.G.*]; *Borowski v The Attorney General of Canada* [1989] 1 S.C.R. 342; *Egan v Canada* [1995] 2 S.C.R. 513; *Rodriguez v Canada (Attorney General)* [1993] 3 S.C.R. 519; *R. v Latimer* [2001] 1 S.C.R. 3; *Trinity Western University v British Columbia College of Teachers* [2001] 1 S.C.R. 772; *Harvard College v Canada (Commissioner of Patents)* 2002 SCC 76; *Doe v Bennett*, 2004, SCC 17. The CCCB was granted intervener status in this reference by the order of the Honourable Mr. Justice Iacobucci dated the 23<sup>rd</sup> of January, 2004.

especially when that institution does not implicate human rights and is not discriminatory.

6. While it is true the social and legal considerations accommodated within the institution of marriage have changed over the years to reflect changing social mores and other values, they have done so only to the extent those social mores and other values (like those reflected in childless marriages) are not inconsistent (like those reflected in polygamous marriages) with the state's interest in the institution of marriage.
7. The government's proposed bill would result in two grave harms: it would eliminate the state's interest in protecting and promoting, for its own benefit, the institution of marriage; and, it would impose an orthodoxy that contravenes freedom of conscience and religion.

(2) Traditional Definition of Marriage

8. Marriage is a natural institution as it predates all recorded, formally structured, social, legal, political and religious systems. It has traditionally been defined as: "the lawful and voluntary union of one man and one woman to the exclusion of all others". It has accommodated many sets of legal, social, religious, spiritual and moral values so long as they did not conflict with the state interest in marriage. Catholics treat marriage as both a vocation and a sacrament, the celebration of the sacred commitment and interrelationship between a man and a woman which is at the heart of family life as it is the point of origin and the central locus of responsibility for the rearing and education of most of each new generation of citizen. This view coincides with the state interest in marriage, which is protecting and promoting the traditional family<sup>2</sup> for the benefit of current and future generations of children and, consequently, for the benefit of society as a whole.

John Witte Jr., *"The Tradition of Traditional Marriage"*, in *Marriage and Same Sex Unions*, Lynn Wardle et al (eds), Praeger, Conn. (2003) at p. 47-59 [hereinafter *Marriage and Same Sex*]; *Hyde v Woodmansee* (1866), L.R.P & D. 130 at 133, [1861-73] All. E.R. Rep. 175; Standing Committee on Legal and Constitutional Affairs, *To Have and to Hold: Strategies to Strengthen Marriage and Relationships*, Commonwealth of Australia, 1998 at 73 [hereinafter *Standing Committee: Australia*]

9. Because the institution of marriage has accommodated many different values, it is a mistake to look at marriage as a number of institutions contained within a larger one as the Court of Appeal did in *Halpern* when it said, "This case is solely about the legal institution of marriage...We do not view this case as, in any way, dealing or interfering

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<sup>2</sup> There is nothing more important to society than to support an institution that integrates the sexes (as opposed to segregating the sexes) in an ideal social unit from which children are born, educated and socialized. Their education and socialization occur not only through the example and teaching of their biological parents, but through contact with their extended families which is so necessary for the transmission of intergenerational values. As one author has said: "Although some dismiss the traditional family as an anachronism, a vestige, a historical relic, the opposite is true - the traditional family is more essential now than ever. In order to thrive, the modern, liberal, capitalist democracy needs citizens with higher job skills, education and moral character than pre-modern or undemocratic societies. These qualities are best cultivated in the traditional family; indeed, no society has developed such a citizenry except through the traditional family." *Dent: Defense of Traditional Marriage, infra*, at page 596.

with the religious institution of marriage.” Civil or religious ceremonies are simply different gateways to one institution; they are not, themselves, institutions.

*Halpern et al v Attorney General of Canada* (2003), 65 O.R. (3d) 161 at para. 53 (Ont. C.A.) [hereinafter *Halpern Court of Appeal Decision*]

(3) Relational Equality

10. For the purposes of this discussion, there are basically two competing views of marriage: the traditional view as discussed above and the one advocated by the Law Commission of Canada [hereinafter *Law Commission*] based on what it has termed *relational equality*. It was this view that found favour with the Court in *Halpern*.

11. The Law Commission suggests that sexual relations within a relationship are not relevant to the legitimate state objective; the legitimate state objective being one of regulation designed to facilitate private ordering, given that one relationship is as important to the state interest as another.

Law Commission of Canada, *Beyond Conjugalilty*, Government of Canada, 2001 at xi, xviii, 14-15, 21-22, 34 and 129 to 130 [hereinafter *Beyond Conjugalilty*]; *Halpern Court of Appeal decision, supra* at paras. 116, 119-122, 123, 124, 129 and 132; see also Maggie Gallagher, “Normal Marriage - Two Views” in *Marriage and Same Sex, supra* at 13-21

12. The Law Commission implicitly advocates the end of marriage and the traditional family as it believes marriage perpetuates inequality not only between the sexes, but between all adult relationships. This radical thinking is entirely in accord with some academic writers who want to revolutionize marriage and family relationships

*Beyond Conjugalilty, supra* at xvii-xviii; Valerie Lehr “Relationship Rights for a Queer Society: Why Gay Activism Needs to Move Away from the Right to Marry” in *Child, Family and State*, S. Macedo and I. Young (eds), New York University Press at 331 [hereinafter *Lehr*]; George W. Dent, Jr., *The Defense of Traditional Marriage* (1999) 15, *The Journal of Law and Politics*, 581 at 616-17 [hereinafter *Dent: Defense of Traditional Marriage*]; Stanley Kurtz, *Beyond Gay Marriage*, *The Weekly Standard*, vol. 8, Issue 45, 8<sup>th</sup> August 2003; Stanley Kurtz, *Marriage Radicals: Slipping Down the Slope*, July 31st, 2003

13. This term, *relational equality*, turns on this Court’s analysis in *Miron v Trudel* [1995], 2 S.C.R. 418 and *M. v H.* [1999], 2 S.C.R. 3 which found marital status an analogous ground under s. 15 of the *Charter*. From this, the Law Commission reasoned all adult consensual relationships must be treated equally. This, of course, is not what this Court decided in those cases as relationships may or may not be entitled to similar treatment depending on the purpose for the comparison. In those cases, the relationships were

entitled to similar treatment for the purpose of receiving certain benefits, marital status being an irrelevant criterion for denying those benefits.

14. If the compelling state interest in marriage as an institution is as impoverished as that advocated by the Law Commission,<sup>3</sup> then the state over the last several hundred years would have developed a registration system to regulate all adult consensual relationships. As this was not done, it is evident regulation is not the state interest in marriage as an institution.

(4) The State Interest in Marriage

15. There is an obvious yet compelling state interest in the institution of marriage: the creation and nurturing of the next generation of citizens within a social unit [the natural family] which provides the best *chance* for successfully realizing this interest. This state interest in marriage as an *institution* ought not be confused with the state interest in regulating the affairs of married couples, or other adult relationships, by promoting equality within the union, protecting children born within marriage, providing for an orderly distribution of assets when the marriage is terminated through divorce and so on.

16. Marriage, as an institution, is not about individual rights as the state protects and promotes the sexual relationship underlying opposite-sex marriage for its own benefit which, as noted, is the creation and nurturing of the next generation of its citizens in a social unit best suited for that purpose.<sup>4</sup> It follows, therefore, there is no compelling state

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<sup>3</sup> As one author has said: “One should not imagine that lawmakers ever decided to create an entitlement program and called it (for some reason) “marriage” with the idea of making eligibility (to be “married”) functionally related to the benefits. If you can enjoy the benefits, you can get married. On this view, “marriage” is an empty place holder in a social welfare scheme.” *Bradley: Final Answer, infra* (para. 33) at 747.

