

## **FACTUM OF THE APPLICANT COUPLES**

I love this person with all of my heart and soul. I know that I will spend the rest of my life with her regardless of the obstacles we face together and as individuals. Julie is my family in the fullest sense of the word. She is the life of my life and the heart of my heart. I am a better person because she is in my life. I am a better daughter, sister, friend and citizen. I live my life more fully because of her. I care more deeply. I want to tell her and the world of this love. I want to manifest this commitment through marriage.

Affidavit of Dawn M. Onishenko, sworn Nov. 3, 2000, at page 57-58.

### **PART I – THE ADJUDICATIVE FACTS**

1. Excluding gays and lesbians from marriage denies one of the most fundamental of all human and civil rights. The freedom to marry is so central to our definition of humanity that a marriage ban against an entire class of people necessarily implicates numerous *Charter* rights and freedoms. It offends human dignity by withholding the rights of equality, liberty, and security, and it infringes the freedoms of expression, conscience, and association on the basis of sex. There is no pressing and substantial objective in denying lesbians and gay men the freedom to marry their chosen partners. Rather, the recognition of the marriages of same-sex spouses would accord with the laudatory purposes of marriage recognition. The Applicant Couples must therefore be issued marriage licences if the promise of the *Charter* is to have meaning.
2. This case began when eight same-sex couples applied for civil marriage licences from the Clerk of the City of Toronto. The Clerk neither granted nor refused to issue the licences,

but instead indicated that the applications would be “held in abeyance” while she sought directions from the Ontario Superior Court of Justice.

3. After separate applications were commenced by the Clerk and the couples, and the parties argued motions about the appropriate forum, the current case was constituted and transferred to the Ontario Superior Court of Justice (Divisional Court), by order of the Honourable Madam Justice Lang dated August 29, 2000. Court File No. 684/00 involves sixteen applicants for civil marriage licences (the “Applicant Couples”), supported by the national equality rights organization Equality for Gays and Lesbians Everywhere (“EGALE”) and the Metropolitan Community Church of Toronto (the “MCCT”), both as party interveners. The Respondents are the Attorney General of Canada (“AGC”); the Attorney General of Ontario (“AGO”); and the Clerk of the City of Toronto (the “Clerk”). Neither AGO nor the Clerk takes a significant position with respect to the merits. AGC claims that marriage “just is” the union of one man and one woman, and is supported by two party interveners, the Association of Marriage and the Family, and the Interfaith Coalition on Marriage and the Family.

4. About six months after the original applications were commenced, the Reverend Dr. Brent Hawkes of MCCT solemnized two marriages between persons of the same sex by publication of banns, pursuant to the Ontario *Marriage Act*. The two couples, married at the MCCT on January 14, 2001, are the first known gay and lesbian couples in the province to hold marriage certificates. When Ontario refused the usual formality of registering these marriages, the MCCT commenced a separate application as Court File No. 39/01. The MCCT and the Applicant Couples applications are to be heard together by consent order of the Honourable Madam Justice

Lang dated January 25, 2001. The parties are the same, and all of the same evidence has been filed under a combined title of proceedings.

### **The Applicant Couples**

5. This Factum is filed on behalf of eight Applicant Couples: Hedy and Colleen, Mike and Michael, Dawn and Julie, Michelle and Rebekah, Al and Tom, C.J. and Carolyn, Barb and Gail, and Alison and Joyce. These are men and women, from all walks and stages of life, who simply want to share their love for their partner in civil marriage. They include a nurse, a psychotherapist, university students, a Crown Attorney, and a church deacon. Four of the couples parent children together, and three more of the couples hope to rear children together in the coming years. Some are Jewish, some Christian; two met and fell in love as Anglican clergy. Some have been previously married to a different-sex partner, some have married their same-sex partner in a non-legally recognized ceremony, and some await legal recognition before they will marry. A few have lived together a short time; others have already shared their lives more than 25 years. They hail from across Canada – from Adeptown and Marystown in Newfoundland, from Ile du Grand Calumet, from Kingston, from Fredericton, from Saskatoon. All have a very ordinary, usually taken-for-granted wish: to marry the person they love.

6. The Applicant Couples seek nothing more than the recognition of the equal worth and dignity of their relationships. We commend to the Court the affidavits of the Applicant Couples themselves, in Volume 1 of the Record, as they speak most eloquently of their hopes and goals in seeking the freedom to marry. Here are just a few of their words:

People with a long lasting commitment and love get married. The only substantive difference in our relationship is not in our aspirations to get married, but in the discrimination we have faced in sustaining our family. / Instead of being recognized as an equal family, we are considered to have an “alternative lifestyle.” We’re not very alternative. We’re very ordinary. We’d like to be married because it’s the ordinary thing to do with the feelings and commitments we share./... Our children want us to be married. .../ We are simply people determined to build a family. This is our task in life. .../ We love each other and wish to legally marry.

Affidavit of Alison Kemper, sworn Aug. 17, 2000, at page 90.

My brothers and my sister have all been legally married. We have the same parents and upbringing; we all work and pay taxes; and we have all fallen in love and settled down with our partners. Although my relationship is longer than that of any of my siblings, I find myself deposing my first affidavit, and commencing a court proceeding, to seek a marriage licence - simply because I am gay.

Affidavit of Mike Stark, sworn Nov. 15, 2000, at page 41.

I love Michelle. She is the only person I ever want to be with. I want to raise children with her, build a family, and buy a house, a car, and a deep freezer. / I want to marry Michelle because I would never bring a child into this world without the safety net that a legally recognized marriage creates. / I want to marry her because I’m proud of us, of the family we are starting. I want to proclaim how much she means to me to my friends and family in a ceremony that any straight couple can take for granted. I want to scream it off the rooftops. / There are a million reasons why I want to marry her, and frankly, that’s how I know that I do. If there were only one reason, I would question myself, but I am certain that it is right for us. / My parents just celebrated their 25th wedding anniversary. There is nothing I look forward to more than Michelle and our family celebrating ours.

Affidavit of Rebekah Rooney, sworn June 13, 2000, at page 48-49.

## **PART II - LEGISLATIVE FACTS**

### **The Expert Evidence**

1. If the personal accounts of the Applicant Couples do not suffice, the violation of the *Charter* by the exclusion of gays and lesbians from civil marriage is clearly established by extensive evidence filed by the Applicant Couples, EGALE and the MCCT. The expert deponents include a psychologist, a child psychologist, sociologists, historians, foreign legal scholars, an anthropologist, philosophers, and a political scientist. Specific excerpts from this evidence are

referenced throughout the legal argument, but many of the themes of the expert material are summarized below. These themes may be divided into four categories: the history of marriage, its purposes, the effects of its denial, and the importance of equal marriage recognition to gays and lesbians.

**A. THE HISTORY OF MARRIAGE IN A CROSS-CULTURAL CONTEXT**

**i. Marriage is not an Unchanging Institution with a Singular, Universal Meaning**

**1.** Although all parties recognize the importance of marriage in our society, the government wishes to argue that marriage is an extra-legal, pre-political institution that exists in some essential form across all times and across all cultures. This assertion is not supported by even the government's own evidence. Rather than being an unchanging, monolithic entity, marriage has been a dramatically changing and variable institution.

Over the course of the centuries from the ancient to the modern world, the nature of marriage in western societies has changed again and again in its most fundamental features. The means by which individuals chose their partners, whether by arrangement or by love, the relatives whom they might or might not marry, the percentage of the population who entered into marriage, the number of spouses an individual might have, the nature of the relationship whether formal or affectionate between spouses after marriage, the number of children and the necessity or not of having children, whether the widowed might remarry, whether a marriage might be ended by divorce, the role of religion in the celebration of marriage, the means by which the marriage contract had been established in private or in public, and the sexual identity of those who have entered into marriage, all these have changed so repeatedly in the ancient, medieval, and modern societies of the western world that it becomes impossible to say that marriage has had a single enduring meaning.

Affidavit of Dr. Trumbach, sworn Nov. 20, 2000, particularly at page 439; Affidavit of Dr. Eskridge, sworn Nov. 14, 2000; Reply affidavit of Dr. Eskridge, sworn Aug. 2, 2001; Reply affidavit of Dr. Trumbach, to be sworn.

**ii. Not All Marriages Are or Have Been Between Different-Sex Couples**

1. Historically, the union of different-sex spouses is not an essential, universal feature of marriage. Professor Eskridge establishes, and Professor Trumbach concurs, that "... same-sex unions have been culturally and legally recognized as marriages in dozens, and probably hundreds, of societies in human history." Indeed, the government's own evidence acknowledges that, in many cultures and at many times in history, same-sex relationships have been recognized as marriages. In particular, Professor Eskridge, in uncontroverted evidence, establishes that the following cultures recognized actual marriages between persons of the same sex:

- Ancient Greece;
- Imperial Rome;
- many Pre-Columbian Indian cultures;
- the Mohave of the North American West;
- Indian cultures in the North American Plains, including the Northern Plains;
- the Navajo of the North American West;
- the Zuni of the American Southwest;
- the Meru of Kenya;
- the Chuckchee of Siberia;
- Tahiti;
- the Azande in Africa;
- the Nuer of Sudan;
- the Lovedu of Africa;
- the Bantu in Southern Africa; and
- tribal cultures in what is now Nigeria and Dahomey.

Reply Affidavit of Dr. Eskridge, sworn Aug. 2, 2001, at para. 6; Affidavit of Dr. Eskridge, sworn Nov. 14, 2000, particularly at page 372, 404.

1. Today, same-sex couples have the freedom to marry in the Netherlands, and the governing party in Belgium has announced its intention to introduce equal marriage legislation next year. Denmark, Norway, Sweden, Hungary, Germany, Belgium, France, Portugal, Iceland, Spain, the State of Vermont and Canada currently provide same-sex couples with many of the same rights and obligations as marriage, either through ascribed status or registered domestic

partnership schemes. Professors Wintemute, Wolfson, and Eskridge, the Applicants' foreign law scholars, anticipate that equal marriage will be adopted in many of these jurisdictions in the coming years.

Affidavit of Dr. Eskridge, sworn Nov. 14, 2000, at page 402-404; Reply Affidavit of Dr. Eskridge, sworn Aug. 2, 2001, at para. 3; Reply affidavit of Prof. Wolfson, to be sworn, at para. 40-41; Reply affidavit of Dr. Wintemute, to be sworn, at para. 27; Affidavit of Prof. Verschraegan, sworn April 2, 2001, AGC Record at page 823-882.

2. Canada is one of the most progressive countries in recognizing the equality rights of gay and lesbian people. Here same-sex couples already enjoy extensive relationship recognition at the federal level and in several provinces; the rest are required and expected to amend their legislation. As Professor Eskridge explains, the next logical step on the continuum of rights recognition in Canada, viewed from a historical and comparative legal perspective, is full civil marriage. Marriage is the final unresolved issue, the last bastion of discrimination against lesbians, gays and bisexuals in Canada's legal culture.

Cross-Examination of Dr. Eskridge, Aug. 2, 2001, at Q. 153-156, 206, 207.

### **iii. Contemporary History of Marriage in Canadian Society**

1. Litigation seeking the recognition of marriages of same-sex couples is part of the contemporary history of marriage. Since the 18<sup>th</sup> century, marriage has evolved from an arranged institution rooted in obligation, property exchange and male control. It is now a chosen institution based on companionship, love and equal partnership.

Affidavit of Dr. Trumbach, sworn Nov. 20, 2000; Affidavit of Dr. Eskridge, sworn Nov. 14, 2000, at page 406-407; Affidavit of Dr. Arnup, sworn Nov. 16, 2000; Affidavit of Dr. Bradbury, sworn Dec. 18, 2000.

1. Professors Katherine Arnup and Bettina Bradbury describe the historical changes to marriage and the family in this country. They explain that, as Canadian society has shifted from rural to urban, from patriarchal to egalitarian, the institution of marriage has changed. The historical record shows that equal marriage for same-sex couples is simply part of the historical evolution of marriage in contemporary Canada.

At the broadest of levels, marriage has evolved from a social and economic arrangement based on a sexual division of labour in which women were subordinate to their husbands, to a more equal union of two people united by love and sexual intimacy, in which both partners are frequently responsible for wage earning as well as domestic labour. Furthermore, while in earlier times, parents had significant control over their offspring's choice of whom to marry, given the important economic and social consequences that flowed from the marriage arrangement, the long term movement in Canada, as in most western countries, has been to recognize that individual choice is the major basis for marriage.

Affidavit of Dr. Bradbury, sworn Dec. 18, 2000, particularly at page 504-b; Affidavit of Dr. Arnup, sworn Nov. 16, 2000.

**iv. The Historical Deployment of a “Crisis” in the Family as a Means of Exclusion**

1. The one constant in the history of the dramatic changes to marriage is the claim that there is a “crisis” in the family. Professor Arnup gives many historical examples of this repeated prophesy of “crisis”, including fears of flappers, “race-suicide”, and the “masculinization” of women working in wartime industries. She explains that the notion of “crisis” has been used to validate certain social groups and exclude others. She writes:

[T]here have been dramatic changes to “the family” over the past two centuries in Canada. These ongoing changes have regularly been accompanied by expressions of fear and disapproval, with cries that the family is “in crisis”. From a contemporary perspective, these concerns probably seem foolish or irrational, but their political impact is clear: the language of “crisis” was deployed to exclude families perceived to “different”. Similarly, some would attempt to deny gays and lesbians the freedom to choose marriage on the basis that it is a “threat” to the meaning of marriage to family and to civilization itself. The lesson of history is that despite constant changes, families – in all their varieties – persist. Indeed, families arguably benefit from the recognition of equality and diversity.

