

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 OF COUNCIL, P.C. 2003-
1055, DATED THE 16TH OF JULY, 2003**

NOTICE OF MOTION

TAKE NOTICE that the Canadian Conference of Catholic Bishops hereby applies to a Judge pursuant to Rule 18 of the *Rules of the Supreme Court of Canada* to be added as a party on this reference or, in the alternative, applies to a Judge pursuant to Rules 55 and 56 of the *Rules of the Supreme Court of Canada* for an Order granting leave to intervene on the reference and permitting the Intervener to present oral argument on the reference or such further or other Order that the said Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

- a) The CCCB was founded sixty years ago and is the national association of Catholic Bishops in Canada. Its membership includes bishops from the seventy-one Catholic dioceses located across Canada. The individual bishops are responsible for the pastoral care of approximately 13 million Catholics and are assisted in this work by clergy, members of religious orders and lay people in a variety of settings including

religious, health care and educational institutions.

b) The CCCB, either on its own or in association with other groups, was granted intervener status before this Court in the following cases:

- *Jacobi et al v Boys' and Girls' Club of Vernon* [1999] 2 S.C.R. 570
- *The Children's Foundation et al v Bazley* [1999] 2 S.C.R. 534
- *Dobson v Dobson* [1999] 2 S.C.R. 753
- *Winnipeg Child and Family Services (Northwest Area) v G.(D.F.)* [1997] 3 S.C.R. 925
- *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* S.C.C. [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 S.C.C. 76

c) It cannot be overemphasized that 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 the institution of marriage.

d) The Catholic Church teaches that marriage, as an institution, is both a vocation and

a sacrament which institution exists solely between a man and a woman for the common good of society.

- e) The CCCB says that the draft legislation will establish a moral orthodoxy which will contravene freedom of religion and conscience in a fundamental way while at the same time undermine state protection and promotion of the traditional family.
- f) Given the complexity of the constitutional issues involved in this appeal and their fundamental importance to the Catholic Church in Canada and elsewhere, these issues can only be properly presented by the CCCB if it is given party status.
- g) If it is given party status, the CCCB will take the position that the questions on the reference should be answered as follows:
 - 1. The proposed legislation is not within the exclusive jurisdiction of the Parliament of Canada.
 - 2. If it is, section 1 of the proposed legislation is unconstitutional.
 - 3. While section 2(a) of the *Charter* should provide protection to religious officials from performing same-sex marriages contrary to their religious belief, section 2 of the proposed legislation does nothing to protect religious officials (and others) from the unconstitutional and adverse effects of section 1 of the draft legislation.
- h) If party status is not granted to the CCCB then, in the alternative, it requests leave to

intervene on the reference.

- i) If the CCCB is granted party status or if leave to intervene is granted, the CCCB would make the following arguments summarized as follows.

A. Overview

- (i) This intervener will argue:
- a) the draft bill breaches freedom of conscience and religion;
 - b) the traditional definition of marriage is constitutional, while the proposed definition in the draft bill is not.

B. Marriage

- (i) Marriage which is traditionally defined as: “the lawful and voluntary union of one man and one woman to the exclusion of all others” is, in Canada, an institution that accommodates many legal, social, religious, spiritual and moral values. For Catholics, marriage (which is a pre-political and, hence, natural institution) is 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 and, thus, also the basic unit of society.
- (ii) It is, therefore, a mistake to look at the institution of marriage as a number of institutions contained within a larger one as the Court of Appeal did in *Halpern* when it said at paragraph 53, “This case is solely about the legal institution of marriage... We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.” [*Halpern et al v Attorney General of Canada* (2003) 65 O.R. (3d) 161 (Ont.C.A.)]

C. Religious Freedom

- (i) The draft bill implicates moral and hence religious values in such a way that it infringes freedom of conscience and religion. This was likely inevitable given the issue involved.
- (ii) The applicants in *Halpern*, who are homosexuals, sought public acceptance

of their relationship through marriage. They successfully argued that their equality rights under s. 15 of the *Charter* were infringed as a result of the exclusion of their relationships from the institution of marriage.