<sup>4</sup> The Australian Standing Committee on Legal and Constitutional Affairs noted, “Simply defined, marriage is a relationship within which a community socially approves and encourages sexual intercourse and the birth of children.” *Standing Committee: Australia*, p. 73; this definition is, of course, connected with the law relating to consummation of marriage, something the Ontario Court of Appeal did not deal with in *Halpern*. See *Gajamugan v Gajamugan* (1979) 10 R.F.L. (2d) 280 (OHC); *K.H.L. v G.*, Q.L. [2003] B.C.J. No. 1249 which cases demonstrate the continuing relevance of consummation for legal purposes; see also Patrick Lee and Robert George, *What Sex*

interest in protecting and promoting sexual relationships based on sexual orientation, sexual preferences, personal preferences, individual taste, cultural practices or religious beliefs of the individuals involved. There may be a state interest in recognizing adult non-marriage relationships for the purpose of regulating them but there is no state interest in institutionalizing them. While common experience, over all millennia and worldwide, confirms this compelling state interest, it has also been recognized in numerous Court decisions, and by international covenants.

*Miron v. Trudel* [1995], S.C.J. no 44 per Gonthier, J at paras 40, 41, 42, 43, 44; *Egan v Canada* [1995], 2 S.C.R. 513 per LaForest, J at 536 [hereinafter *Egan*]; *M v H* [1999], 2 S.C.R. 513; [1999] S.C.J. No. 23, per Gonthier, J. at para 209, 228, 240; *Nova Scotia (A.G.) v Walsh* 2002, SCC83, per Gonthier, J at para 192 and 194; *Moge v Moge* [1992], 3 S.C.R. 813 at 848; *Layland v Ontario (Minister of Consumer & Commercial Relations)* [1993], O.J. No. 575 at 8; *French v McAnarney*, 195 N.E. 714 at 715 (1935); *Milford v Worcester*, 7 Mass. 48, 52 (1810); *Skinner v Oklahoma*, 316 U.S. 535, 541 (1982); *Maynard v Hill*, 125 U.S. 190, 211 (1888); *Murphy v Ramsey*, 114 U.S. 15, 45 (1885); *Reynolds v United States*, 98 U.S. 145, 165 (1878); *Lawrence v Texas*, [2003] SCT-QL 144 at para. 71 per O'Connor, J. [hereinafter *Lawrence*]; *Estate of Cooper*, 564, N.Y.S. (2d) 684 (Surr. 1990) at 688; In *Re H.J.*, Supreme Court 19 October 1990, *R. v d.W.* (1990) No. 176, N.J. (1992) No. 129, (1992) 23 Netherlands Yearbook of International Law, 463 at 469; *Quilter v Attorney General (New Zealand)* [1998] NZFLR 1996; appeal to the United Nations Human Rights Committee, CCPR/C/75/D/902/1999, dismissed, at paras. 8.2-8.3 (*The Family Proceeding Act* of New Zealand recognizes polygamous marriages entered into outside the country, for the purpose of regulating them); Article 23, *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171; preamble to the Convention On the Rights of the Child; In *Re: Kevin* [2001] Fam. C.A. 1074 at para. 287 (Aust. Fam. Ct.); *Goodridge v Department of Public Health*, 440, Mass. 309 at 32-33, 36, 46-48 [hereinafter *Goodridge*]; *Corbett v Corbett*, [1970], 2 All. E.R. 33 at 48.

17. The above discussion and authorities cited, simply reflect the reality that has been understood and accepted by nearly all western democracies: marriage, as an institution, does not implicate human rights.

(5) Statistics Support the State Interest

18. Proof of the state interest in marriage can be found in the statistics. The 2001 Census showed: married couple families represented 70% of the total, followed by lone parent families making up 16% and common law families comprising 14%. Same-sex couples represented 0.5% of all couples, with about 15% of the 15,200 female same-sex couples living with children, compared to only 3% of male same-sex couples. The majority of same- sex couples (88% of male and 77% of female) had no other people living in their

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*Can Be: Self-Alienation, Illusion or One Flesh Union* (1997) 42, *The American Journal of Jurisprudence*, 135 at 143-45, 157 [hereinafter *What Sex Can Be*]; see also *Bradley: Final Answer, infra* at 750.

households. Sixty-eight percent of children (ages 0-14) lived with married parents in 2001, while only 13% (ages 0-14) lived with common law parents.

Statistics Canada, *Profile of Canadian Families and Households: Diversification Continues* October 2002; at 3, 4, 7 and 24

19. Common law relationships are generally less stable than marriages. Children who were born to a married couple who had not lived together before marrying were the least likely (13.6%) to see their parents separate; children whose parents had lived common law but then married either before or soon after starting a family were in an intermediate category - approximately 25% of these children experienced family breakdown; while family breakdown was a fact for 63.5% of the children of unmarried common law couples. Children living in lone parent families were almost seven times more likely to live with low income continuously than the overall population.

Statistics Canada, *Changing Conjugal Life in Canada*, July 2002 at 6; R. Morrisette and M. Drolet, *To What Extent are Canadians Exposed to Low Income?*, April 2000 at 4; See the Vanier Institute of the Family "Lone Parents and Their Children", Spring 1995 at p. 5

20. Being raised by both biological parents<sup>5</sup> is also important to a child's well-being. As two researchers found, "Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parent's race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries."

S. McLanahan and G. Sandefur *Growing Up With a Single Parent: What Hurts, What Helps*, Cambridge, Massachusetts, Harvard University Press, 1994, at 1, 39-62 and 134-5

21. There is no doubt that weakening the institution of marriage has detrimental consequences for children. One of the factors leading to the weakening of marriage is the

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<sup>5</sup> Whether children suffer harm from being raised by lesbian or gay parent(s) is still an open question. Some authors suggest they do, while others say no. See for example, P. Cameron and K. Cameron, *Children of Homosexual Parents Report Childhood Difficulties*, Psychological Reports 2002, 90, 71-82; Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833-920; Family Research Report, *Homosexual Parents: Hidden Study Uncovered*, vol. 16, No. 4, June-July 2001; Judith Stacey and Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, (2001) 66, American Sociological Review, 159; N. Anderssen, C. Amlie, E. Ytteroy *Outcomes for Children with Lesbian or Gay Parents*, a review of studies from 1978 to 2000, Scandinavian Journal of Psychology, 2002, 43, 335-351; see also Don Browning and Elizabeth Marquardt, *A Marriage Made in History?*, New York Times, 9 March 2004; Goodridge, *supra* at 32-33; see also Mark Lehmann, *At the End of the Rainbow*, 1997 at 2-3, who estimates up to one-third of gays are in violent or abusive relationships.



redefinition and widening of the meaning of “family”. As a legislative study found in Australia, “...the passive acceptance of all change involving families is an overly sanguine response to factors that expose many men, women and children to serious emotional trauma, and the nation to an enormous cost.”