Affidavit of Dr. Arnup, sworn Nov. 16, 2000; at page 481-483; Affidavit of Dr. Bradbury, sworn Dec. 18, 2000, at page 504-c, 504-x; Reply affidavit of Dr. Bradbury, to be sworn, at para. 14-18.

1. As the historical evidence demonstrates, the nature of marriage has changed and continues to change over time. Legislatures and courts have acknowledged this change and diversity, recognizing that there is no one model of marriage. Duties of support have been broadened, the concept of “illegitimacy” of children has been abandoned, property rights have been modified to recognize marriage as an economic, as well as emotional, partnership, and no-fault divorce laws permit an easier dissolution of the marital bond. Family law recognizes and supports all of these realities of modern family life.

*M. v. H.*, [1999] 2 S.C.R. 3 at 95-104, para. 164-80; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 16-33; *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 624-634

1. Historical tradition is no justification for continuing discrimination. The Supreme Court has held that same-sex relationships must be accorded equal respect and recognition. In response, legislatures have changed, or will be forced to change, laws failing to recognize the equality of same-sex relationships. Lesbian and gay people are integrated in our communities, form families and rear children. Given the changing nature of families and our society, it only makes sense to recognize the marriages of same-sex couples. Indeed, more and more, as gays and lesbians become visible, the Canadian population affirms the relationships of same-sex couples. Toronto’s Gay and Lesbian Pride event now attracts almost a million celebrants each summer. Recent polls show that a majority of Canadians support equal marriage for gays and lesbians. Our concepts of marriage and family have changed. It is precisely this capacity for change that has “kept families viable historically as key institutions in our society.”

*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.); Reply Affidavit of Dr. Trumbach, to be sworn, at para 11; Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 70, 78-81; Cross-Examination of John Fisher at page 53:10 - 55:4; Reply Affidavit of Dr. Bradbury, sworn June 1, 2001, at para. 12-14, 16, 18; Affidavit of Dr. Eichler, sworn Nov. 15, 2001, at page 214-216.

## **B. THE PURPOSES OF CIVIL MARRIAGE IN CONTEMPORARY CANADA**

### **i. An Overview of the Modern Attributes of Marriage**

1. In the 21<sup>st</sup> century, the purpose of civil marriage is to provide government recognition, protection, and support to those couples who are willing to make a mutual commitment to share their lives. Society thereby encourages couples to commit to lasting relationships in which they agree to be responsible for their partner throughout their joined lives, fostering emotional and economic security. Marriage recognition promotes these purposes by providing a variety of statutory benefits, supports, and protections, and by imposing legal obligations on married couples. Professor Margrit Eichler, who is widely considered to be leading sociologist in Canada, describes the many reasons modern couples wish to marry.

There is considerable diversity in the reasons that stimulate heterosexual couples to marry. These reasons include adherence to tradition; mutual support and economic cooperation; spiritual or religious reasons; emotional reasons; family reasons; practical reasons; and the social legitimacy and acceptance accorded to being married. Few question the “couplehood” of married couples. Same sex couples, like opposite sex couples, may want to marry for a variety of these same reasons.

Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 225.

1. Since the underlying purpose of civil marriage is to provide legal protection and support for those couples who are willing to make a mutual commitment to support and care for one another as a family, there is no reason for denying legal marriage to same-sex couples who want to enter into the marriage contract. In fact, under Canadian and American jurisprudence, allowing same-sex couples to legally marry is entirely consistent with the articulated purposes of civil marriage recognition.

Many believe that marriage and the family provide for the emotional, economic, and social well-being of its members. It may be the location of safety and comfort, and may be the place where its members have their most intimate human contact. Marriage and the family act as an emotional and economic support system as well as a forum for intimacy. In this regard, it serves vital personal interests, and may be linked to building a “comprehensive sense of personhood”. Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.

*Moge v. Moge*, [1992] 3 S.C.R. 813 at 848.

In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships. . . . In Hawaii, and elsewhere, people marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) emotional closeness; (4) intimacy and monogamy; (5) the establishment of a framework for a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations. . . . In Hawaii and elsewhere, gay men and lesbian women share this same mix of reasons for wanting to be able to marry.

*Baehr v. Miike* 65 USLW 2399, 1996 WL 694235 (Ha. Cir. Ct. 1996); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Superior Ct. Feb. 1998); Affidavit of Dr. Barnes, sworn Nov. 20, 2001; Affidavit of Dr. Eskridge sworn Nov. 14, 2000, at page 407; Affidavit of Dr. Kaufman sworn Nov. 20, 2000, at page 332; Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 224-226.

1. The Applicant Couples wish to marry for a variety of reasons, but common to all is a desire to express, share and celebrate their love and commitment to each other in a manner acknowledged by the state in the same way as that respect is shown to other loving couples who wish to marry. To deny the Applicant Couples, and other couples like them, the legal status, recognition, protections, supports and obligations of marriage is contrary to the purposes of marriage recognition.

**ii. Marriage Confers Social Respect And Legitimacy**

1. Marriage is the traditional, well-accepted and understood means to promise love and commitment. Many same-sex couples wish to participate in this important cultural ritual as a result of their ethical and religious traditions. Many are interested in civil marriage because of its power to communicate the “realness” of their relationship. Professor Ellen Lewin, an anthropologist who has studied the reasons that same-sex couples have entered into commitment ceremonies, writes:

[L]esbians and gay men who stage commitment ceremonies are concerned, among other symbolic aims, with establishing claims to “couplehood” and with proving to the assembled guests, to themselves, and to society at large, that their relationship is real and authentic. This quest for authenticity and recognition makes it clear that legal marriage is more than a list of rights and obligations to these couples, but amounts to a kind of verification that the couple is as worthy of respect as any other couple.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000, particularly at page 156; Affidavit of Alison Kemper, sworn Aug. 17, 2000, at page 89-90; Affidavit of Thomas George Allworth, sworn Feb. 19, 2001, at page 93-g-h; Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 50; Affidavit of Dawn M. Onishenko, sworn Nov. 3, 2000, at 56; Affidavit of Rebekah Rooney sworn June 13, 2000, at page 48-49; Affidavit of Julie Erbland sworn Nov. 3, 2000, at page 61.

1. A central problem in the struggle for equal marriage is that many heterosexuals fail to comprehend that lesbian and gay couples love each other as much as heterosexual couples do. Same-sex couples simply wish to communicate and celebrate the authenticity of their love by entering into a “real” civil marriage, not some newly-created, socially and emotionally meaningless “alternative” institution imposed by the government’s unwillingness to recognize the authenticity and equality of gay and lesbian love.

[It]... will take legal marriage to fully inscribe [the] reality [that same-sex couples love each other just as much as heterosexuals] in the popular consciousness. Legal marriage will enable same-sex couples to reiterate their claims in sites not currently available, and to make these claims convincing even without elaborate ritual support.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000, at page 204.

Affidavit of Aloysius Edmund Pittman sworn Feb 20, 2001, at page 93-b; Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 77; Affidavit of Michelle Bradshaw sworn June 13, 2000, at page 46.

**iii. Marriage Strengthens and Supports the Relationship of the Spouses**

1. Marriage provides state sanction for the couples' relationship in a manner that strengthens the union. Dr. Barnes, whose psychological evidence is uncontroverted, states:

While marriage is no guarantee against relationship dissolution, the legal framework, social/religious rituals and moral legitimacy associated with marriage have long been recognized by societal institutions as central to enhancing the stability of adult partnerships, family and community.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 117, para. 2a.

This conclusion is furthered by the evidence of sociologists Drs. Stacey and Biblarz:

[R]esearchers find that marriage serves to stabilize couple relationships, attracts social recognition of and investment in the continuity of the relationship, contributes to financial well-being, individual happiness, improved levels of physical and mental health, job satisfaction and achievement, to higher rates of involvement with extended family members, and lower rates of domestic violence than are found in cohabiting partnerships.

Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 47; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 120.

**iv. Marriage Provides a Secure, Supported Environment for the Care of Children**

1. For many couples, including applicants Alison Kemper and Joyce Barnett, marriage would serve the important purpose of providing a legally and socially recognized and affirmed family unit in which to raise children. Seven of the eight Applicant Couples are or plan to be parents. They hope to offer their children the benefits and protections at law, the community support and expectation of permanence, and the sense of security and acceptance that marriage provides.

I am engaged in this struggle to achieve the freedom to marry as part of our continuing effort to keep our kids safe - not just our kids but all kids./ [Our child] Hannah is very excited about our marriage. We told her that it may be years away, but she is still happy and greatly looking forward to it.

Affidavit of Joyce Barnett, sworn Aug. 17, 2000, at page 92-93.

Some people in society think of lesbian, gay and bisexual people as “anti-family” and many assume that queer people do not have children, do not care for children, or are dangerous to children. The reality is that same-sex couples have kids, love them, and want more than anything, the best possible lives for our children. Marriage allows parents to enjoy a measure of safety for their children. It would allow same-sex parents to consider parenting with security - it would not only secure legal status but also limit discrimination against the children of lesbian and gay parents.

Affidavit of Alison Kemper, sworn Aug. 17, 2000, at page 89; Affidavit of Dr. Eskridge, sworn Nov. 14, 2000, at page 407; *Baehr v. Miike*, 1996 WL 694235 (Hawaii Cir. Ct., Dec. 3, 1996).

1. The evidence establishes that many same-sex couples raise children together. While it is difficult to determine precise numbers, studies indicate that about 33% of lesbians and about 10% of gay men are parents. Experts suggest that we have recently been experiencing a “lesbian baby boom”. Increasing numbers of same-sex couples are choosing to give birth, adopt or foster children in the context of their relationships. The notion that gays and lesbians do not

produce and rear children is an inaccurate generalization – the very kind of stereotype anti-discrimination law is meant to prevent.

Affidavit of Dr. Bigner, sworn Nov. 15, 2000, at page 276-277; Affidavit of Dr. Arnup, sworn Nov. 16, 2000, at page 484; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 142; *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999) at page 881-882.

1. Over two decades of reliable social scientific evidence demonstrates that the children of same-sex parents experience outcomes equal or superior to the children raised by heterosexual parents. Drs. Stacey and Biblarz, who recently published an article in the prestigious *American Sociological Review* analyzing the parenting research studies, depose:

Research in the most rigorously peer-reviewed journals in child development and sociology provide generally accepted social scientific evidence that lesbian and gay parents are as fit, effective and successful as similar heterosexual parents. Likewise these studies find that children of same-sex couples are at least as emotionally healthy, socially adjusted, and cognitively successful as children raised by heterosexual parents. Research even provides some suggestive evidence that there may be certain hidden advantages that lesbian parents and their children seem to enjoy. There is neither theory nor evidence that leads in the opposite direction.

Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 4, 36, 68; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 143; Affidavit of Dr. Bigner, sworn Nov. 15, 2000, at page 277-279.

2. The community and social supports which accompany civil marriage will no doubt promote even better parenting. Dr. Jerry Bigner, an expert in child development who has done empirical research on parenting by gay fathers, writes:

... [S]ocial science research supports the conclusion that legal recognition of marriages between same-sex couples would benefit the children of gay and lesbian parents. ... Children are generally better off, both emotionally and materially, when their parents stay together in a healthy relationship, and recognizing marriages of same-sex parents would promote the goal of protecting and supporting children. In any event, these children deserve the same security and protections that flow from legal recognition of their parents' relationships as children of different-sex parents. Finally, all children of gay and lesbian parents, as well as gay and lesbian children and adults, would benefit from the removal of

the last, but perhaps the most significant, vestige of state-sanctioned discrimination against gay and lesbian Canadians and their families.

Affidavit of Dr. Bigner sworn Nov. 15, 2000, at page 279-280; Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 4, 48, 50, 52, 55; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 143-146.

1. The fact is that same-sex couples will continue to parent regardless of the outcome of this litigation. The issue posed is, thus, whether such children will be denied the benefits and protections that civil marriage would afford their families. As Drs. Stacey and Biblarz put it:

Is it preferable for them to parent under conditions of invisibility, conditions of discrimination, or conditions of equality? It is difficult to imagine how anyone could argue in good faith that it is preferable to parent without access to equal recognition, social and legal resources, and benefits that other parents and their children enjoy.

Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 70.

Marriage would give the children of same-sex spouses a sense of security, and a better sense of legitimacy and belonging. It would have a positive impact on self-worth and reduce the stigmatization and violence directed against their families. "...[G]ranting same-sex parents the freedom to marry would likely result in positive outcomes for such parents, their children, gay and lesbian people, and society as a whole."

Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 4; Affidavit of Dr. Bigner, sworn Nov. 15, 2001, at page 278-280; Affidavit of Joyce Barnett, sworn Aug. 17, 2000, at page 92-93; Affidavit of Dr. Kaufman, sworn Nov. 20, 2000, at page 333-338; Affidavit of Barbara McDowall, sworn Aug. 15, 2000, at page 73-74.