- (iii) From a civil perspective, *Halpern* requires Ontario and its citizens, to treat same-sex unions and heterosexual marriages as equivalent in all respects. The Court did not turn its mind as to how same-sex unions might be consummated. Because intimate sexual relations lie at the heart of the institution of marriage, the Court's decision in *Halpern* and this legislation requires 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.
- (iv) There is harm in this. The state through this legislation has established a social and moral orthodoxy which holds that intimate sexual relations at the core of same-sex unions must be shown the same public respect and approval as sexual relations at the core of heterosexual marriages. This moral and social orthodoxy provides formal legitimacy to the proposition [which is already being made] that all those who believe and publicly espouse the view that homosexual sexual conduct is immoral are anti-gay, homophobic, intolerant and no better than racists.
- (v) Once this social and moral orthodoxy is established, it becomes but 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 orthodoxy. It adds legitimacy to the 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, *Ross v New Brunswick School District* [1996] 1 S.C.R. 825 and *R. v. Keegstra* [1990] 3 S.C.R. 697].
- (vi) The comparison of individuals or religious groups who teach and publicly espouse these views with racists is not only inflammatory, but intolerant. Racism is based on stereotypical assumptions or ascriptions relative to group characteristics without reference to individual conduct or merit and is designed to maintain the superiority of one race over another. [See *Loving v Virginia*, 388 U.S.1, 8 (1967)]. 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.
- (vii) The effect of this draft bill brings it within the 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]

- (viii) While s. 2 of the draft bill recognizes that 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 a result, the draft bill is unconstitutional.
- (ix) As discussed below, and as ironical as it may appear, the moral orthodoxy imposed by section 1 of the draft bill is also contrary to the state’s interest in marriage as an institution.
- (x) Section 2 of the draft bill also fails to adequately address freedom of conscience and religion implicated in the solemnization of same sex unions because:
 - a) this provision is beyond the constitutional powers of the federal government;
 - b) this provision does not safeguard the freedom of all persons who, on religious or conscientious grounds, refuse to solemnize a civil or religious same sex union; and
 - c) this provision is on its face ambiguous because it does not deal with the situation where a person is both a religious official (e.g. permanent deacon) and a civil official with power to solemnize marriages (e.g. a judge) and whether such person, in their civil capacity, could be forced to solemnize a same sex union.

D. The Traditional Definition is Constitutional

- (i) 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, the basic definition of marriage being “the lawful and voluntary union of one man and one woman to the exclusion of all others” has never changed.

- (ii) There is an obvious and compelling state interest in the institution of marriage which is 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* should not be confused with the state interest in regulating the affairs of married couples by promoting equality within the union, protecting children born within marriage, providing for the orderly distribution of assets when the marriage is terminated through divorce and so on.
- (iii) The Ontario Court of Appeal in *Halpern* held that the equality rights under s. 15 of the *Charter* trumped this state interest. The Court held that natural procreation was not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex unions.
- (iv) The Court found that the equality rights of the applicant couples were infringed not only because they were denied immediate access to some benefits, but also 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.” [See *Halpern, supra* at para. 5].
- (v) There are three difficulties with the Court of Appeal’s approach. First, once procreation is removed as a compelling state interest, then it would be impossible to confine marriage to conjugal relationships. Second, there are many conjugal and non-conjugal adult relationships that are marked by love and commitment that are not recognized as marriage and which have been excluded from marriage largely because they did not meet the compelling state interest as traditionally understood. Polygamous, polyamorous and endogamous adult relationships come to mind. It is equally valid for persons

involved in these or other relationships to seek public approval of those relationships in order to “enhance an individual’s sense of self-worth and dignity” not to mention access to financial benefits that marriage might provide. Third, the Court confused equality with uniformity. Non-discrimination does not require uniformity; it requires respect for diversity and differences. To treat heterosexual and homosexual couples as the same ignores biological reality.