*Standing Committee: Australia*, pp. 49-50, 73; see *Lehr, supra*; *Dent: Defense of Traditional Marriage, supra*, at 594; see also C. Le Bourdais and N. Marcil Gratton, *The Impact of Family Disruption in Childhood on Demographic Outcomes in Young Adulthood in Labour Markets, Social Institutions and the Future of Canada’s Children*, Statistics Canada, 1998 at 91-2, 107 and 109

22. There is also a huge social and financial cost when marriages break down. As the Standing Committee on Legal and Constitutional Affairs for the Australian Parliament found, “marriage and relationship breakdown costs the Australian nation at least 3 billion each year. When all the indirect costs are included, the figure is possibly double. When the personal and emotional trauma involved is added to these figures, the cost to our nation is enormous.” Given these social and financial costs, the Committee made several recommendations in order to strengthen and support traditional marriage.

*Standing Committee: Australia* at xiv; see also *Family Breakdown, infra* at 5, where it was noted, “The whole of society is affected by the social consequences of family breakdown. It impairs the health of the nation, reduces the educational achievements of its children, increases the crime rate, places a burden on the national economy and a strain on social relationships at all levels.”

23. Respected Canadian ethicist Margaret Somerville has it right when she notes: “Marriage involves the public recognition of the spouses’ relationship and commitment to each other but that recognition is for the purpose of institutionalizing the procreative relationship in order to govern the transmission of a human life and to protect and promote the well being of the family that results. It is not a recognition of the relationship just for its own sake or for the sake of the partners to the marriage, as it would necessarily become were marriage to be extended to include same-sex couples.”

Margaret Somerville, *The Case Against Same-Sex Marriage: A Brief Submitted to the Standing Committee on Justice and Human Rights*, Montreal, 29<sup>th</sup> April, 2003 at 2 [hereinafter *Somerville: Brief*]; see also Stanley Kurtz, *Beyond Gay Marriage*, *The Weekly Standard*, Vol. 8, Issue 45, 8<sup>th</sup> August, 2003; Stanley Kurtz, *Marriage Radicals: Slipping Down the Slope*, July 31<sup>st</sup>, 2003; *Bradley: Final Answer, supra* at 748

24. While individual children can thrive in other settings, the statistics demonstrate that most children will have the best chance for long term positive outcomes when raised by their

married, biological parents.<sup>6</sup> The state, therefore, is entirely justified in excluding from marriage, relationships which do not accord with this compelling state interest; in fact, the state would be inviting folly to do otherwise as this would be acting against its own interest without any countervailing benefit.

*The Cost of Family Breakdown: A Report by Family Matters Produced for the House of Lords and Commons Family and Child Protection Group* Bedford, England 2000 at 4 [hereinafter *Family Breakdown*]; *Goodridge, supra* at 49-52. That the government has lost its way on this issue has been starkly demonstrated by its inconsistent and, therefore, unprincipled approach; one minute vigorously defending traditional marriage, while in the next vigorously attacking it.

(6) *Halpern - Unwarranted Judicial Activism*

25. The Court in *Halpern* revolutionized the common law relating to a societal institution that has deep meaning for most Canadians. It did this in an environment where Parliament was actively involved in studying this socially divisive issue; where Parliament had clearly expressed its views that marriage was between a man and a woman; and where there was no social consensus for change.<sup>7</sup>

Parliamentary Resolution on Marriage (confining it to opposite sex couples); *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1; Hearings held by the Standing Committee on Justice and Human Rights; Poll conducted by the National Post and as reported in the National Post, 3 December, 2003; CNN-USA Today Gallop Poll, National Anneberg Election Survey, ABC News - Washington Post Poll, as reported by the Ottawa Citizen, 25 February 2004.

26. Given these circumstances, the Court ran afoul of this Court's direction in *Watkins* where it cautioned lower courts against radical and revolutionary changes to the common law, especially when, as in this case, those changes will have unforeseen and profound ramifications.

*Watkins v Olafson* [1989] 2 S.C.R. 750 at 760-761; see also *M. v H.* [1999] 2 S.C.R. 3 at para. 310, per Bastarache, J.; see also, *Dobson, supra* and *D.F.G., supra*

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<sup>6</sup> Well before the same-sex marriage debate, the Ontario Ministry of Community and Social Services, in a 1980 report on reforming the *Child Welfare Act*, said "The philosophy endorses the family as the best social structure available for meeting the needs of children and strives to maximize its use whenever possible. Put more simply, the family is rarely perfect, frequently faulted and sometimes outright deficient, but in the vast majority of [child welfare] cases, it still remains the best placement available for the child." See *Consultation Paper: Children's Services Past, Present and Future*, Dec. 1980 at 35.

<sup>7</sup> This is true, even among the gay and lesbian community. See, for example, Clifford Krauss, *Now Free to Marry, Canada's Gays Say: 'Do I?'*, New York Times, 21 August 2003; see also *Lehr, supra*; Mitchel Raphael, *Who Says All Gays Want to Marry?* Globe & Mail, 7 April 2004.

27. The Court also ran afoul of McGillvray, J.A.'s pre *Charter* but still relevant and sensible caution in *Kazakewich* when referring to the *Person's* case, "...none of the observations of Viscount Sankey can be said to provide legal justification for an attempt by Canadian courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present-day social and economic conditions."

*Kazakewich v Kazakewich* [1937] 1 D.L.R. 548 at 567 (Alb. C.A.)

28. Besides incorrectly treating marriage as several institutions within a larger one, the Court in *Halpern* made several other fundamental and far-reaching errors:

- 1) By comparing the demand for same-sex marriage to the American civil rights movement, the Court embraced a paradigm that is itself inflammatory and will lead to intolerance toward those who advocate the opposite view;
- b) By eliminating procreation and, hence, the protection and promotion of the traditional family, as the compelling state interest in the institution of marriage, the Court made it impossible to confine marriage to sexually committed relationships;
- 3) By applying a mechanical s. 15 *Charter* analysis to the traditional definition of marriage, the Court made it impossible to confine marriage to opposite and same-sex couples;
- 4) By requiring Ontarians to treat homosexual sexual practices as a good, it will lead to intolerance of those who teach and espouse the opposite view which, in turn, will have wide ranging negative consequences for freedom of religion and conscience.

(7) Civil Rights Analogy Misguided

29. The Court in *Halpern* saw itself as striking a major and historical blow for what it perceived were the civil rights of gays and lesbians in much the same way as another court did for Blacks in the famous American case of *Brown v Board of Education*, 347 U.S. 483 (1954). This becomes clear when the Court compares the exclusion of gays and lesbians from marriage to the anti-miscegenation laws struck down in *Loving*.

*Halpern, supra* at paras. 2, 70; *Loving v Virginia*, 388 U.S. 1 (1967) [hereinafter *Loving*]; Whether *Brown v Board of Education* has had a salutary effect on the education of black children, or their integration, is open to debate. As Professor W.A. Bogart notes: "A cumbersome, adversarial, litigious approach to complex social problems may create some possibilities for change. It is more likely, however, that the range of responses will be constrained, that the positions advocated will become polarized." See W.A. Bogart, *Consequences: The Impact of Law and its Complexity*, University of Toronto Press, at 308 and see also pp. 304-308, which deal with the debate over *Brown v Board of Education*.

30. The analogy between same-sex marriage and anti-miscegenation laws has been rejected in a number of American decisions after the passage of the *Equal Rights Amendment*, on

the basis there is a clear distinction between a marital restriction based upon race and one based upon the fundamental difference in sex.