**v. Marriage as a Unitive Event**

1. Marriage has many unitive goals. In addition to joining the couple together, marriage brings together the families of each spouse, helping them become better acquainted and creating supportive inter-family ties. Marriage also functions to affirm bonds with one's birth family. The continuity of tradition, the participants' memories of their own weddings, the variety

of time-consuming tasks associated with the event and the excitement of the occasion, all create opportunities for familial interaction and closeness. Intimate moments and conversations are exchanged not only between the spouses, but with close friends and relatives. Marriage is an emotional, life-altering stepping stone that brings people together.

I feel as though our marriage is just a visible milestone on our journey together. Our ceremony was an opportunity to recognize and celebrate our relationship, not as something removed from community, but as a relationship that will deepen our community.

Affidavit of Hedy Halpern, sworn June 13, 2000, at page 33-34.

2. Equal marriage recognition is necessary in order to facilitate real understanding of same-sex relationships by heterosexual family members and the wider community. Dr. Barnes provides the following example:

Although Esther Gould and her partner Susan had not expected their families to be understanding or accepting of their commitment ceremony, the ceremony in fact led Susan to be significantly more accepted by Esther's family:

My mother didn't get how important the ceremony was until it happened. But she came. After the ceremony and at the party that followed it, she went up to Susan and held her. There are a million photographs of this long period in which she cried and held Susan and said to her, "I didn't understand before, I understand now." She said to Susan that she's glad that I chose her to be with. That if she had a choice of my being with a man or with Susan, that she was glad I chose Susan. She was just completely transformed by the ceremony. For Susan, it really did mean some new level of acceptance by my family, especially my mother.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 134.

Dr. Barnes adds to this narrative from an empirical perspective:

Marriage and its associated legal arrangements and religious/social rituals and celebrations signal progression through normal transitions in the family life cycle. Such passages bind the family together by reminding family members of all ages that they either have already or may in future experience the same transition. Legal status as spouses together with the rituals and celebrations associated with marriage allow a couple to assume a status of substantial psychological, moral, social and legal importance in the family and larger community. Moreover, the change in legal status together with social and religious rituals and celebrations associated with marriage facilitate the psychological adjustment required

of family and community during periods of transition, for example, changing relationships with parents and others in one's childhood family in order to establish a relationship with a partner and a new family. The impossibility of legal marriage thus deprives lesbians and gay male couples of social validation and legitimate access to rituals and celebrations which would enhance the couple's stability and affirm their place in the extended family and community.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 117-18.

3. By sharing in the ritual of marriage, a gap in understanding may be bridged between heterosexual friends and family, and the same-sex couple. Distanced parents, friends and relatives will be reminded of how much they have in common with their gay or lesbian kin by their participation in this basic *human* event.

I was raised in a family where marriage was understood as a life commitment to be entered into when you love someone. I grew up reading books about people who, when they fell in love, they got married. The television shows that I watched had people who, when they wanted to make a life commitment to each other, they got married. I understand marriage as a defining moment for people choosing to make a life commitment to each other. I want the family that Dawn and I have created to be understood by all of the people in our lives and by society. If we had the freedom to marry, society would grow to understand our commitment and love for each other.

Affidavit of Julie Erbland, sworn Nov. 3, 2000, at page 61-62; Affidavit of Dr. Lewin sworn Nov. 14, 2000, at page 156-157, 186-187, 197-198; Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 85; Affidavit of Alison Kemper, sworn Aug. 17, 2000, at page 90; Affidavit of Joyce Barnett, sworn Aug. 17, 2000, at page 92; Affidavit of Carolyn (C.J.) Rowe, sworn Nov. 9, 2000, at page 65; Affidavit of Margaret Nosworthy, sworn Nov. 14, 2000, at page 270.

## C. EFFECTS OF THE DENIAL OF EQUAL MARRIAGE

1. Just as participation in civil marriage would communicate a powerful message of inclusion in civil society, so the denial of the freedom to marry causes numerous, egregious harms. It threatens the well-being and psychological integrity of all gays and lesbians, their children and society at large.

### i. Denial of Equal Recognition has Detrimental Psychological Impact

2. The exclusion from a fundamental social institution, valorized by our culture, undermines the lesbian or gay couple. As Dr. Barnes writes:

The *M. v. H.* Supreme Court decision and recent legislation indicating spousal rights has strengthened the legal framework for same-sex relationships in significant ways. However, these recent changes fall far short of conferring an easily recognized and understood social and legal status on same-sex couples. Lesbians and gay men as well as their friends, families of origin and others in the community are well aware that these special spousal rights arrangements do not confer the authority or legitimacy of legal marriage. As a result, such arrangements and observances fall short of supporting the lesbian and gay couple morally, psychologically or socially in the way that [] legal marriage supports heterosexual couples.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 119.

3. Exclusion from civil marriage threatens the psychological integrity and sense of self-worth of lesbians and gays. Just as Cory J. wrote in *Egan*, “The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them...” Denial of equal marriage also serves to justify the legitimacy of cultural heterosexism, thus perpetuating prejudice and violence against lesbians, gays, and bisexuals.

Extending access to marriage would ... encourage social attitude and behavioural changes that would enhance the ability of lesbians and gay men to be accepting of their own sexual

orientation and to enjoy a greater sense of self-esteem, self-worth and psychological integrity.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 141-142.

If lesbians, gays and bisexuals grew up in a social and legal environment where, instead of being stigmatized, our relationships were affirmed in law as equal, this would go a long way towards countering the stereotypes and negative portrayals of same-sex couples with which we are all ingrained. By contrast, the denial to same-sex couples of the ability to choose to marry sends the opposite message, reinforcing the stereotypes that our relationships are less worthy and committed, and do not deserve the same degree of social support as heterosexual relationships.

Affidavit of John Fisher, sworn Jan. 10, 2001, at para..60.

Making marriage available to same-sex couples would send a powerful and much-needed message to those struggling with “coming out” issues: it’s okay if you’re gay or lesbian. You will still be a member of society. You can lead a normal life. Given the statistics on suicide among gay and lesbian teens, this is perhaps the most compelling reason to recognize same-sex marriage.

Affidavit of Dr. Kaufman, sworn Nov. 20, 2000, at page 337-338; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 132-135; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 594, para. 161; Affidavit of Mike Stark, sworn June 9, 2000, at page 41; Affidavit of Dawn Onishenko, sworn Nov. 3, 2000, at page 54-55.

## **ii. Harms Gay and Lesbian Parents and their Children**

4. Exclusion from civil marriage denies children of same-sex couples the advantages that civil marriage would bring to their families. Marriage enhances the relationship of the couple, and thus enhances the well-being of children raised in the relationship. Dr. Barnes adds:

...[T]he opportunity for their parents to be legally married would benefit the children of lesbian and gay parents by enhancing the moral and social legitimacy of their parents’ relationships and by reducing the stigma and prejudice associated with their parents’ sexual orientation. Such support for same-sex parents and their children would benefit Canadian society by increasing the likelihood that children, regardless of their parents’ sexual orientation, will receive equal, fair and respectful treatment from family, school officials and peers.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 146; see *supra*, para. 26-27.

## **iii. Harms all Canadians by Damaging Our Pursuit of the Equality Ideal**

5. Equality in the right to marry would benefit everyone in society by encouraging the equal, fair and respectful treatment of all Canadians. It is in the interest of every individual to be free to marry without discrimination, whether on the basis of race, sex or sexual orientation. The exclusion of gay and lesbian people from a fundamental aspect of citizenship, a basic personal choice, and a unique expressive resource, harms all our families.

Full legal equality in marriage will provide my grandson and all children with a safer, better world. Our hope is that every child, whether gay or straight, is born and is reared in a family surrounded by love, goes to school, grows up and earns a living and contributes to his or her community. Gay and lesbian people are part of our families and communities. They are our daughters and sons, cousins, siblings, aunts and uncles, grandparents. We are discriminating against our own family members.

Affidavit of Margaret Nosworthy, sworn Nov. 14, 2000, at page 270; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 147-148.

6. If Canadians wish to take pride in our progress toward equality goals, recognition of marriage for same-sex couples is the required next step. Although *Charter* claims should never be subject to majority opinion, it is clear that there is broad base support of marriage recognition for same-sex spouses. The times have changed. In *Egan*, Jim Egan and Jack Nesbit were denied spousal benefits despite a forty-year relationship because their claim was deemed too “novel”. The Court was ready to recognize the equality of same-sex relationships in *M. v. H.*, ruling that the definition of “spouse” had to include gay and lesbian couples. The time has now come for full and equal relationship recognition. The sky will not fall when Michael Leshner is allowed to formalize his twenty year commitment to Mike Stark in marriage, although the government and its interveners suggest otherwise with their *in terrorem* speculation. The time has come for courts to do the right thing.

The United States Supreme Court came under enormous criticism for declaring apartheid a violation of our Equal Protection Clause, and then for requiring the states to recognize different-race marriages. From the vantage point of 1954 or 1967, the Justices may well have doubted that they had done the politically astute thing – but they knew in their hearts

they had done the right thing. Almost fifty years later, their unpopular equality judgment has earned them universal praise. Indeed, their insistence on equality has proven so robust that young people cannot understand how much fuss their rulings provoked. I foresee the same phenomenon with same-sex marriage. If recognizing it in 2000 seems unpopular in some quarters, every judge knows in her heart that denying it is wrong and unequal. And in 2050, young Canadians will wonder why it was that the state ever denied marriage rights to same-sex couples.

Affidavit of Dr. Eskridge, sworn Nov. 14, 2000, at page 83; Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 78-81; Affidavit of Mike Stark sworn June 2000, at page 42. *Vriend v. Canada*, [1998] 1 S.C.R. 493 at 535-536, para. 67.

#### **D. THERE IS NO ALTERNATIVE TO EQUAL MARRIAGE**

7. All of the Applicant Couples and experts make a clear plea in their evidence: civil *marriage* is required to respect and promote the equality of lesbians and gays. If the Applicant Couples succeed merely in securing equivalent rights and obligations that pertain to marriage, but are denied the status of civil marriage itself, the case will have been lost; discrimination will be permitted. Given our social, political and historical context, only equal access to civil marriage will meet the requirements of the *Charter*.

“Marriage” is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals.

Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 226-227.

[L]anguage does not merely reflect discriminatory social attitudes and practices, but is involved in shaping and perpetuating such attitudes and practices.... [I]f gay and lesbian unions are excluded by the term ‘marriage’ ... then that use of language does more than merely reflect heterosexist and homophobic attitudes; it functions to perpetuate them. Specifically, the exclusion of gay and lesbian relationships from access to the word ‘marriage’, and/or the invention of a different word to describe their unions, represents gays and lesbians, and their relationships in particular, as ‘deviant’ and ‘abnormal’, and as less worthy than heterosexual unions for which the term ‘marriage’ would be reserved.

Affidavit of Dr. Ehrlich, sworn Dec. 15, 2000, at para. 26; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 134-135; Affidavit of Dr. Mercier, to be sworn, at para. 74-75;

Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 77; Affidavit of Colleen Rogers, sworn June 13, at page 36.

8. Marriage is a unique, public manner for the state and spouses to recognize, affirm and celebrate an intimate relationship in our society. It has completely different social, psychological, and political meanings and consequences than providing equivalent material rights and obligations by some other mechanism. As McLachlin J. (as she then was) wrote in *Miron v. Trudel*, “To most in our society, marriage is a good thing; to many a sacred thing. There is nobility in the public commitment of two people to each other to the exclusion of all others.” Domestic partnership laws and ascribed social status simply do not strike the same emotional, spiritual chord.

I do not believe that common law or a “registry” of our relationship is equal to marriage. Marriage has always implied a stronger commitment in our society and in many faith communities.

Affidavit of Thomas George Allworth, sworn Feb. 19, 2001, at page 93-h; Affidavit of Michelle Bradshaw sworn June 13, 2000, at page 46; Affidavit of Aloysius Edmund Pittman sworn Feb 20, 2001, at page 93-b; *Canada (Attorney General) v. Moore (T.D.)* (1998), 4 F.C. 585 at para. 62; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at page 500, para. 157.

1. Professors Barry Adam, William Eskridge, Evan Wolfson and Andrew Koppelman reveal the many parallels between the government’s “remedial options” arguments and those that supported the segregationist system of racism. Just as the United States’ system of racial segregation in public schools was separate and unequal, refusing access to marriage and creating a new scheme, even if materially equivalent, will not produce substantive equality. In a larger social and political context of discrimination, reserving marriage to “heterosexuals-only” is a replication of the discredited “whites-only” “separate but equal” doctrine.

The question at hand is the kind of limitations that may be acceptable to participation in civil society. The “separate but equal” doctrine advanced in the United States in the 19<sup>th</sup> century and by the apartheid regime in South Africa in the 20<sup>th</sup> claimed that limited access

to public institutions was acceptable because different racial communities would be able to develop a full range of community institutions for themselves and did not need to avail themselves of institutions in the dominant society. This doctrine was belied by social realities. Permitting the denial of publically available legal affirmation to some people and not others resulted not in equal development but in the reproduction and amplification of social inequalities and the virtual expulsion of large categories of people from participation in democratic institutions.

Affidavit of Dr. Adam, sworn Nov. 15, 2000, at page 496-497.

Suppose that, before the Court's decision in *Loving*, Virginia had created an alternative regime for interracial couples, which gave them the legal rights and obligations of marriage, but expressly denied them the status of being "married". In my opinion, the imposition of such a "civil union" registry would have been recognized by American courts (both in 1967 and now) as discriminatory and would have been rejected, just as the "separate but equal" doctrine was rejected in other race discrimination contexts, such as school segregation.