- (vi) Because this is a reference and the Court is dealing with the constitutionality of the proposed definition of marriage and because marital status is an analogous ground under s. 15 of the *Charter*, the group that must be compared to married heterosexual couples under that section should not be confined to same-sex unions but must be expanded to include “adult persons in a loving and committed relationship who wish to marry.” While this might lead to the formal relational equality which the *Charter* arguments compel (and which the Law Commission of Canada recommends), it would undermine marriage as an institution.
- (vii) No doubt, it will be suggested that this is an extreme view as some of these relationships are currently illegal. This is not convincing because what was considered illegal yesterday may not be considered illegal tomorrow when *Charter* rights are implicated. [See *Halpern, supra*]
- (viii) One example will suffice. Religious belief is a personal characteristic which has *Charter* protection both under ss. 2(a) and 15. In this reference, substitute religious belief for sexual orientation. This would compel legal recognition of polygamous relationships based on religious beliefs. It may be suggested that these marriages would be excluded under s. 1 on the basis they are immoral or demean women in these relationships. While morality would clearly be irrelevant, non-recognition would simply serve to further demean the individuals involved. It is difficult to see how these marriages could be excluded on any basis other than their inconsistency with the state interest.
- (ix) It may be suggested that homosexual relationships should be treated differently because sexual orientation is generally considered today as an immutable personal characteristic. This assertion is not compelling.
- (x) There are likely many people who choose, for whatever reason, a same-sex partner - bisexuals would be one example. The lack of choice argument would imply that those who can choose between a heterosexual relationship and a homosexual one, should not be allowed to marry someone of the same sex. This suggestion would be neither logical nor reasonable.

- (xi) It follows if some individuals can choose to marry a same-sex partner, there is no basis on which the state could exclude those who choose other non-traditional relationships but wish to marry. Others may choose relationships based on their sexual preferences or practices, personal preferences, cultural beliefs, religious beliefs and so on.
- (xii) The above discussion simply reflects the reality that has been understood and accepted by nearly all western democracies which is marriage as an *institution* does not implicate human rights or *Charter* values. This is because there is no compelling state interest in protecting and promoting sexual relationships based on the sexual orientation, sexual preferences, personal preferences, individual tastes, cultural practices or religious beliefs of the individuals involved. There may be a state interest in recognizing these relationships for the purpose of regulating them but there is no state interest in institutionalizing them.
- (xiii) Marriage as an *institution* is not about individual rights since the state protects and promotes the sexual relationship underlying opposite sex marriage for its own benefit which is the creation and nurturing of the next generation of its citizens in a social unit best suited for that purpose. Although the happiness of individuals involved in a relationship may be a beneficial byproduct of the relationship, such happiness does not form part of the state interest in the *institution* of marriage nor should it. For this reason, the traditional definition of marriage is constitutional. If marriage as an institution does implicate human rights or *Charter* values, then the proposed definition is unconstitutional because it is underinclusive.
- (xiv) It is likely impossible to redefine marriage in a way that did not breach someone's *Charter* rights. It may be suggested that a line can be drawn at same-sex unions. This too would be wrong because human rights and individual freedoms are not subject to line drawing. The above discussion demonstrates that marriage, as an institution, does not concern individual rights.
- (xv) It was argued and 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. This fact leads to the opposite conclusion for two reasons: first, the sexual relations underlying these marriages are the same as those the state protects and promotes for its own benefit; and second, these marriages reinforce and reflect the importance 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 are entirely consistent with the state's interest.

E. Conclusion

- (i) Promoting human rights and preventing discrimination are laudable goals. These goals, however, should not be employed to contravene the *Charter* rights of others, or undermine an institution that has proven its worth over time, especially when that institution does not implicate individual rights.
- (ii) While it is true that marriage as an institution has accommodated many legal, social, religious, spiritual and moral values, it has only done so to the extent those values (like childless marriages) are not inconsistent (like polygamy) with the state's interest.
- (iii) The government's proposed bill results in two grave harms: it imposes a moral orthodoxy that contravenes freedom of conscience and religion in a fundamental way; and it eliminates the state's interest in protecting and promoting, for its own benefit, the traditional family. For these reasons, the draft bill is unconstitutional.

Relief Requested

Given the grave importance of the issues involved in this appeal to the CCCB and the Catholic community and given the complex nature of the issues involve, the CCCB requests that, in any event, it be allowed to file a Factum thirty pages in length and to make oral submissions on the reference not exceeding one hour in length.

DATED at Ottawa this 26th day of November, 2003.

Signed by:

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