*Singer v Hara*, Wash. App. 522 P.2d 1187, 1191-93, 1195-97; *Baker v Nelson*, 191 N.W. 2d 185 at 187; *Adams v Howerton*, 486 F. Supp. 1119 (1980) at 1122 to 1123; see also the following American cases where same-sex marriage was rejected: *Slayton v State*, Tex. App. 633 S.W. 2d 934 at 937; *B. v B.* 355, N.Y.S. 2d, 712 at 716; *Storrs v Holcom*, B. 645 N.Y.S. 2d, 286, (Supp. 1996) at 287 to 288; *Anonymous v Anonymous*, 325, N.Y.S. 2d, 499 at 499 and 501; *McConnell v Noonan*, 547 F. 2d 54 (1976) at 55-56; *DeSanto v Barnsley*, 476A. 2d. 952 (PA. Super. 1984) at 955-956; *Jones v Hallahan*, K.Y. 501 S.W. 2d 588 at 589-90; *Succession of Bacot*, 502 S.O. 2d, 1118 (L.A. App. 4 Cir. 1987) at 1130; *Dean v District of Columbia*, 653 A. 2d 307 (D.C. App. 1995) at 333.<sup>8</sup>

31. The inappropriateness of comparing same-sex marriage to the American civil rights movement was articulated by one commentator who noted:

Gay marriage is radically different from, and antipodal to, interracial marriage within the traditions of Western culture. Christianity expressly condemned racism as, for example, in the parable of the Good Samaritan. Anti-miscegenation laws were almost unheard of outside the United States, and less than one-third of the states had such laws when *Loving* was decided. Thus in striking down these laws *Loving* did not reject but embraced Western tradition. By contrast, neither the West nor any other culture has ever recognized same-sex marriage, and Christianity, like Judaism, has always condemned homosexual acts. By embracing Western tradition *Loving* argues against recognition of same-sex marriage.

Anti-miscegenation laws prevented intimate contact between the races. Traditional marriage laws do not keep the sexes apart but bring them together. Interracial marriages create mixed-race children; same-sex marriages do not create mixed-gender children. In the analogy between race and gender, traditional marriage resembles integration; gay marriage resembles segregation. It is not surprising, then, that most Afro-Americans reject the analogy between the civil rights and homosexual movements. Government does not compel racial integration, but it can encourage integration by education, exhortation and subsidies. Likewise, government cannot force individuals into traditional marriages, but it can encourage traditional marriages by favoring them in various ways.

*Dent: Defense of Traditional Marriage, supra*, at 615; see also David Crary, *Gay Marriage Question Widens After Ruling*, Associated Press, 28 November 2003; Robert P. George, "Neutrality, Equality and Same Sex Marriage", *supra*, at 129; Lynn D. Wardle,

<sup>8</sup> "A couple of earlier rulings favouring same-sex marriage were later legislatively overruled. See *Baehr v Lewin*, 852 P.2d 44, 75, 82, (Haw. 1993) (holding state must show compelling reason to deny recognition of same-sex marriages); *on remand, Baehr v Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (finding no compelling reason). In 1998 Hawaii voters passed a Marriage Amendment to the state constitution providing: "The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. art 1, s. 23 (<http://www.state.hi.us.lrb/con/condoc.html>) (visited 13 June 2000). The Hawaii Supreme Court then held that the "amendment validated [the existing marriage statute] by taking statute out of the ambit of the [state] equal protection clause." *Baehr v Miike*, Civ. No. 91-1394-05, 1999 Haw. LEXIS 391, at \*3 (Haw. Dec. 9, 1999). A similar ruling in Alaska - *Brause v Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) - was also overruled by an amendment to the state constitution. Alaska Const. art. I, s. 25 (1998)." See *Dent: Defense of Traditional Marriage, supra*, at 582, footnote #2; *Contra*, see *Goodridge, supra* (a 4-3 decision of the Supreme Judicial Court of Massachusetts).

*"Beyond Equality"*, in *Marriage and Same Sex*, *supra*, at 186, [hereinafter Wardle, "Beyond Equality"]

32. In addition to encouraging segregation of the sexes (the opposite of marriage), the *Halpern* decision and the government's proposed legislation also create a segregation-like system between "civil marriage" and "religious marriage" whereby gays and lesbians can be included in the former, but excluded from the latter especially when one considers that 76% of Canadians are married by clergy (98.5% in Ontario). For "religious marriage", there would be further segregation between those churches that do marry same-sex couples and those that do not.

*"The Daily"*, Statistics Canada, 20 November 2003

33. As discussed below, comparing the exclusion of gays and lesbians from the institution of marriage to the anti-miscegenation laws or the American civil rights movement is inflammatory because it paints all those in favour of traditional marriage, or who condemn homosexual sexual conduct, as the moral equivalent of racists.

(8) Properly Framing the Issue

(9)\_\_\_\_\_

34. Human rights attach to everyone, not because of their sexual orientation or other personal characteristics, but because they are human beings. The Court on this reference, therefore, must ask itself: does marriage as an institution, which is open to everyone (there are likely many gays and lesbians who, through personal choice, are married to opposite-sex partners), and is defined by its monogamous, opposite sex nature, discriminate against adults not caught by its definition who are in loving and committed relationships but wish to marry?<sup>9</sup> Central to this question is whether the state must provide symbolic or moral approval to sexual conduct underlying these relationships by including them in marriage, hence creating a constitutional right from a sexual preference. In considering this issue, a mechanical application of the s. 15 analysis to

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<sup>9</sup> In *Halpern*, the Court of Appeal framed the issue in such a way that its answer was self-evident: "...this case is ultimately about the recognition and protection of human dignity and equality in the context of social structures available to conjugal couples in Canada." See *Halpern Court of Appeal decision*, *supra*, at para. 2. This is like stacking the deck in a game of cards, because it leaves out of the equality equation all other troublesome relationships which also have been excluded from marriage while conveniently eliminating the reason for their exclusion in the first place - protecting and promoting the traditional family.

distinctions that do not, appropriately viewed, raise a compelling human rights dimension should be avoided.

Gerard A. Bradley, *Same-Sex Marriage: Our Final Answer?* (2000) 14 Notre Dame Journal of Law, Ethics, and Public Policy 729 at 733 and 734-5, 739, 751; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] S.C.J. No. 6, 2004 SCC 4 at para. 106 (Binnie, J. dissenting) [hereinafter *Canadian Foundation*]

35. People disagree on the morality of homosexual sexual conduct. Some argue moral disapproval is not a reason on which to base public policy by excluding gays from the institution of marriage.

*Somerville: Brief*, at 7, *What Sex Can Be*, *supra* (fn. 3); Thomas C. Caramagno, *"Irreconcilable Differences? Intellectual Stalemate in the Gay Rights Debate"*, Prager, [Westport, Connecticut, London] at p. 75, *"The Theological Meaning of Sex"*

36. The fact some may wish to normalize homosexual sexual conduct, however, by requiring its public celebration through marriage is not a reason on which to base public policy by including gays within the institution of marriage.

Bruce MacDougall, *The Celebration of Same-Sex Marriage*, [2000-2001] 32 Ottawa Law Review 234 at 260 [hereinafter *MacDougall: Celebration of Same-Sex Marriage*], where the author argues: "And beyond that the state must celebrate [gays and lesbians] and that which flows from their status, including their relationships"; MacDougall's view was implicitly accepted by the Ontario Court of Appeal in *Halpern* (see para. 5 of the Judgment); *Dent: The Defense of Traditional Marriage*, *supra* at 581, 592-3

37. As the traditional definition of marriage does not discriminate or implicate human rights (see para. 16, *supra*), it is constitutionally sound. The proposed definition is not, because an extended definition of marriage based on a mechanical application of s. 15 of the *Charter* cannot be restricted to same-sex unions.