Affidavit of Dr. Koppelman, to be sworn, at para. 14-19.

*Brown et al. v. Board of Education of Topeka et al.*, 347 U.S. 483 (1954); Reply Affidavit of Dr. Eskridge, sworn Aug. 2, 2001, at para. 17-18; Cross-Examination of Dr. Eskridge, Aug. 2, 2001, Q. 208, 209, p. 93-96; Affidavit of Prof. Wolfson, to be sworn, at para. 33-37.

1. Professor Calhoun, a cross-disciplinary scholar in philosophy and gay/lesbian studies, explains the importance of marriage in recognizing the full citizenship of gay and lesbian people. She articulates why no separate regime will ensure the equality of lesbians and gays:

Providing lesbians and gay men with the option of legally recognized domestic partnerships that come with the same practical benefits as legal marriages does not address the basic injustice. Same-sex marriage bars encode the view that lesbians and gays are not competent to be full citizens.

...

[A] conception of marriage as the prepolitical foundation of society has an important implication. It means that if a social group can lay claim to being inherently qualified or fit to enter into marriage and found a family, it can also claim a distinctive political status. To be inherently qualified for entering marriage is thus to be qualified for sustaining the foundation of civil society itself. ... Because [gays and lesbians are deemed] incapable, as a group, of providing the necessary foundation for civil society, they are, ultimately, inessential citizens.

Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, Exhibit "B" at page 526, 528  
Cross-Examination of Dr. Calhoun, at Q. 57.

1. Similarly, Professor Lewin writes that the personal quest for authenticity pursued by gay and lesbian couples in marriage will never be fully realized until equal civil marriage is achieved. Although gays and lesbians will continue to celebrate their unions with commitment ceremonies and though they are “... adept at wringing seeming acknowledgment out of the most fragile indicators, ... [n]o matter how psychologically effective the illusion of justice might be, it remains an illusion until authentic, rather than illusory, equality is achieved.”

The [commitment] ceremonies attempt to confirm the authenticity of the couples' relationships and help them to overcome their status as outsiders within their families, churches and the community at large. While these ceremonies are important, nothing short of legal marriage will serve to fully authenticate same-sex relationships, for the couple and the wider community. Legal status would serve a more powerful and validating role in our society than any other ritual mechanism.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000, at page 204-206; Affidavit of Marg Nosworthy, sworn Nov. 14, 2000, at page 272.

Until same-sex couples can indicate that they are married without putting the term in quotations, the reality of their equal love and commitment will not be respected and acknowledged by the state or the community.

### PART III – THE ISSUES AND THE LAW

2. The Applicant Couples suggest that the legal issues to be decided in this case are as follows:

1. Since there is no statutory requirement of different-sex parties to a marriage, are gays and lesbians entitled to marriage licences under present law? The Applicant Couples answer in the affirmative.
2. Following *M. v. H.*, what is the common law with respect to the recognition of gay and lesbian relationships? The Applicant Couples state that *M. v. H.* establishes that same-sex relationships are entitled to equal respect and recognition. Second, arguments seeking to justify differential treatment on the basis of definitional, biological or natural “imperatives” are untenable.
3. Is there a common law rule in Canada that holds that marriages between couples of the same sex are void? The Applicant Couples argue that there is not, and that the common law permits equal marriage.
4. If there is a common law rule that marriages between couples of the same sex are void, is such a rule contrary to the *Canadian Charter of Rights and Freedoms*?
  - i. In particular, would a common law bar to the otherwise valid marriages of same-sex couples violate ss. 2, 7, 15, and 28 of the *Charter*?
  - ii. If so, could an infringement of these rights and freedoms be demonstrably justified under s. 1 of the *Charter*?
  - iii. If it cannot be justified, what is the appropriate remedy for this Court?

The Applicant Couples plead that the *Charter* requires a finding that any common law bar to marriages of same-sex couples is unconstitutional. The appropriate remedy for this Court is to amend the common law to comply with the *Charter* and issue declarations accordingly, without suspension or other limitation, so that the Applicant Couples may obtain licences and enter into legally-recognized marriages. No other remedy will satisfy the *Charter*'s promise of equality and freedom for all persons.

#### A. THERE IS NO LEGISLATIVE RESTRICTION

1. The power to pass laws with respect to capacity to marry is a matter of federal jurisdiction. The federal government is granted exclusive jurisdiction with respect to “marriage

and divorce” under section 91(26) of the *Constitution Act*. The provincial jurisdiction is limited to the “solemnization of the marriage” pursuant to section 92(12).

*Constitution Act, 1867 (U.K.)*, 30 & 31 Victoria, c.3, ss.91 and 92; *Re North et al. and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct) at 282.

2. There is no statutory requirement that a marriage must be between two persons of a different sex. The federal government has not attempted to legislate capacity to marry in relation to the sex of the respective parties. The only federal legislation that explicitly addresses capacity to marry is the *Marriage (Prohibited Degrees) Act*, which forbids persons from marrying if they are related to each other within certain prohibited degrees of consanguinity.

*Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46

3. The Ontario *Marriage Act* addresses procedural requirements to marriage, but does not expressly define the sex of the parties to a valid marriage. All other provincial and territorial legislation, except Québec, is silent on the issue of gender or sexual orientation in relation to marriage. Despite its professed lack of jurisdiction, the Ontario government has issued a direction to issuers of licences instructing them not to grant marriage licences to same-sex couples.

Affidavit of William John Paul Jones, sworn June 27, 2000, at para. 15-16  
*Federal Law-Civil Law Harmonization Act*, No. 1, S.C. 2001, c. 4, s. 3(1)

4. The *Modernization of Benefits and Obligations Act* amended sixty-eight federal statutes to include same-sex spouses in the definition of “common law partners”. The legislation grants unmarried different and same-sex “common law partners” almost all the same rights and obligations as married spouses in federal law.

*Modernization of Benefits and Obligations Act*, S.C. 2000, c.12 (“MBOA”), s.1.1

5. The “interpretation clause” of the MBOA, section 1.1, states that “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”. Purporting to define “marriage” is not an interpretative aid to any MBOA provision. It is clear from the plain language of the section that it is merely a statement of the government’s view of the common law. Of course, whether that view is correct, or whether any existing common law rule should continue, is within the purview of the courts. These observations being made, the government’s true purpose is revealed. The government is attempting to have it both ways: it wishes to say it has not legislated but also wants to demonstrate its discriminatory intent.

6. In many respects, this case presents similar issues to those raised in *Edwards v. Attorney-General for Canada* (“the Persons Case”). Principles of statutory interpretation and fundamental justice lead inexorably to the conclusion that the Applicant Couples have the freedom to marry and should be issued marriage licences. If the government meant to exclude same-sex couples, it should have legislated that only “two persons of the opposite sex” are permitted to marry, just as the legislature should have provided that only “male persons” were permitted to sit as Senators, if it had so intended. There is nothing in the statutes to indicate that same-sex couples are denied the freedom to marry. It is a principle of fundamental justice and statutory interpretation that in a free society, every person can do whatever he or she wishes, subject only to what is prohibited by law. Under the doctrine of *expressio unius*, permissive legislation has been enacted. It is therefore not necessary to consider common law cases. The Persons Case is virtually indistinguishable from the case at bar.

*Edwards v. Attorney-General for Canada*, [1930] A.C. 124.

7. Statutory interpretation must always be undertaken through “the interpretative lens of equality.” The Honourable Madam Justice L’Heureux-Dubé describes this principle with respect to the *Moge v. Moge* decision:

Despite the fact that this case was not brought under s. 15 of the *Charter*, this Court held that equality considerations must inform the determination of spousal support obligations under the *Divorce Act*. The Court recognized that, in order to be sensitive to the equality implications of interpreting a provision in a particular way, judges may need to examine the factual, social and economic context in which a particular piece of legislation operates. In that particular case, focusing on equality enabled the Court to look at the perspective and experiences of women and children, so as to ensure that the principles governing spousal support took into account their needs and realities. Moreover, as a result of that case, the concept of substantive equality became important not only for the area of family law, but also more generally for judicial fact-finding and analysis.

Cases such as these emphasize the fact that one’s approach to every issue that comes before the courts, and not just to equality challenges, should be informed by the s. 15 equality guarantee.

C. L’Heureux-Dubé (Hon.), “The Legacy of the “Persons Case”: Cultivating the Living Tree’s Equality Leaves” (2000) 63 Sask. L. Rev. 389 at para. 7, 8-9.

8. Since there is no impediment to the marriages of same-sex couples under an equality-minded, dynamic approach to statutory interpretation, marriage licences should issue to the Applicant Couples under existing law.

To conclude otherwise would be to stand like King Canute, ordering the tide to recede when the tide in favour of equality rolls relentlessly forward and shows no sign of ebbing. If I am to be criticised — and of course I will be — then I prefer to be criticised, on an issue like this, for being ahead of the times, rather than behind the times. My hope ... is that I am in step with the times.

*Fitzpatrick v. Sterling Housing Association Ltd.*, [1998] Ch. 304, Ward L.J., dissenting; rev’d [1999] 3 WLR 1113 (H.L.).

## **B. THERE IS NO COMMON LAW RULE**

9. The federal government states that same-sex couples are denied the right to marry by a common law rule. However, there can be no common law rule in the absence of a binding precedent, or if the rule is grounded in faulty principles. There is, simply, no common law rule in Canada prohibiting same-sex marriage.

10. A “common law rule” refers to a principle of law which has become settled by a series of decisions, that is binding on the courts and therefore must be followed in similar cases. Any common law rule must be supported by appellate decisions. That is why it is described as a common law *rule*. In this case, there is no binding, or even persuasive, precedent which prohibits marriages between persons of the same sex.

11. There are two Canadian rulings, both from courts of first instance, that have concluded that a valid marriage requires different-sex parties, *Re North and Matheson*, and *Layland v. Ontario*. These cases do not establish a common law rule: they are not binding decisions, but are decisions of courts of inferior jurisdiction or the same court; they are based on precedents which rely on faulty principles; the common law has since evolved; and the cases have been impliedly overruled by subsequent decisions.

*Re North and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct.) (“North”); *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.) (“Layland”).

**i. There Can Be No Common Law Rule Without Any Binding Authority**

12. Decisions of a court are only binding if they are rendered by a court of higher rank within the jurisdiction. None of the cases, *North* or *Layland*, or the cases on which these rely, are decisions of appellate courts in Ontario and therefore none are binding authority. None are even

persuasive since they are based on archaic, discriminatory principles which have been widely critiqued and rejected.

D. J. Lang, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths Canada Ltd., 2000) at 379-385.

**ii. *Hyde and Corbett* are a Flawed Foundation**

13. No common law rule can be based on *North* or *Layland*, since they rest on such a flawed foundation. The British cases on which they rely, *Hyde v. Hyde* and *Corbett v. Corbett*, are no longer good law. *Hyde* is an 1866 British decision in which the court refused to grant a divorce on the basis that the marriage was solemnized in Utah, and therefore was “potentially polygamous.” The court found that, given the difference in its own rules regarding marriage, it did not have jurisdiction to grant a divorce. The court reasoned:

It is necessary to define what is meant by “marriage.” In Christendom it means the union of two people who promise to go through life alone with one another.

*Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130 at 132; *Corbett v. Corbett (Ashley)*, [1970] 2 All E.R. 33.

14. The federal government and lower courts, however, have always cited the following passage from *Hyde*:

I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

*Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130 at 133

15. Given that the issue before the court was polygamy, any reference to the sex of the parties was clearly *obiter*. The *ratio* of the ruling was that a court should only take jurisdiction to grant a divorce when the marriage was “the union of two people who promise to go through life alone with one another.” The *Hyde* polygamy decision does not therefore constitute a common

law source of a restriction against same-sex marriage. The Canadian cases that have concluded otherwise were wrongly decided and should be disregarded.

16. In addition, the ratio of *Hyde* is not the law in Canada. Jurisdiction to grant a divorce is found in the *Divorce Act*, which cares nothing about whether the marriage was solemnized in a place that makes it “potentially polygamous.” The test is whether a party has been ordinarily resident in the jurisdiction for one year preceding the issuance of a petition. Further, polygamous marriages are recognized for the purposes of matrimonial property protections across Canada. Given that the *Hyde* ratio is inapplicable in Canada today and its reasoning is seriously flawed, there is nothing that should commend *Hyde* to this Court as a useful authority. The government’s reliance upon this feeble precedent reveals the vulnerability of its entire case.

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 3; *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(2); *Re Hassan and Hassan* (1976), 12 O.R. (2d) 432 (H.C.J.); *Yuen Tse v. Canada (Minister of E’ment and Immig.)*, [1983] 2 F.C. 308 (C.A.); *Sara v. Sara* (1962), 31 D.L.R. (2d) 566 (B.C.S.C.) at 571-574, rev’d on other grounds (1962), 36 D.L.R. (2d) 499 (B.C.C.A.).

17. The decision of *Corbett v. Corbett* is equally flawed. *Corbett* involved a petition by a man for a decree of nullity in respect of his marriage to a post-operative male-to-female transsexual woman. The Court concluded that the marriage was void on two grounds: a transsexual woman is actually a man and thus the marriage was void; and the marriage lacked “the capacity for natural heterosexual intercourse” that “is an essential element” of marriage. The reasoning of the case is astonishingly archaic and discriminatory, particularly in its language about transsexuals and the role of women in sexual relations. It should have no precedential value in this case. On the first point, whether transsexuals can enter into a valid marriage, *Corbett* has been specifically disregarded in many jurisdictions. On the second point, with respect to

consummation, the Canadian nullity jurisprudence is directly contradictory to the analysis in *Corbett*.