(9)

#### The Traditional Definition of Marriage is Not Discriminatory

38. The Court of Appeal in *Halpern* held that equality rights under s. 15 of the *Charter* trumped the state interest in marriage. It held natural procreation (and, hence, protecting and promoting the traditional family) was not a sufficiently pressing and substantial objective to justify infringing equality rights of homosexuals.

*Halpern Court of Appeal Decision*, paras. 119-122; see also *Halpern v Canada (Attorney General)* [2002] O.J. 2714 (Ont. Div. Ct.) [hereinafter *Halpern Divisional Court Decision*] per Blair, J. at para. 90, 137 and Laforme, J. at para. 418

39. The Court found equality rights of the applicant couples were infringed not only because they were denied immediate access to some benefits, but mainly because they were denied the symbolic benefit of being included in the institution of marriage. The Court put it this way at paragraph 5 of its decision:

“Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through the institution, society publicly recognizes expression of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed, conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.”

*Halpern Court of Appeal Decision, supra* at para. 5

40. This reasoning is troublesome because neither the Courts nor the state can force *all citizens* to publicly approve sexual relationships they find morally offensive. While s. 15 may require *the state* to publicly recognize some relationships by treating them equitably when providing or withholding benefits, there is no *Charter* requirement that the state promote the sexual conduct underlying those relationships by endowing the conduct with moral or symbolic approval.<sup>10</sup> As Justice Cory said in *Egan*, “So long as those [sexual] preferences do not infringe any laws, they should be tolerated”; this does not mean promotion, or approval.

*Egan, supra*, at 594-95

41. Before turning to whether the common law definition is discriminatory, one must look at perspective. The test is whether a reasonable person possessing the attributes and the claimants’ circumstances would conclude the definition marginalizes the claimants or treats them as less worthy *on the basis of an irrelevant characteristic*.

*Canadian Foundation, supra* at para. 53 per McLachlin, C.J.

42. In determining this, the Court must look at four factors outlined in *Law v Canada* [1999], 1 S.C.R. 497: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimants’ characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected.

*Canadian Foundation, supra* at para. 55

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<sup>10</sup> This would be similar to holding that all Canadians are automatically entitled to be admitted into the Order of Canada because their exclusion suggests they are not as worthy as those included.

43. In this case, the state interest in protecting and promoting the traditional family benefits the state because that is what is in the best interest of the current and future generations of children. A decision to exclude all other adult relationships from marriage based on sexual orientation, religious belief, cultural practices, sexual preferences and so on, is not intended to devalue the individuals in those relationships, but rather to protect and promote what is undoubtedly and historically the primary and best social unit for raising and nurturing most children, something vital to a healthy civil society.

*Canadian Foundation*, paras. 58, 62; Mary Ann Glendon, *For Better or For Worse?*, Wall Street Journal, March 2004; *Dent: Defense of Traditional Marriage* at 594, 596

44. Admitting same-sex unions to the institution of marriage is obviously not consistent with the state interest of promoting the traditional family, while treating those unions differently than married heterosexual couples does not stigmatize those relationships any more than excluding other adult relationships from marriage. In other words, exclusion does not arise from an irrelevant criterion, sexual orientation, but from the lack of sexual complementarity elemental to the state purpose. No matter how much one argues the contrary, there is a fundamental biological difference between an opposite-sex couple and a same-sex couple, which difference embodies its importance to an overriding state interest. By treating unalikes alike, as the Court did in *Halpern*, the very notion of equality is destroyed. The traditional definition of marriage is, therefore, not discriminatory.

*Canadian Foundation*, para. 51 (equal treatment does not mean identical treatment); see also Peter Westen, *"The Empty Idea of Equality"* (1982) 95 Har. Law Rev. 537 at 594-95; Christopher J. Peters, *"Equality Revisited"* [1997] 110 Har. Law Rev. 1210 at 1258-59; Kent Greenwalt *"Prescriptive Equality: Two Steps Forward"* [1997] 110 Har. Law Rev. 1265 at 1280; *Dent: Defense of Traditional Marriage*, *supra* at 609, 615-616; *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143 at 171, 174-5; *Somerville Brief*, *supra*, at 11; Wardle, *"Beyond Equality"*, *supra* at 188

**SECOND ISSUE: The definition of marriage contained in section 1 of the proposal is unconstitutional.**

**(i) Proposed Definition is Discriminatory**

45. Once *Halpern* eliminated procreation as the compelling state interest, the Court made it impossible to confine marriage to conjugal relationships. There are many conjugal and



non-conjugal adult relationships that are marked by love, commitment and interdependency which are not recognized as marriage and which have been excluded from marriage because they do not meet the compelling state interest as always understood.

See *Lehr, supra*, at 319, 334-336; *Fitzpatrick v Sterling Housing Association Ltd.* [1999] H.L.J. No. 43 at 30; Unlike the sexual relations between an opposite-sex couple, sexual relations between a homosexual couple have no wider public interest. There is no rational reason to give their relationship a different status merely because they have sex than two sisters who live together out of mutual familial love and who support each other in exactly the same way as a married couple but without a sexual element to their relationship. The same can be said about many other non-conjugal relationships. In *M v H, supra*, at para. 354, Bastarache, J., speaking about the equality of relationships, said: "However, where the distinction is drawn along other lines, the onus is on the claimant to demonstrate that it involves a new analogous ground. For example, two sisters living together in an economically dependent relationship will not a priori satisfy this requirement." But once procreation is removed as a compelling state interest, so is the sexual relationship underlying marriage. Once the sexual relationship is removed, and given that marital status *itself* is an analogous ground under s. 15, there is no basis left to distinguish the relationship of the two sisters and a same-sex couple and, therefore, both can assert an equal right to be included in marriage. See also, Teresa Stanton Colett, "*The Illusory Public Benefits of Same-Sex Encounters*" in *Marriage and Same Sex, supra*, at 148-150.

46. It would be equally valid for those involved in polygamous, polyamorous and some forms of endogamous relationships, as well as other non-traditional family relationships, to seek symbolic approval of their relationships through marriage in order to "enhance an individual's sense of self-worth and dignity" not to mention access to marriage's financial or other benefits.

See Kurtz, *Beyond Gay Marriage; Dent: Defense of Traditional Marriage* at 628 to 633, David L. Chambers, *Polygamy and Same-Sex Marriage*, Hofstra University School of Law, Law Review [hereinafter *Chambers: Polygamy and Same-Sex Marriage*]

47. Polygamy is a good example. Religious belief is a personal characteristic having *Charter* protection under ss. 2(a) and 15. On this reference, substitute religious belief for sexual orientation. This compels legal recognition of polygamous relationships based on religious beliefs. Some may suggest these relationships should be excluded under s. 1 because they are immoral or demean women. If morality is considered irrelevant, non-recognition would simply serve to further demean the individuals involved. It is difficult to see how, if *Halpern* is upheld, these other claims to marital status could be excluded on any basis, other than their inconsistency with the state interest.

See *Chambers: Polygamy and Same-Sex Marriage*, pages 13 to 16; *Vriend v Alberta* [1998] 1 S.C.R. 493 at 539, 545; *Dent: Defense of Traditional Marriage* at 616

48. Some may argue this is an extreme view as some of these relationships are illegal. This is not convincing because what was considered illegal yesterday may not be considered so tomorrow when *Charter* rights are implicated.