*M.T. v. J.T.* (1976), 355 A.2d 204 at 209; *R. v. Harris and McGuinness* (1988), 17 N.S.W.L.R. 158 at 160; *Secretary, Department of Social Security v. S.R.A.* (1993), 118 A.L.R. 467 (Federal Court of Australia); *R. v. Cogley* (1989), 41 A. Crim. R. 198 at 201-202.

18. Nullity jurisprudence establishes that an inability to consummate renders a marriage voidable, not void. Unlike a marriage that is void *ab initio*, a voidable marriage is valid and has legal effect, unless and until it is nullified by a court on the application of one of the parties to the marriage. A declaration of nullity will only be granted if the non-consummation is due to an irreversible physical or psychological incapacity, which existed at the time of the marriage, but was not then known to the party seeking the annulment. It is therefore possible for persons to contract companionate marriages that are completely non-sexual. Inability to consummate is distinct from inability or unwillingness to have children, which is not a ground for an annulment.

*Baxter v. Baxter*, [1948] A.C. 274 (H.L.); *Norman v. Norman* (1979), 9 R.F.L. (2d) 345 (Ont. U.F.C.); *Tice v. Tice*, [1937] O.R. 233 (H.C.) at 235-236, upheld [1937] 2 D.L.R. 591 at 592-93 (C.A.); *Heil v. Heil*, [1942] S.C.R. 160 at 162-163; *Fleming v. Fleming*, [1934] O.R. 588 at 592 (C.A.); *W. v. W.*, [1950] 1 W.W.R. 981 (B.C.C.A.) at 985; *D. v. D.* (1973), 3 O.R. 82 (H.C.J.) at 84-85, 94, 96, and 100.

19. The Canadian cases, *North* and *Layland*, rely on the flawed foundation of *Hyde* and *Corbett*, and thus both decisions should be rejected. They certainly should not be the basis of a “common law rule”.

**iii. The Evolving Common Law**

20. The suggestion of a binding common law rule ignores the nature of judge-made law. The common law -- by its very essence -- evolves as society changes. It is influenced by changing social mores, new empirical information, and judicial comment in related cases.

[T]he common law must grow with the development of the nation. It must face and deal with changing circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law.

*Prager v. Blatspiel, Stamp and Heacock Ltd.*, [1924] 1 K.B. 566 at 570 cited in *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Gen.Div.), per Greer J., dissenting, at 667; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670 and 678; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1169.

21. There is a difference between invoking the dynamic nature of common law and seeking to change it. In order to change common law, it is necessary to isolate a rule that requires amendment. The Applicant Couples do not argue that a common law rule should be “changed” since there is no binding precedent and since previous decisions rest on such flawed principles. The common law grows and expands to reflect modern circumstances, principles of equality, and recent judicial decisions. On this basis, it simply can no longer be the law that gays and lesbians are denied the right to marry. This is the sort of approach that was taken in *Brown v. Board of Education*. The Court relied on new social science research to disallow racial school segregation, rejecting but not expressly overruling *Plessy*, based on its new understanding of the issues.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was first adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of equal protection of the laws.

*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) at 492-496.

22. We must “discover the law” as it exists today. This approach allowed Greer J., who dissented in *Layland*, to find that, in 1993, there was “no common law prohibition against same-sex marriages in Canada”. As Lord Denning wrote,

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

*Packer v. Packer*, [1954] P. 15 at 22 per Denning L.J.; *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Gen.Div) at 668.

#### iv. What Common Law Rule Does Apply?

23. In determining whether there is a common law bar to marriages between persons of the same sex, it is not sufficient to cite a handful of cases rendered by courts of first instance, particularly where subsequent appellate decisions have seriously affected the validity of the judgments rendered. The two Canadian same-sex marriage decisions are now clearly in error, following the leading Supreme Court of Canada decision on same-sex spousal recognition.

24. *North* pre-dates the *Charter*. *Layland* pre-dates the Supreme Court of Canada rulings of *Egan v. Canada*, holding that sexual orientation is an analogous ground of discrimination, and *M. v. H.*, finding that same-sex relationships are entitled to equal recognition to different-sex relationships. In *M. v. H.*, eight judges soundly rejected all of the arguments which seek to justify discrimination against same-sex couples on the basis of definitional imperatives, “natural biological differences” and universal traditions. The Supreme Court of Canada has clearly ruled that same-sex relationships are entitled to equal status. This must include the fundamental right to marry. In fact, the sole dissenting justice, Justice Gonthier, recognized

that the case of *M. v. H.* was indistinguishable from gays and lesbians seeking equal marriage. In this case, the government's arguments are all culled directly from his dissent.

*Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.*, [1999] 2 S.C.R. 3 at 127, 130, para 227, 231.

25. A considered opinion of the majority of the Supreme Court, even if *obiter*, should be followed by a lower court. The decisions of *North* and *Layland* have therefore been impliedly overruled by the principles adopted in *M. v. H.* The Honourable Madam Justice Greer's dissent in *Layland* now represents the law in Canada, as it correctly reflects the principles adopted by our highest court.

*R. v. Sellars*, [1980] 1 S.C.R. 527.

26. The current common law rule in Canada is that same-sex relationships must be accorded equal status and that differential treatment of such relationships on the basis of definitional or biological justifications is untenable. If gays and lesbians are entitled to equal respect and recognition, marriage – a unique expressive resource, associational commitment and socially privileged status – cannot be reserved exclusively to heterosexuals.

27. Since there is no binding precedent, and there is authoritative dicta from the Supreme Court of Canada which should be treated as binding, there is no common law rule against marriages between persons of the same sex. The Applicant Couples should be granted marriage licences and the requisite declarations should issue accordingly. There is no need for a declaration of invalidity under section 52 of the *Charter*, and there is no jurisdiction for a suspension of the remedy.

**C. IF THERE IS COMMON LAW RULE, IT SHOULD BE REFORMULATED**

28. In the alternative, if there is a common law rule, it must be reformulated. Courts have an obligation to ensure that the common law evolves and develops in a manner that reflects contemporary social reality and the values underlying the *Charter*.

[I]t is not strictly necessary to invoke s. 52(1) of the *Constitution Act, 1982* in order to challenge a common law, judge-made rule on the basis of the rights and values guaranteed by the *Charter* -- if a common law rule can be reformulated so as to attain its objectives while removing any inconsistency with basic principles, a judge is entitled to undertake such a reformulation and is not obliged to seek jurisdiction for this action under s. 52(1).

*R. v. Swain*, [1991] 1 S.C.R. 933 at 979; *R. v. Salituro*, [1993] 3 S.C.R. 654 at 670.

29. This approach was applied by the House of Lords in *R. v. R*. In that case, the Lords simply reformulated a common law rule to correspond with modern realities. The rule, set out by Matthew Hale in his *History of the Pleas of the Crown*, was that “the husband cannot be guilty of a rape committed by himself upon his lawful wife...” While the Court noted that Hales’ rule was “generally regarded as an accurate statement of the common law”, the Lords held that “in modern times the supposed marital exception in rape forms no part of the law of England.” The Court adopted the following language:

...This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

*R. v. R*, [1991] 4 All ER 481 at 489 i; Matthew Hale, *History of the Pleas of the Crown* 1 Hale P.C. (1736) 629.

30. Although the common law evolves slowly, equal marriage flows naturally from the current legislative framework. The federal government has already completed extensive changes to the law of spousal recognition, and its approach has been to provide equivalent benefits and obligations between same-sex and married couples. There are therefore no uncertain ramifications arising from inclusion which should be left to the legislature. Instead, the

reformulation of any common law rule would only be an incremental change, necessary to bring legal rules into step with a changing society. Any common law rule should therefore be reformulated to accord with *Charter* values and current understandings.

*R. v. Salituro*, [1991] 3 S.C.R. 654 at 666.

#### **D. ANY COMMON LAW RESTRICTION VIOLATES THE *CHARTER***

31. If this Court finds that there is a common law rule and is not willing to change the law to accord with modern principles and *Charter* values, it is then necessary to consider whether the common law rule violates specific *Charter* rights and freedoms. Since the common law is relied on by a government actor, the Court cannot permit the common law to violate *Charter* rights and freedoms. Any law -- including common law -- that is inconsistent with the *Charter* is of no force or effect. The common law, when it forms the basis of government action, *must* be declared invalid and amended to ensure compliance with the *Charter*.

*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1164-1172, para. 83-98; *R. v. Swain*, [1991] 1 S.C.R. 933 at 968; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 675.

32. In this case, any common law restriction against same-sex marriage violates the equality rights of lesbians, gays, and bisexuals, as guaranteed by s. 15 of the *Charter*. It also violates the freedoms of expression, association, and conscience. It denies liberty and security interests. It infringes on all these rights and freedoms in a manner that discriminates on the basis of sex, and is therefore a breach of section 28 of the *Charter*.

#### **Any Common Law Restriction Against Same-Sex Marriage Violates Equality Rights**

33. If the common law does not allow valid marriages between persons of the same sex, this is discrimination on the basis of sex and sexual orientation contrary to s. 15 of the *Charter*.

#### **i. A Purposive and Contextual Analysis is Required**

34. The analysis of discrimination must be made “in the context of the place of the group in the entire social, political and legal fabric of our society”. This context includes, among other factors, the historic and current marginalization and denigration of lesbians, gays, and their relationships in Canadian society; the corresponding celebration of heterosexuality as a normative ideal; the relative political powerlessness of gay, lesbian and bisexual people; the changes to the institution of civil marriage in Canadian society over time; and the continuing cultural significance and privileged status of marriage.

*Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 152, 164; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-32; *Law v. Canada*, [1999] 1 S.C.R. 497 at 517, para. 25, 41.

35. The Supreme Court of Canada has recognized that gays and lesbians “whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.” In particular, the Supreme Court has recognized that the denial of relationship recognition to same-sex couples has promoted the view that gay and lesbian relationships are less worthy of social recognition and affirmation. In this context, it is clear that the denial of civil *marriage*, and any proposed “alternative” system of recognition, will be discriminatory.

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 601, para. 175; *M. v. H.*, [1999] 2 S.C.R. 3 at 27, 57, para. 3, 73; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 551, para. 102.

36. All parties to this litigation recognize the vital importance of marriage to many persons in our society. The government’s own experts concede that marriage has positive effects on the length and stability of relationships and promotes happiness. Still, the government claims that gays and lesbians must be excluded because the institution of marriage is *too important, too precious and too special* to allow same-sex couples access. The Applicant Couples respond that it

is precisely because of the fundamental importance of the institution that their exclusion is so egregious.

Affidavit of Dr. Shorter, sworn March 13, 2001, AGC Record at page 442-443; Affidavit of Dr. Nock, sworn March 12, 2001, AGC Record at page 1562; and see Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 43-55.

37. This litigation does not concern, except peripherally, the material rights and protections of marriage. Instead, it decries the powerful badge of inferiority and exclusion communicated by the denial of civil marriage to lesbians and gay men. It seeks equality of access to a unique expressive resource, between the couple, their witnesses, the community and at a symbolic level. It asks that gays and lesbians have the ability to make a fundamental, intensely personal decision of whether to marry, without state interference and coercion over the choice of life partner.

38. Gaining access to equal marriage is about being recognized as a person who is an equally worthy participant in the Canadian community. Given the denigration and invisibility often accorded to same-sex relationships, winning equal marriage is crucial to the achievement of full equality for lesbians and gay men.

Being denied a marriage licence suggests that Mike and I do not love each other, and that our hopes, our dreams, our life together do not exist. Mike and I, while supposedly equal citizens of this great country, are deemed non-persons, because we are gay.

Affidavit of Michael Leshner, sworn June 9, 2000, at page 39; B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235.

Equal marriage signifies the final step in the recognition of the personhood of gays and lesbians: equal *celebration* of same-sex relationships by recognizing them as equally worthy of respect and consideration.

**ii. The Framework for Analysing Section 15 Charter Claims**

39. The denial of equal marriage violates s. 15 in the following manner:
- (a) The impugned law subjects the Applicant Couples to differential treatment.
  - (b) The differential treatment is based on one or more of the enumerated or analogous grounds in s.15.
  - (c) The differential treatment discriminates in a substantive sense.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 524, 547-552, para. 39, 88; *M. v. H.*, [1999] 2 S.C.R. 3 at 46-47, para. 48.

**(a) The Applicant Couples are Subjected to Differential Treatment**

40. With respect to the first inquiry, the Supreme Court has ruled that differential treatment exists if the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 524, para. 39; *M. v. H.*, [1999] 2 S.C.R. 3 at 46-47, para. 48.

41. The denial of the marriage licences draws a distinction on the basis of sex and sexual orientation. If the Halpern and Rogers application for a marriage licence said Colin Rogers

instead of Colleen Rogers, Hedy Halpern would today be legally married. Instead, Hedy has chosen Colleen, and the government declares that their marriage is a “nullity”. The State therefore denies Hedy Halpern the mate of her choice. In doing so, the law draws a distinction between the applicant and others, based on the personal characteristics of sex and sexual orientation.