See *Halpern Court of Appeal Decision, supra*

49. Some may suggest homosexual relationships should be treated differently because sexual orientation is now generally considered an immutable personal characteristic,<sup>11</sup> and, therefore, homosexuals cannot choose to marry a heterosexual. Besides the fact there are likely many gays who have chosen an opposite-sex partner, this assertion is not compelling.
50. There are probably many people who choose, for whatever reason, a same-sex partner - bisexuals are one example. The lack of choice argument has a hollow ring to it, because it logically implies that those who can choose between a heterosexual and homosexual relationship should not be allowed to marry a same-sex partner.

51. If some gays have a choice between opposite-sex and same-sex partners, there is no principled basis for the state to deny similar choices to those involved in other non-traditional family relationships, like polygamy, but who wish to marry. In any event, it is neither unreasonable nor discriminatory for society to hold that relationships are different in kind, and different in definition, irrespective of how the parties came to enter upon those relationships.

Richard G. Wilkins, *"The Constitutionality of Legal Preferences for Heterosexual Marriage"*, in

*Marriage*

52. Applying a mechanical s. 15 analysis renders it impossible to redefine marriage in a way that does not breach someone's *Charter* rights. It may be suggested a line can be drawn at same-sex unions. This would be wrong as individual freedoms are not subject to line drawing. The simple truth is marriage, as an institution, does not concern individual rights; otherwise, we are left with what has been termed *relational equality*, a harbinger for the end of the traditional family, with its consequential harm.

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<sup>11</sup> This suggestion, which amounts to a stereotype, has not been universally accepted. See for example, Paul and Kirk Cameron, *Does Incest Cause Homosexuality?*, *Psychological Reports*, 1995, 76, 611-621; see also *The Etiology of Homosexuality: Biology and/or Culture?*; *Dent: Defense of Traditional Marriage* at 612-614.

Lynn D. Wardle, *"Marriage, Relationships, Same Sex Union, and the Right of Intimate Association"* in *Marriage and Same Sex*, *supra* at 196

53. It was accepted in *Halpern* that since some people are allowed to marry who cannot have or do not want children, the state interest in the institution of marriage cannot be procreation. Apart from the obvious point that exceptions do not make the rule, this fact leads to the opposite conclusion for two reasons: first, the sexual relations underlying these marriages, with their symbolic procreative potential, are the same as those the state protects and promotes for its own benefit; and second, these marriages reinforce and reflect the importance and value of the traditional family to the state interest. Either reason would be sufficient to vindicate the state's interest in these marriages. Put another way, these marriages, unlike same-sex unions or polygamy, are consistent with the state's interest.

*Halpern Court of Appeal Decision* at para. 130, *Halpern Divisional Court Decision*, para. 418; *Dent: Defense of Traditional Marriage*, at 601-603; *Somerville Brief*, *supra* at 3; Lynn D. Wardle, *"Image, Analysis and the Nature of Relationships"* in *Marriage and Same Sex*, *supra*, at 117

(2) Proposed Definition Breaches Freedom of Conscience and Religion

54. Besides being discriminatory, the draft bill implicates moral and hence religious values in a way that infringes freedom of conscience and religion. This was inevitable given the issue involved.
55. The *Halpern* applicants sought public acceptance of their sexual relationship through marriage, successfully arguing their equality rights under s. 15 of the *Charter* were infringed as a result of their relationships' exclusion from marriage.
56. Because intimate sexual relations are an inextricable core element of the institution of marriage, *Halpern* and this legislation would require all Canadians to treat same-sex unions, and the intimate sexual relationships underlying those unions, with the same public respect and approval as intimate sexual relations underlying heterosexual marriages. Put another way, the state would require all Canadians to treat homosexual sexual conduct as a good.

See MacDougall, *The Celebration of Same-Sex Marriage*, p. 256; *Bradley: Final Answer*, *supra* at 738

57. There is harm in this. The state, through this legislation, would establish a particular ideological opinion as a universal and binding norm which holds that intimate sexual relations at the core of same-sex unions must be treated as a good. If established, this norm would provide formal legitimacy to the proposition, which is already being advanced by some,<sup>12</sup> that all those who believe and publicly espouse the view that

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<sup>12</sup> There are many examples of this. The following represent a few of them. In a website established by Kevin Bourassa and Joe Varnell at [www.equalmarriage.ca](http://www.equalmarriage.ca), these two gay activists use language that can only be described as intolerant. The following are representative examples: a) posting 20<sup>th</sup> of January, 2004 • “in the marriage challenge, there was one judge, Justice Pitfield, (nationally discredited), who had a perverse view on Canada’s constitution that he used to justify discrimination.” b) posting January 25<sup>th</sup>, 2004 • “opposing equality...the CCCB” • “Rome is where the hate is” • “Followers of these proceedings will note the overwhelming presence of the Catholic Church. Their voice is represented three times in opposing equality - one for each member of their holy trinity.” c) posting February 5<sup>th</sup>, 2004 • “The Alliance party was hobbled by their well deserved reputation as a party of bigots: a reputation they had burnished since their inception as the Reform party.” (emphasis in original)

In another situation, Margaret Somerville and Katherine Young, two well known and respected McGill University professors were targeted and harassed by pro gay and lesbian students and professors, for their stand in favour of traditional marriage. They were labelled “homophobes” and “gay-haters”. See Globe and Mail article, 31<sup>st</sup> July, 2002. Archbishop Adam Exner from Vancouver sought police protection after being threatened by pro gay and lesbian activists after withdrawing Catholic schools in his diocese from certain programs. He was accused of teaching intolerance and hatred against homosexuals. (See LifeSitenews.com, Vancouver, 1<sup>st</sup> October, 2003; letter by Archbishop Exner, OMI, to the Vancouver Sun dated 1<sup>st</sup> of October, 2003.)

In the United States, a school’s decision to ban a religious student from expressing her views on the immorality of homosexual conduct at a school sponsored panel on religion and sexual orientation was overturned only after she turned to the Courts. One of the organizers of this event said that allowing her to present her views would be like “inviting white supremacists on a race panel.” As the Judge noted, “This case presents the ironic and unfortunate paradox of a public high school celebrating “diversity” by refusing to permit the presentation to students of an “unwelcomed” viewpoint on the topic of homosexuality and religion, while actively promoting the competing view.” See *Hansen v Ann Arbour Public Schools*, 293 F. Supp. 2d , 780; 2003 U.S. Dist. *Lexis 21920*, at pps. 2 and 10.

In British Columbia, a teacher’s suspension for publicly expressing his disapproval of homosexual sexual conduct was upheld on judicial review. See *Kempling v British Columbia College of Teachers* [2004] B.C.J. No. 173. In *Hall (Litigation Guardian of) v Powers* [2002] O.J. No. 1803, a Court ordered a Catholic school to allow a homosexual student to bring his same sex date to the school prom despite the Catholic Church’s well known teachings on the immorality of homosexual sexual conduct.

The judiciary is not immune from these attacks. Judges who disagree with the suggestion that same-sex marriage is a matter of human rights have been ridiculed. Speaking about Justices La Forest and Gonthier of this Court, one academic sarcastically asked how these two judges would have decided the “person’s case” or the miscengation cases in the United States. See MacDougall, *The Celebration of Same-Sex Marriage* at pps. 245-6 and 249.

homosexual sexual conduct is immoral are anti-gay, homophobic, intolerant and equivalent to racists.

See Robert George *The Clash of Orthodoxies: Law, Religion and Morality in Crisis*, November 2001, who notes at p. 2, "Secularism aims to privatize religion altogether, to render religiously informed moral judgment irrelevant to public affairs and public life, and to establish itself, secularist ideology, as the nation's public philosophy".