**(b) Denial of Benefit on the Protected Grounds of Sex and/or Sexual Orientation**

42. The bar to marriage between persons of the same sex is most obviously sexual orientation discrimination. Lesbian, gay and bisexual persons are those who choose a spouse of the same sex, and who experience the discriminatory effects of the current exclusion.

*M. v. H.*, [1999] 2 S.C.R. 3 at 52, para. 62; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 601, para. 175.

43. Exclusion from marriage is also sex discrimination. A woman is not free to marry a woman, but would be if she was a man. The differential treatment is based on discriminatory ideas about the “essential nature” of men and women which reinforce sexist ideology. This is made obvious by the Attorney General's reliance on sexist stereotype, including the suggestion that there is no discrimination in restricting marriage because of the “complementary natures” of men and women.

Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 526; Affidavit of Dr. Koppelman, to be sworn, at para. 10, 13, ftnt. 12; Affidavit of Prof. Wolfson, to be sworn, at para. 22-24;  
*Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993); *Baehr v. Miike*, 80 Haw. 341, 910 P 2d. 112 (1996).

**(c) The Differential Treatment Discriminates in a Substantive Sense**

44. Whether on the basis of sex or sexual orientation, or both, the denial of the right to marry is imposed on the basis of an enumerated or analogous ground of discrimination. This differential treatment discriminates in a substantive sense, because it is inconsistent with the purpose of s. 15 of the *Charter*:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 524, 529, para. 39, 51; *M v H*, [1999] 2 S.C.R. 3 at 53, para. 65.

45. In determining whether the differential treatment discriminates, the question is whether the differential treatment (i) imposes a burden upon or withholds a benefit from the Applicant Couples (ii) in a manner that reflects the stereotypical application of presumed group or personal characteristics, or otherwise perpetuates or promotes the view that the Applicant Couples (and other lesbians, gays, and bisexuals) are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. The “focus of the inquiry must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity.”

*Law v. Canada*, [1999] 1 S.C.R. 497 at 529, para. 51; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 552-553, para. 56; *Miron v. Trudel* [1995] 2 S.C.R. 418 at 488, para. 133.

**(d) The Applicants are Denied Equal Benefit of the Law**

46. Exclusion from civil marriage withholds the equal benefit of the law from the Applicant Couples, in at least the following respects, each of which will be explored below:

1. Denies equal respect to same-sex relationships;
2. Withholds personal benefits associated uniquely with marriage;
3. Denies same-sex relationships community supports and security;
4. Withholds access to family law rights, obligations and protections;
5. Causes confusion and unfairness;
6. Withholds opportunities for familial bonds;
7. Denies gays and lesbians status as full citizens;
8. Withholds an important personal choice; and
9. Denies a fundamental human right.

***1) Denies Equal Respect to Same-Sex Relationships***

2. The refusal to recognize the marriages of persons of the same sex withholds from the Applicant Couples, and all same-sex couples, the equal benefit of the law. It denies gays, lesbians and bisexuals the state celebration, recognition and acceptance of their unions as marriages, a status available to all heterosexuals. “[M]arriage...is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value.” The denial of marriage sanction therefore marks gays and lesbians and their relationships as inferior. It trivializes the emotions and commitment that gay and lesbian people feel for their chosen partners, treating their love and dedication as second-class to that felt by non-gay people, perpetuating social stigma. “Legal marriage ... is not only a list of rights and obligations, a “piece of paper”; it amounts to a kind of verification that the couple is what it represents itself to be – as worthy of respect as any other couple.”

The government has relegated us to the status of “pretend couple” by not recognizing our marriage exactly as it would for a heterosexual couple.

Affidavit of Colleen Rogers, sworn June 13, 2000, at page 36.

By drawing the line at marriage, the courts and society seem to be saying that we are not quite equal. I want to be completely equal under the law.

Affidavit of Carolyn Moffatt, sworn June 13, 2000, at page 69.

Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 225-226; B. MacDougall, “The Celebration of Same-Sex Marriage” (2000) 32:2 Ottawa Law Rev. 235 at 242; Affidavit of Dr. Lewin, sworn Nov. 14, 2000, particularly at page 179, 182, 206; see *supra*, para. 20-21.

3. The Supreme Court of Canada has specifically recognized the status of being unmarried – of not having contracted a marriage in a manner recognized by the state – as a ground of discrimination. In so doing, the Court acknowledged that unmarried relationships have been and continue to be treated with social disadvantage and prejudice. “The sanction of the union by the state through civil marriage” is obviously a benefit of the law, quite apart from whether the same cluster of material benefits and obligations otherwise applies to a couple. If heterosexuals who do not to marry are subject to stigmatizing treatment, the discriminatory impact of an absolute marriage bar to gays and lesbians should be obvious. Gay and lesbian people are marked as persons *forbidden to marry* in a society that recognizes marriage as a fundamental social institution and public good.

*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 498, para. 152, 153.

**2) Withholds Personal Benefits Associated Uniquely with Marriage**

4. Same-sex couples and their children are denied access to significant personal benefits associated uniquely with the institution of marriage. Dr. Barnes explains that marriage confers significant psychological benefits not enjoyed by unmarried couples: it promotes emotional well-being, greater emotional stability, greater maturity, and better psychological adjustment. Research also shows that marriage is linked to improved physical and mental health, greater happiness, and superior financial well-being. All of these significant benefits are denied to gays and lesbians when they are told they cannot choose civil marriage.

Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, at para. 45-47; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 136; see *supra*, para. 22.

**3) *Denies Same-sex Relationships Community Supports and Security***

5. Dr. Barnes also deposes that access to legal marriage would promote stability and security in same-sex relationships, just as it fosters those benefits in different-sex relationships. Children of same-sex couples would enjoy the advantages and protections that marriage would offer their families. By denying the legal framework of marriage, the state contributes to the lack of social support for same-sex relationships, causing psychological stress and fostering stigma, harassment and violence.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000; see *supra*, para. 22, 26-27, 33-34.

**4) *Withholds Access to Family Law Rights, Obligations and Protections***

6. The current legal context in Ontario is that unmarried couples have almost the same rights and obligations, whether they are different or same-sex couples. The situation is the same at the federal level. Of course, different-sex couples can choose to marry, and if they do, they have access to expanded rights and responsibilities. The most notable of these legal benefits are protections on separation or death (such as equalization of net family property, matrimonial home protections and intestacy rights). If gays and lesbians cannot choose civil marriage, they are denied access to legal protections in the same way as M was denied access to the court-enforced system of spousal support.

*M. v. H.*, [1999] 2 S.C.R. 3 at 53, para. 66; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 593-594, para. 158-61, *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 544-5, para. 87.

**5) *Causes Confusion and Unfairness***

7. Following *M. v. H.*, there have been piecemeal changes to the rights and responsibilities of same-sex couples across Canada. Some provinces and territories offer no recognition; others provide limited, divergent benefits and obligations, flowing from differing

periods of cohabitation. In the context of the Applicant Couples, Rebekah would be able to adopt a child born to Michelle if they continue to reside in Ontario but not if they move to Manitoba. Barb and Gail qualify for most of the same rights and obligations as married spouses in Ontario, but are not entitled to protections on intestacy. Dawn and Julie had no relationship rights while they lived in Newfoundland and would lose all of the rights they now have in Ontario if they returned. There is no overarching scheme of regulation to govern same-sex spouses as they interact with society and the law. Couples face the inconsistencies of the various patchwork provincial schemes.

Affidavit of John Fisher, sworn Jan. 10, 2001, para. 27-35.

8. Moreover, unlike different-sex couples, same-sex couples cannot immediately access the benefits and protections associated with marriage. This is an intractable problem for those forced to live apart. Denial of equal marriage is also a serious practical difficulty for intimate relationships which display limited factors to prove cohabitation. Marriage, unlike ascribed spousal status, makes absolutely clear the relationship of the parties – to the couple, the state and the community at large.

*M. v. H.*, [1995] 2 S.C.R. 3 at 50-51, para. 59-61.

9. In the face of this uncertain legal situation, the federal government argues that gay and lesbian couples experience no discrimination, because those who have cohabited for one year are “common law partners” with the same benefits and obligations as married spouses for the purposes of almost all federal laws. It claims that provincial schemes should solve all remaining problems. They do not and cannot. Marriage, and uniquely marriage, creates a status that is well

understood and portable across the country. Patchwork provincial protections cannot have the same effect practically or psychologically.

Affidavit of John Fisher, sworn Jan. 10, 2001, at para. 29; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 134-135; Affidavit of Hedy Halpern, sworn June 13, 2000, at 31; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 565, para. 86.

**6) Withholds Opportunities for Familial Bonds**

10. Recognizing equal marriage would send a message that same-sex relationships are equally worthy of celebration. It would acknowledge that gays and lesbians are entitled to all the usual conventions to celebrate a permanent intimate commitment, including the blessing of the state. It would allow families and friends to come together in preparation and attendance at an event that has equal status and legitimacy. Entering into marriage with the sanction of the government humanizes and makes visible and authentic the relationship between the parties, in a manner that would allow and enhance the comprehension and acceptance of many heterosexuals.

Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 84-85; *supra* para. 28-30.

11. Marg Nosworthy explains the effect of attending the wedding of her lesbian daughter. Even though the wedding was denied legal recognition or effect, the event brought back memories of her own ceremony. This cultural resonance created a wonderful new memory for her, her husband, her daughter and her daughter-in-law.

Bob and I remembered what it meant to us forty some odd years before when we stood before our family, friends and neighbours and promised to love and honour each other ‘til death due us part – a covenant that we haven’t take lightly.

It was great day. They belonged. They were accepted. On that wedding day, my daughter’s greatest wish to be like everyone else had been fulfilled. ... For the rest of their lives, they will remember the love that was poured out to them that day – the day they were married. I have never seen my daughter or daughter in law so happy.

Affidavit of Marg Nosworthy, sworn Nov. 14, 2000, at page 270.

12. As Professor Lewin explains, such “... ceremonies attempt to confirm the authenticity of the couples’ relationships and help them to overcome their status as outsiders within their families, churches and the community at large.” Exclusion from civil marriage denies

lesbians and gay men full and equal participation in the ritualistic passages of the family life cycle, which bind all extended family members together.

Affidavit of Dr. Lewin, sworn Nov.14, 2000, at page 157.

13. Marriage creates a public legally binding promise. The presence of the witnesses for the giving of the promise creates a disincentive to termination, and a promise of invaluable social support in times of crisis or difficulty. The legal consequences reflect the seriousness of the commitment. Marriage creates connections and bonds between the state, community, families, friends and the couple. By denying gays and lesbians the right to marry, government thus denies the full participation of gays and lesbians in our communities.

**7) *Denies Gays and Lesbians Status as Full Citizens***

14. Any common law bar to equal marriage rests on the view that gays and lesbians are not full citizens. By deeming gay and lesbian people as outside of civil society, a denial of equal marriage limits the capacity of non-heterosexuals to fully participate in our society.

Same-sex marriage bars encode the view that lesbians and gays are not competent to be full citizens. This is because we, as a culture, think that marriage is the bedrock on which social and political life is then built. Citizens support civil life by getting married and having families. When same-sex couples are told that they cannot marry they are being told that their unions do not provide the same bedrock for social life. Their unions do not contribute to social life. Thus they are not essential citizens. In short, marriage and citizenship are such intertwined notions, that you cannot bar a group of people from marriage without undermining their status as citizens.

Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 526.

The importance of the freedom to marry in securing full citizenship and public participation is echoed by Professor Barry Adam, a sociologist:

Citizenship rights are *not* just about *not* being excluded from the public sphere, but [are] more positively about being able to participate fully in civil society. ... Being permitted to speak one's own language only at home but not in public, or being prevented from building community institutions, such as community centres, newspapers, or archives, scarcely qualifies as equal participation in civil society. Similarly being restricted from affirming relationships and domestic life in the public sphere through the virtually universal

currency of marriage constitutes a curb on public recognition as a valid actor in civil society.

Affidavit of Dr. Adam, sworn Nov. 15, 2000, at page 496.

**8) Withholds an Important Personal Choice**

15. The decision whether or not to marry is a choice that must be available for gays and lesbians, as it is a choice which is open for acceptance or rejection by heterosexuals. Even for those who would not choose to marry, being denied self-determination stigmatizes all gays and lesbians. The denial of such a significant choice withholds the equal benefit of the law.

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 593, para. 159-161; Affidavit of Dr. Eichler, sworn Nov. 14, 2000, at page 227; Affidavit of Dr. Rayside, sworn Nov. 14, 2000, at page 558; Affidavit of Dr. Kaufman, sworn Nov. 20, 2000, at page 332; Affidavit of John Fisher, sworn Jan. 10, 2001, para. 36-39.

**9) Denies a Fundamental Human Right**

16. There is a fundamental right to marry recognized in Canadian, US and international law jurisprudence.

[T]he decision of whether or not to marry can, indeed, be one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion.

*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 471, para 95; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 169 citing with approval *Loving v. Virginia*, 388 U.S. 1 (1967) at 12; Affidavit of Prof. Wolfson, to be sworn, at para. 6-9; Article 16(1) of the Universal Declaration of Human Rights, G.A. res. 217A (III) UN DOC A/8 10 at 71 (1948); Article 23 of the International Covenant on Civil and Political Rights, 19 December 1996, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (1976).

17. The withholding of a fundamental human right must be a denial of the equal benefit of the law.

**e. *The Denial of Equal Marriage Demeans the Dignity of Gays and Lesbians***

18. Having established that the differential treatment on the basis of sex and sexual orientation denies the equal benefit of the law in a myriad of ways, it is now necessary to consider whether it does so in a manner that demeans dignity. There are four contextual factors that may be of assistance in demonstrating that the exclusion from marriage demeans the dignity of gays and lesbians. Throughout the analysis, the main consideration “must be the impact of the law.” This reveals that the denial of equal marriage perpetuates and promotes the view that same-sex couples are less capable, less worthy of recognition, and less valuable members of Canadian society.

*Andrews v. Law Society of Canada*, [1989] 1 S.C.R. 143 at 165; *Law v. Canada*, [1999] 1 S.C.R. 497 at 517, 547-552, para. 25, 88.

### ***1) Pre-existing Disadvantage***

19. A first factor which demonstrates that the exclusion from marriage has the effect of demeaning dignity is the existence of “pre-existing disadvantage, vulnerability, stereotyping, or prejudice” experienced by gay and lesbian people, and exacerbated by the denial of civil marriage. The Supreme Court of Canada has recognized that same-sex relationships “have often not been given equal concern, respect, and consideration.” Instead, gay and lesbian relationships have been rendered invisible or viewed as inferior to those of heterosexuals. It is therefore logical to conclude that the exclusion from marriage contributes to the perpetuation or promotion of the invisibility and cultural denigration of gays and lesbians. The denial of equal marriage reflects and reinforces existing, inaccurate understandings of the merits, capabilities and worth of lesbian and gay relationships within Canadian society, resulting in further stigmatization.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 534-535, para. 63-64; *M. v. H.*, [1999] 2 S.C.R. 3 at 54-55, para. 68; Affidavit of Drs. Stacey and Biblarz, sworn June 6, 2001, para. 48-49; Affidavit of Dr. Adam, sworn Nov. 15, 2000, at page 497-501.

20. Marriage remains a privileged institution in our society, a social good. Indeed, it is often considered the authentic marker of a serious and committed love relationship: a symbolic rite of passage into adulthood. Couples receive social disapproval for failing to marry, and persistent encouragement and questions about when they might be “tying the knot.” If those who “live in sin” experience disapprobation, what is the message communicated by the government’s position that gays and lesbians are *forbidden* to marry? The denial of equal marriage reinforces

the view that same-sex spouses are less worthy of recognition, support and celebration than opposite-sex spouses.

The exclusion of same-sex couples from legal marriage or the creation of a special legal arrangement for same-sex relationships implies that there is a substantive basis for treating lesbians and gay men differently from heterosexual men and women. Because marriage carries powerful connotations of moral and social legitimacy, denial of this status to lesbian and gay male relationships means that these relationships and, by implication, the individuals who are or might potentially become involved in these relationships, have second class status.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 132-135; B. MacDougall, “The Celebration of Same-Sex Marriage” (2000) 32:2 Ottawa Law Rev. 235; D. Cruz, ““Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource”, 74 So. Cal. Law Rev. 925 at 942 (2001).

21. Dr. Barnes demonstrates that symbolic exclusion by government has concrete, material effects, as well as causing psychological harms. Law which declares same-sex couples to be less worthy of recognition and respect – like the denial of equal marriage – perpetuates and promotes stereotype, stigma, harassment and violence.

A legal distinction between same-sex and opposite-sex couples would serve to justify the legitimacy and acceptability of cultural heterosexism and thus help to perpetuate stigmatization, prejudice, harassment and violence directed against all lesbians, gay men and bisexual men and women, regardless of relationship status, and against heterosexual men and women whose behavior and attitudes do not conform with conventional gender role expectations.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 132-135; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 550, para. 99.

## **2) Relationship Between Grounds and Claimant's Characteristics or Circumstances**

22. A second contextual factor is whether the impugned law takes into account the claimant’s actual situation. Here the government argues that there is no discrimination because the exclusion of same-sex couples from the institution of marriage is a description of the actual situation of different-sex and same-sex couples: marriage “simply is” heterosexual in nature. This

argument amounts to the following assertion: marriage is the union of a man and a woman because marriage is and always has been the union of a man and a woman.

23. This circular reasoning attempts to short-circuit the s. 15 analysis by refusing to engage the issue of discrimination. As Dr. Mercier explains, “Tautologies like this teach us nothing whatsoever about anything, least of all about the meaning of the word ‘marriage’ in contemporary English, or about the nature of marriage in contemporary North American society.” The Supreme Court has recognized that circular reasoning threatens the integrity of the discrimination analysis. In *Miron v. Trudel*, the majority rejected the approach of Gonthier J., in the following terms:

[Gonthier J.] asserts, however, that [marital status] is not used in a discriminatory manner in this case because ... the Legislature's intention was to assist those couples who are married. He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. ... The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.

*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-491, para 134-137; Affidavit of Dr. Mercier, to be sworn, para. 10; *Baehr v. Lewin* 852 P.2d 44, 61, 63 (Hawaii 1993); *Brause and Dugan v. Bureau of Vital Statistics*, Case No. 3AN-95-0562 CI (Alaska Superior Ct., Feb. 27, 1998).

24. The Supreme Court faced a similar argument in the constitutional challenge to the definition of “spouse” in Ontario’s *Family Law Act*. In *M. v. H.*, Gonthier J. concluded that people in a same-sex relationship could not be spouses since “...[t]he concept of “spouse”, while a social construct, is one with deep roots in our history...” This definitional argument was rejected by the

eight other judges, because deference to “traditional” definitions cannot substitute for judicial scrutiny. To conclude that same-sex couples simply “fall outside the definition of marriage,” which “is now, and has traditionally been, defined as a union between the sexes,” is to beg the question of whether the “traditional” definition offends the dignity of lesbians and gay men contrary to the *Charter*.

*M. v. H.*, [1999] 2 S.C.R. 3 at 127, para. 227 per Gonthier J., dissenting.

25. Discriminatory treatment and exclusion is not less damaging because it is long-standing or common. There would be no end to discrimination if courts relied on traditional norms. Section 15 guarantees the “unremitting protection of the individual rights and liberties” of minorities who have been *historically* vulnerable to stigma and stereotyping. It aims to protect the traditionally disadvantaged from discrimination, however deeply ingrained, accepted, and longstanding.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 539, para. 72; *Hunter v. Southam*, [1984] 2 SCR 145 at 155.

26. Again, the Persons Case provides a useful parallel. In rejecting the Supreme Court of Canada’s finding that women were not “persons” on the basis of the history of the common law, the Privy Council wrote:

The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.

*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 134; Affidavit of Dr. Mercier, to be sworn.

27. The argument that marriage law is not discriminatory because marriage, by definition, requires one man and one woman also finds a parallel in those arguments rejected in the interracial marriage context. In *Loving v. Virginia*, the trial court held that a marriage between two persons of different races was, by definition, not a true marriage. The Hawaii Supreme Court wrote:

The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both . . . unmask the tautological and circular nature of [the state of Hawaii's] argument that [Hawaii's prohibition of same-sex marriage] does not implicate [the equal rights provision] of the Hawaii Constitution because same sex marriage is an innate impossibility. . . . [C]onstitutional law may mandate, like it or not, that customs change with an evolving social order.

*Baehr v. Lewin*, 852 P.2d at 63; *Loving v. Virginia*, 388 U.S. 1 at 3. *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 284, 285 (1878).

28. History is not static. Society evolves. It is therefore not sufficient to state that, because same-sex couples have not historically been allowed to marry (at least in some societies) then by definition, marriage is justifiably restricted to different-sex couples. The issue is not how “marriage” has historically been defined, no more than the Persons Case could have been correctly resolved by how the term “person” had been historically defined. The issue is whether the exclusion of a historically disadvantaged group is discriminatory and, if so, whether it is justified.

29. In relying on the definitional argument, the government ultimately seeks to classify gay and lesbian relationships as “other”, fundamentally outside the realm of civic and linguistic intelligibility. In a symbolic sense, the definitional argument declares same-sex unions to be meaningless and incomprehensible. Whatever the arguments advanced by the government, the marriage of two persons of the same sex is not an expression of unintelligible nonsense. There are

*marriages* between same-sex couples in the Netherlands. Some of the Applicant Couples consider themselves married. It is the government that fails to recognize their marriages and their humanity; they are nevertheless real.

I love Rebekah. I am committed to her. I can't see myself with anyone else for the rest of my life. It is real, it is valid and it is beautiful. It is a relationship filled with trust, compassion, understanding and lots of open communication. The fact that Rebekah and myself are both female does not diminish the depth of our relationship in the least degree.

Affidavit of Michelle Bradshaw, sworn June 13, 2000, at page 45; Affidavit of Dawn M. Onishenko, sworn Nov. 3, 2000, at page 57.

30. The government's error is easily corrected by approaching the s. 15 analysis from the requisite subjective-objective perspective. In the case at bar, from the reasonable perspective of persons in the circumstances of the rights claimants, the denial of equal marriage fails to take into account the existence of the Applicant Couples' loving, committed unions which serve all the valid purposes of marriage between different-sex persons.

Like heterosexual men and women, lesbians and gay men value and commit themselves to enduring intimate relationships characterized by emotional, social and material interdependence. Involvement in a loving, committed relationship is central to the personal lives of many lesbians and gay men in the same way that marriage is central to the personal lives of many heterosexual men and women. Insofar as possible given the current social and legal context, loving, committed same-sex relationships are psychologically and practically equivalent to heterosexual marriages.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 109.

I grew up in a loving environment with the same challenges as everyone else. I went to school, obtained an education, eventually started working and continue to hold gainful employment. I grew up always dreaming and having the same desires and needs as everyone else. I wanted a house, to get married, and have kids. I wanted the same rights, responsibilities, and security as everyone else enjoys. / Now, I get up and go about my day and finally retire in the evening with the person I love in the same fashion as millions of people around me. Yet, I am not privileged to have the same rights as everyone else. Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 84.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 532, 538, para. 59, 70; Affidavit of Aloysius Edmund Pittman, sworn February 20, 2001, at page 93-b; Affidavit of Barbara McDowall, sworn Aug. 15, 2000, at page 74; Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 84; Affidavit of Dawn M. Onishenko, sworn Nov. 9, 2000, at page 57- 58; Affidavit of Dr. Eichler, sworn Nov. 15, 2000, at page 224 - 226; Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 526.

31. Excluding gays and lesbians from marriage thus disregards the needs, capacities, and circumstances of same-sex spouses and their children. It declares an entire class of persons unworthy of the recognition and support of state sanction for their marriages.

### ***3) Ameliorative Purpose or Effects***

32. Another contextual factor which assists in the identification of discrimination is whether the denial has an ameliorative purpose or effect for a historically disadvantaged group. In this case, the denial of marriage to gays and lesbians has no ameliorative purpose whatsoever. The Supreme Court has held that an underinclusive benefit, like civil marriage recognition, that “excludes from its scope the members of an historically disadvantaged group will rarely escape the charge of discrimination”.

*Law v. Canada*, [1999] 1 S.C.R. 497 at 539, para. 72; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 547-552, para. 94-104; *M. v. H.*, [1999] 2 S.C.R. 3 at 56-57, para. 71.

### ***4) Nature of the Interest Affected***

33. The fourth contextual factor is the nature of the interest affected by the impugned law. “[T]he more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction with the meaning of s.15.” Here, the discriminatory impact of the denial of equal marriage is amply demonstrated by the fundamental nature and broad scope of the interest affected.

[T]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects “a basic aspect of full membership in Canadian society”, or “constitute[s] a complete non-recognition of a particular group”.

*Law v. Canada*, [1999] 1 S.C.R. at 540, para. 74; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 556, para. 64.

The evidence demonstrates that all of these factors are engaged by a denial of equal marriage.

34. Perhaps few things are more important than the freedom to choose the spouse of one’s choice and to have that relationship celebrated as marriage. At this stage of the analysis in *M. v. H.*, Justice Cory recognized both the tangible and symbolic impact of the denial of access to the protections of the spousal support scheme:

The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALÉ submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

*M. v. H.*, [1999] 2 S.C.R. 3 at 57-58, para. 73.

35. Surely, access to equal marriage is even more fundamental and important than access to spousal support. The right to marry is a highly personal and momentous decision which the Supreme Court of Canada has recognized as a fundamental constitutional, personal and societal interest.

*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 450, 471, 497, para. 45, 95, 150; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848.

36. There is a distinct and profound benefit in the ability to participate in marriage itself. A cluster of rights and obligations that provide equivalent economic benefits does not have the same meaning or significance as access to a basic social and cultural institution. The government tries to reduce the applicants' cause to a battle over a single word, because most federal benefits and obligations have been extended. At the same time, it threatens that terrible consequences will befall society if gays and lesbians are permitted to marry. This is a struggle that obviously matters a great deal; it is about more than just semantics. This case matters because it goes to the heart of the privilege accorded to heterosexuality and to the core of the oppression of gays and lesbians. The case challenges the government not just to condone same-sex couples but to recognize and celebrate lesbian and gay relationships as fully equal. The question is: will gays and lesbians be included in civil society as persons deserving of equal respect and consideration? Or will the Applicant Couples be dismissed as fundamentally "other"?

37. This theme, and its connection to the fundamental nature of the interest affected, is also revealed by the government's argument. It suggests that marriage is a pre-political institution on which civilization is built, and then claims that gays and lesbians are not capable of entering into such a relationship. The message is clear: gays and lesbians are outsiders to the most fundamental institution in our society.