58. Once this social and moral orthodoxy is established, it would be a small step to remove charitable status and other public benefits from individuals, religious groups, or affiliated charities who publicly teach or espouse views contrary to this claimed orthodoxy. It would add the legitimacy of the Court and of the law to the false charge, which is also being made, that those who teach or espouse these views are hate-mongers.

See *Bob Jones University v United States* [1983] S.C.T.-Q.L. 1094 at para. 50; *Ross v New Brunswick School District* [1996] 1 S.C.R. 825 and *R. v. Keegstra* [1990] 3 S.C.R. 697]; *Dent: The Defense of Traditional Marriage*, *supra* at 640-41.

59. Comparison of individuals or religious groups who teach or publicly espouse these views with racists is inflammatory and intolerant. Racism is based on stereotypical assumptions or ascriptions relative to group characteristics without reference to individual conduct or merit, designed to maintain racial superiority. Sexual morality, on the other hand, is judged solely on the basis of individual conduct; if it were otherwise, no consensual adult sexual acts or practices could ever be judged immoral. When one condemns, for example, some forms of heterosexual sexual conduct, that person would not ordinarily be branded anti-heterosexual, heterophobic or racist.

See *Loving*, *supra* at 11, 12; *Lawrence*, *supra* at para. 81; Richard G. Wilkins, "Reply to *Discrimination Against Gays is Sex Discrimination*" in *Marriage and Same Sex*, *supra* at 221-23

60. *Halpern* and this proposed legislation are troubling because they attempt to displace traditional and enduring notions of morality, based on religious belief and individual conscience, with state imposed notions of morality based on amorphous principles of "Charter values"; some might call it *Charter* morality. The effect is to bring the draft legislation within a hypothetical quoted by Dickson, J. in *R. v Big M. Drug Mart* at 332, "I would note that this approach would seem to have been taken by this Court, in its unanimous decision in *Attorney General of Quebec v Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66. When the Court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and therefore one to which the limitation of s. 1 of the Charter could not apply, it recited the hypothetical at p. 88:

'An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a state religion would be in direct conflict with s. 2(a) of the Charter which guarantees freedom of

conscience and religion and would have to be ruled of no force or effect without the necessity of ever considering whether such legislation could be legitimized by s. 1.”

*R. v Big M. Drug Mart* [1985] 1 S.C.R. 295 [hereinafter *Big M*] at 332, see also 331, 334, 336

61. While s. 2 of the draft bill recognizes freedom of conscience and religion are implicated by s. 1 of the draft bill, it does nothing to protect individuals or groups from the adverse effects of the moral orthodoxy imposed by the government in s. 1. As the *Charter* morality imposed by the draft bill will likely have a direct and, at least, indirect coercive effect on religious belief, practice and teaching, it is unconstitutional.

*Adler v Ontario* [1996] 3 S.C.R. 609, per Sopinka J. at 701-02 quoting from *R. v Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713 at 765; *Ross, supra*, at 868; *Big M., supra* at 336

- (3) THIRD ISSUE: Section 2 of the proposal is not only ambiguous on its face, but it does not go far enough in protecting religious freedom.

62. All individuals, because of their inherent human dignity, are entitled to respect but it does not follow that all of their consensual sexual acts are entitled to respect and moral approval. At the heart of the demand for same-sex marriage is a demand for respect and moral approval of the underlying sexual relationship, a demand that could only be met by many Canadians through abrogation of their religious beliefs.

*Bradley: Final Answer, supra* at 738, 739; see MacDougall, *Celebration of Same-Sex Marriage* at 256

63. A public official who conscientiously disapproved of homosexual sexual conduct who were to be required to *solemnize* a same-sex marriage would be presented with a Hobson’s choice: they could perform the marriage and deny their conscience; or they can follow their conscience and refuse to celebrate the marriage but lose their jobs. Forcing such a choice would be a violation of that official’s section 2(a) *Charter* rights.

*Sherbert v Venner*, 374 U.S. 398; *Thomas v Review Board of Indiana Employment Security Division*, 450 U.S. 707 (Q.L.) at 11; *Ontario (Human Rights Commission) v Brillinger*, [ 2002] O.J. No. 2375 at para. 56; see also *Perform Same-Sex Marriages or Resign*, CBC Online, 21 January 2004

64. This is not a situation where legislation is morally neutral, requiring neither public approval nor disapproval, like signing a divorce decree. This legislation requires active, public participation of a government licensed official in celebrating, through *solemnization*, a sexual relationship their conscience tells them is morally wrong.

*O’Sullivan v Canada (Minister of National Revenue)* [1992] 1 F.C. 522 at para. 36

65. Section 2 of the draft bill, therefore, fails to adequately address freedom of conscience and religion implicated in solemnization of same-sex unions because it does not

safeguard the freedom of all persons who, on religious or conscientious grounds, refuse to solemnize a civil or religious same-sex union.

66. Section 2 of the draft bill is, on its face, ambiguous because it does not deal with the situation where a person is both a religious official (e.g. a permanent Deacon) and a civil official with power to solemnize marriage (e.g. a Judge) and whether such person, in their civil capacity, could be forced to solemnize a same-sex union.

#### **PART IV - Conclusion**

67. We would invite folly were we to act against society's interest by failing to acknowledge not all relationships are the same when it comes to promoting the welfare of children and, thereby, the welfare of society. By eliminating the opposite-sex nature of marriage, we would eliminate the centrality and importance to<sup>13</sup> society of the traditional family, while replacing it with an untried, untested, and largely academic theory, misleadingly termed, *relational equality*.
68. Those in some adult consensual relationships may wish to advance claims to certain benefits and if the state wishes to or is required to entertain those claims, it can do so through a state sponsored registration system such as advocated by the Law Commission and others. This would result in substantive equality, which is all the *Charter* requires; the *Charter* does not require the state to provide symbolic or moral equality for sexual conduct underlying any adult relationship. While this Court has found sexual orientation to be an analogous ground under s. 15 of the *Charter*, this Court has never found, nor should it, that sexual preferences, whether heterosexual or homosexual, are constitutionally protected rights.

*Beyond Conjugalinity* at 140; Nicholas Bala, *Alternatives for Extending Spousal Status in Canada*, (2000), 17 Canadian Journal of Family Law, 169 at 185-190; Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same Gender Matrimony*, 5 Mich. J. Gender & L. 353

69. If same sex relationships were to clear marriage's gateway, other adult relationships based solely on the wishes of the individuals involved and having no connection to the

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<sup>13</sup> As Bradley says at 748 in *Our Final Answer, supra*, "Here are the two features of marriage which lawmakers from time out of mind have picked out of that complex open-ended relationship as critically important to the political common good: marriage as the principle of sexual morality, and as the only legitimate setting in which children should come to be, and be raised. It has surely been the undoing of marriage that as a society, we have so detached both sex and marriage from children."

state interest will inevitably follow rendering marriage meaningless. It will also lead to endless and bitter constitutional battles over freedom of conscience and religion.

**PART V - Order Requested**

70. The CCCB requests that the Court answer the questions referred to it on this reference as follows:

- 1) *Question No. 2*: The proposal, which extends capacity to marry to persons of the same sex is not consistent with the *Canadian Charter of Rights and Freedoms* as the proposal is contrary to ss. 2(a) and 15 of the *Charter*.
- 2) *Question No. 3*: Freedom of religion as guaranteed in paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protects everyone, not just religious officials, from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.
- 3) *Question No. 4*: The opposite sex requirement for marriage is consistent with the *Canadian Charter of Rights and Freedoms*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of May, 2004.

WILLIAM J. SAMMON



**PART VI - Table of Authorities**

<b><u>Case</u></b>	<b><u>Page Number</u></b>
<i>Adams v Howerton</i> , 486 F. Supp. 1119 (1980)	9
<i>Adler v Ontario</i> [1996] 3 S.C.R. 609	18
<i>Andrews v Law Society of British Columbia</i> [1989] 1 S.C.R. 143	13
<i>Anonymous v Anonymous</i> , 325, N.Y.S. 2d, 499	9
<i>B. v B.</i> 355, N.Y.S. 2d, 712 at 716	9
<i>Baehr v Lewin</i> , 852 P.2d 44, (Haw. 1993)	9
<i>Baehr v Miike</i> , Civ. No. 91-1394-05, 1996 W.L. 694, 235	9
<i>Baehr v Miike</i> , 1999 Haw. Lexis 391	9
<i>Baker v Nelson</i> , 191 N.W. 2d 185	9
<i>Bob Jones University v United States</i> [1983] S.C.T.-Q.L. 1094	17
<i>Brause v Bureau of Vital Statistics</i> , No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998)	9
<i>Brown v Board of Education</i> , 347 U.S. 483 (1954)	9
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<i>Corbett v Corbett</i> [1970], 2 All. E.R. 33 at 48	5
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<i>DeSanto v Barnsley</i> . 476A. 2d. 952 (PA. Super. 1984)	9
<i>Dobson v Dobson</i> [1999] 2 S.C.R. 753	1, 8
<i>Egan v Canada</i> [1995] 2 S.C.R. 513	5, 12
<i>Estate of Cooper</i> , 564, N.Y.S. (2d) 684 (Surr. 1990)	5

<u>Case</u>	<u>Page Number</u>
<i>Fitzpatrick v Sterling Housing Association Ltd.</i> [1999] H.L.J. No. 43	14
<i>French v McAnarney</i> , 195 N.E. 714 (1935)	5
<i>Gajamugan v Gajamugan</i> (1979) 10 R.F.L. (2d) 280 (OHC)	5
<i>Goodridge v Department of Public Health</i> , 440, Mass. 309	5, 6, 9
<i>Hall (Litigation Guardian of) v Powers</i> [2002] O.J. No. 1803	17
<i>Halpern v Canada (Attorney General)</i> [2002] O.J. 2714 (Ont. Div. Ct.)	12, 16
<i>Halpern et al v Attorney General of Canada</i> (2003), 65 O.R. (3d) 161 (Ont. C.A.)	3, 4, 8, 9, 10, 11, 13, 14, 15, 16
<i>Hansen v Ann Arbour Public Schools</i> , 293 F. Supp. 2d,780; 2003 U.S. Dist. Lexis 21920	17
<i>Hyde v Woodmansee</i> (1866), L.R.P. & D. 130 [1861-73] All E.R., Rep. 175	2
<i>In Re: Kevin</i> [2001] Fam. C.A. 1074 (Aust. Fam. Ct.)	5
<i>In Re H.J.</i> , Supreme Court 19 October 1990; <i>R. v d.W.</i> (1990) No. 176 N.J. (1992) No. 129	5
<i>Jones v Hallahan</i> , K.Y. 501 S.W. 2d 588	9
<i>K.H.L. v G.</i> [2003] B.C.J. No. 1249	4
<i>Kazakewich v Kazakewich</i> [1937] 1 D.L.R. 548 (Alb. C.A.)	8
<i>Kempling v British Columbia College of Teachers</i> [2004] B.C.J. No. 173	17
<i>Law v Canada</i> [1999] 1 S.C.R. 497	13
	<i>Lawrence v Texas</i> , [2003] SCT-QL 144

<u>Case</u>	<u>Page Number</u>
<i>Layland v Ontario (Minister of Consumer &amp; Commercial Relations)</i> [1993], O.J. No. 575	5
<i>Loving v Virginia</i> , 388 U.S. 1 (1967)	9, 10, 18
<i>M v H</i> [1999] S.C.J. No. 23	3, 5, 8, 14
<i>Maynard v Hill</i> , 125 U.S. 190 (1888)	5
<i>McConnell v Nooner</i> , 547 F. 2d 54 (1976)	9
<i>Miron v Trudel</i> [1995] 2 S.C.R. 418; [1995] S.C.J. No. 44	3, 5
<i>Milford v Worcester</i> , 7 Mass. 48 (1810)	5
<i>Moge v Moge</i> [1992], 3 S.C.R. 813	5
<i>Murphy v Ramsey</i> , 114 U.S. 15 (1885)	5
<i>Nova Scotia (A.G.) v Walsh</i> 2002, SCC 83	5
<i>O'Sullivan v Canada (Minister of National Revenue)</i> [1992] 1 F.C. 522	19
<i>Ontario (Human Rights Commission) v Brillinger</i> , [2002] O.J. No. 2375	19
<i>Quilter v Attorney General (New Zealand)</i> [1998] NZFLR 1996	5
<i>Quilter v Attorney General (New Zealand)</i> CCPR/75/D/902/1999	5
<i>R. v Edwards Books and Art Ltd.</i> [1986] 2 S.C.R. 713	18
<i>R. v Big M. Drug Mart</i> [1985] 1 S.C.R. 295	18
<i>R. v Keegstra</i> [1990] 3 S.C.R. 697	17
<i>Reynolds v United States</i> , 98 U.S. 145 (1878)	5
<i>Ross v New Brunswick School District</i> [1996] 1 S.C.R. 825	17, 18
<i>Sherbert v Venner</i> , 374 U.S. 398	19
<i>Singer v Hara</i> , Wash. App. 522 P.2d 1187	9

<u>Case</u>	<u>Page Number</u>
<i>Skinner v Oklahoma</i> , 316 U.S. 535 (1982)	5
<i>Slayton v State</i> , Tex. App. 633 S.W. 2d 934	9
<i>Storrs v Holcom</i> , B. 645 N.Y.S. 2d, 286, (Supp. 1996)	9
<i>Succession of Bacot</i> , 502 S.O. 2d, 1118 (L.A. App. 4 Cir. 1987)	9
<i>Thomas v Review Board of Indiana Employment Security Division</i> , 450 U.S. 707 (Q.L.)	19
<i>Vriend v Alberta</i> [1998] 1 S.C.R. 493	14
<i>Watkins v Olafson</i> [1989] 2 S.C.R. 750	8
<i>Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)</i> [1997] 3 S.C.R. 925	1, 8
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Caramagno, Thomas C., <i>Irreconcilable Differences? Intellectual Stalemate in the Gay Rights Debate</i> , Prager, [Westport, Connecticut, London]	11
<i>Catechism of the Catholic Church</i>	1
Chambers, David L., <i>Polygamy and Same-Sex Marriage</i> , Hofstra University School of Law, Law Review	14
Colett, Teresa Stanton, <i>The Illusory Public Benefits of Same-Sex Encounters in Marriage and Same-Sex Unions</i> , Wardle, Strasser, Duncan, Coolidge (eds), Praeger, (Conn.) 2003	14
Crary, David, <i>Gay Marriage Question Widens After Ruling</i> , Associated Press, 28 November 2003	10
Dent, George W. Jr. <i>The Defense of Traditional Marriage</i> (1999), 15, The Journal of Law and Politics	2, 3, 6, 10, 11, 13, 14, 15, 16, 17
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<i>National Anneberg Election Survey</i>	8
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