38. In conclusion, the denial of equal marriage clearly violates s. 15 of the *Charter*. It draws a distinction on the basis of sex and sexual orientation that withholds the equal benefit of the law in a manner that offends the human dignity of gays, lesbians and bisexuals. It exacerbates pre-existing disadvantage by deeming same-sex relationships less worthy of respect and

recognition, fails to recognize the lived realities of gay and lesbian commitments, and completely denies a fundamental constitutional and societal interest. The law has the power to send a meta-message of full inclusion in society or to perpetuate discrimination against gay men and lesbians.

Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction.

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 567, para. 90.

39. The words of Applicant Gail Donnelly compel the conclusion that any marriage bar offends s. 15 of the *Charter*:

I believe equality is powerful. It gives each individual the opportunity to feel like they belong in all aspects of life. I am no different than anyone else. I have a right to be here, to live, to explore, to learn, to love, to cherish, and to participate in life fully. I ask myself why does the fact that I am in love with a woman make me unequal?

Affidavit of Gail Donnelly, sworn Aug. 16, 2000, at page 83.

#### **E. VIOLATES OTHER FUNDAMENTAL RIGHTS AND FREEDOMS**

40. Exclusion from marriage implicates numerous core rights and freedoms guaranteed under the *Charter* because marriage is such a central concept in our culture. Denial of equal marriage offends the expressive, associational, ethical, religious, liberty and security interests of gays and lesbians, contrary to ss. 2, 7 and 28.

41. Section 15 must inform our analysis with respect to other rights and freedoms. All *Charter* guarantees flow from the recognition of human worth and dignity since these “are the *sine qua non* of the political tradition underlying the *Charter*.”

*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 112; *R. v. Lyons*, [1987] 2 S.C.R. 309 at 326; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 164-166; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 592.

**i. Denies Freedom of Expression**

42. Section 2(b) guarantees the freedom of expression, described in the following terms by Chief Justice Dickson in *Irwin Toy*:

Expression has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our *Constitution* ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is ... “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court “the matrix, the indispensable condition of nearly every other form of freedom”; for Rand J. of the Supreme Court of Canada, it was “little less vital to man’s mind and spirit than breathing is to his physical existence”.

*Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 968 [citations omitted].

43. A recurring theme in the evidence is that marriage is a crucial form of expression which communicates unique meaning. Dr. Ellen Lewin writes:

[The] struggle for same-sex marriage that has emerged in the past decade speaks to the enormous symbolic significance legal marriage holds. Legal marriage speaks to the gravity of commitments; because legal marriage is the expressive vehicle that is most generally recognized in mainstream cultures, it is fair to say that it is potentially more powerful than other symbolic apparatuses in conferring a sense of dignity and value on gay and lesbian relationships.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000, at page 182; Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 520; Affidavit of Michelle Bradshaw, sworn June 13, 2000, at page 46.

44. A civil marriage ceremony communicates meaning at a personal level to one's spouse and at a public level to the community: it expresses commitment, an assumption of mutual responsibility, and it lets others know that one is living specifically as a married person. It makes a *statement* to the loved one, and to everyone, about the nature of the relationship, of who the people are and who they wish to be.

We use ceremony and process for all of the rites of passage in our lives. Marriage is perhaps the most important and most celebrated of these occasions. ... It is a monumental step. ... It is a step I want to take with Julie. I want to tell all of society, my family and my friends that Julie and I are ready to embark on a new stage in our individual lives – we are ready to proceed through life as a family. I want to make this commitment through the age-old ritual of marriage.

Affidavit of Dawn M. Onishenko, sworn Nov. 3, 2000, at page 56.

Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity. / Only mixed-sex couples are permitted to use the unique expressive resource that is civil marriage to make statements about their love, fidelity, or commitment, and, thus, about vital facts of their identity. The mixed-sex requirement thereby privileges one set of viewpoints that hold that only mixed-sex couples are capable of those virtues or that they are superior to same-sex couples insofar as such virtues are concerned.

D. Cruz, ““Just Don't Call It Marriage”: The First Amendment and Marriage as an Expressive Resource”, 74 So. Cal. Law Rev. 925 at 928 (2001); Kenneth L. Karst, “The Freedom of Intimate Association”, 89 Yale L.J. 624, 636 (1980).

45. The fact that this expression carries potential penal consequences is a further illustration of the extreme infringement of s. 2(a). The solemnization of an unlawful marriage is an indictable offence subject to imprisonment for a term not exceeding two years. This harkens

back to *Loving v. Virginia* when Mildred Jeter and Richard Loving were imprisoned for expressing their love across racial differences.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 294, 295; *Marriage Act*, R.S.O. 1990, c. M.3, ss. 5(1), 35(2); *Loving v. Virginia*, 388 U.S. 1 (1967).

46. The decision of whether or not to marry may also constitute a form of political expression. For those who would seek to challenge the privileged status associated with marriage by not participating in it, gays and lesbians, unlike heterosexuals, cannot make a coherent political statement by choosing not to marry. A refusal of marriage for political reasons can only be intelligible where a choice is available. There are also those who see the choice of marriage as a means of repudiating its historical connections with patriarchy. They too are denied this means of political expression.

Affidavit of Dr. Lewin, sworn Nov. 14, 2000, at page 204; Cross-Examination of Dr. Eskridge, Aug. 2, 2001, at Q. 192-195; Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 524-525, 537-540, 544-546; Affidavit of Carolyn Moffatt, sworn June 13, 2000, at page 69; Affidavit of Carolyn (C.J.) Rowe, sworn Nov. 9, 2000, at 64; Cross-Examination of John Fisher, Q. 151 at 60:16- 60:24.

47. The different-sex requirement seriously distorts public discourse. As described by Professors Calhoun, Adam and Barnes, public actors in our society are required to adopt a heterosexual identity. There are socially and legally enforced limits to the public expression of a gay or lesbian sexual orientation on occasions when the public expression of a heterosexual identity is well-accepted. A central part of this alienation from the public sphere of expression of love and commitment is the denial of the freedom to marry.

[P]rivate heterosexual expression has publically recognized and affirmed counterparts which are denied to lesbians and gay men. The institution of marriage is a cornerstone of a variety of socially acceptable public expressions accorded to heterosexual sexual partnerships. However, when lesbians and gay male couples seek to exercise similar forms

of public expression for their partnerships, the individuals involved are viewed as having violated the public/private sexual boundary, as behaving in a highly inappropriate manner and as deserving of punishment.

Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 131; Affidavit of Dr. Adam, sworn Nov. 15, 2000, at page 495- 496; Affidavit of Dr. Calhoun, sworn Nov. 15, 2000, at page 516-525.

48. Marriage is a unique expressive resource denied to gays and lesbians by penal prohibition. This is a violation of the freedom of expression which undermines the core values of the freedom, and in particular, its importance to individual self-fulfilment and human flourishing.

*R. v. Butler*, [1992] 1 S.C.R. 452 at 499; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at p. 765-767; D. Cruz, ““Just Don’t Call It Marriage”: The First Amendment and Marriage as an Expressive Resource”, 74 So. Cal. Law Rev. 925 (2001).

**ii. Denies Freedom of Association**

49. Freedom of association is guaranteed by s. 2(d) of the *Charter*. As the Supreme Court wrote in *Reference re Public Service Employee Relations Act (Alberta)*:

Freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the *Charter*, a *sine qua non* of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations.

*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, para. 22 (“*PSERA*”).

50. In *PSERA*, a right to strike case, the Supreme Court referred to the institution of marriage to define the scope of freedom of association. Although two of the three opinions express different views about the interaction between marriage and freedom of association, they do agree that there might be a “violation of s. 2(d) in a legislative enactment which prohibited

marriage for certain classes of people”, particularly “in combination with other rights and freedoms”.

*PSERA*, at para. 81 per Dickson C.J. and Wilson J., para. 173 per McIntyre J.

51. The institution of marriage is an association for the pursuit of common interests and aspirations, with expressive, economic, religious, ethical, cultural and social purposes. The joint objectives of marriage are not only pursued with one’s spouse, but also with the broader community of married couples. The freedom of association implicated by a denial of equal marriage is therefore not merely concerned with the desire to physically associate with a spouse in a loving relationship. Rather, the freedom of association guarantees that a person will not be denied the freedom to belong and to associate as a married person. The state cannot limit how the couple defines and pursues their relationship together, denying them certain associational goals that cannot be achieved without being married. Marriage is the most intimate form of associational human relationship, and its denial to an entire class of people, an already disadvantaged group, necessarily offends s. 2(d).

*PSERA*, para. 87, 143, 174, 176.

**iii. Denies Freedom of Conscience and Religion**

52. Section 2(a) of the *Charter* guarantees that everyone has the fundamental freedom of conscience and religion. The importance of this freedom in Canadian society was stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart*:

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [emphasis added]

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of “the tyranny of the majority”.

*R. v. Big M Drug Mart*, [1995] 1 S.C.R. 295 at 336-337; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 175-180.

53. Apart from any role in religious experience, entry into marriage is a profoundly personal decision which may reflect conscientiously held beliefs which underlie an individual’s view of the good life. Similarly, sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” For some, sexual orientation is experienced as an unchanging, inborn element of personality. For others, it is experienced as an important personal and ethical choice. In *Edwards Books and Art*, Dickson C.J.C. wrote:

The purpose of s. 2 (a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and in some cases, a

higher or different order of being. These beliefs, in turn, govern one's conduct and practices.

*R. v. Edward Books and Art Limited*, [1986] 2 S.C.R. 713 at 759.

The denial of equal marriage is not a trivial or insubstantial interference with a person's ability to pursue and maintain a relationship with a person of the same sex. It seriously interferes with the ability to choose a same-sex partner, and it denies completely the ability to profess such a chosen commitment as marriage.

*Egan v. Canada*, [1995] 2 S.C.R. 513 at 528, para. 5; Affidavit of Joyce Barnett, sworn Aug. 17, 2001, at page 92- 93; *Brause v. Alaska*, No. 3AN-95-6562-CI, Slip. Op. at 8, 9, 11 (Alaska Sup. Ct. Feb. 27, 1998).

54. If protection on the basis of sexual orientation is to have meaning, the state cannot create different-sex limits on marriage without infringing on the free exercise of conscience. No more can the state privilege Christianity over another religion, regardless of the social goods flowing from the Christian faith, than can it privilege different-sex relationships as a superior choice over same-sex relationships. Applicant C.J. Rowe, who identifies as bisexual, would be permitted to marry if her chosen partner was a man but is denied the choice to marry Carolyn Moffatt. This bar is an indirect form of coercion on what should be C.J.'s intensely personal decisions about her own intimate life. It attempts to manipulate, by social reward and corresponding disincentive, her decision-making when her choice in such an intimate matter should be subject only to her own convictions and feelings. As Applicant Colleen Rogers writes, "The government has taken away the very thing that makes me an adult human being - the right to think and make decisions for myself. At the age of 49, I find this appalling."

Affidavit of Carolyn (C.J.) Rowe, sworn Nov. 9, 2000, at page 63, 65; Affidavit of Colleen Rogers, sworn June 13, 2000, at page 36-37; *Zylberberg v. Sudbury Board of Education*

(1988), 65 OR (2d) 641 (C.A.); *Canadian Civil Liberties Association v. Ontario* (1990), 71 O.R. (2d) 341 (C.A.).

55. Denying the right to marry denies a person the ability to express an ethical politics with respect to her intimate life. Many couples find moral meaning in the marriage bond, because it expresses willingness and commitment to persevere together, for life, in a way that transcends individual needs and desires. It integrates sexuality as an aspect of a whole self. For those who find meaning in life through relations with others, civil marriage often takes on a spiritual and ethical dimensions.

Affidavit of Thomas Allworth, sworn Feb. 19, 2001, at page 93-g, 93-h; Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 82-84; Affidavit of Barb McDowall, sworn Aug. 15, 2000, at page 72-76; Affidavit of Hedy Halpern, sworn June 13, 2000, at page 32-34; Affidavit of Julie Erbland, sworn Nov. 3, 2000, at page 60-62; Affidavit of Michelle Bradshaw, sworn June 13, 2000, at page 45; Affidavit of Dawn Onishenko, sworn Nov. 3, 2000, at page 56; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336, 347 and 350; D.A.J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (Chicago: University of Chicago Press, 1999) chap. 3; D.A.J. Richards, *Women, Gays, and the Constitution: the Grounds for Feminism and Gay Rights in Culture and Law* (Chicago: University of Chicago Press, 1998) at 234, 383-385.

Exclusion from civil marriage denies freedom of conscience and religion by confining the ethics and religious practice of gays and lesbians to a majoritarian, sectarian standard. It therefore offends s. 2(a).

**iv. Denies Liberty and Security Interests Contrary to Section 7 Guarantee**

56. Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The denial of equal civil marriage contravenes the liberty interest by interfering with decision-making in a manner that denies the human dignity, privacy and individual autonomy of gays and lesbians contrary to s. 7. It also contravenes the security interest because it has a direct, serious effect on the psychological integrity of gays and lesbians in relation to a matter of fundamental importance.

*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 340-344, para. 49-57; *Shephard v. Fancy* (1997), 35 R.F.L. (4<sup>th</sup>) 430 (N.S.S.C.).

**a. The Liberty Interest**

57. “[L]iberty” is engaged where state compulsions or prohibitions affect important and fundamental life choices.” The liberty interest protected by s. 7 of the *Charter* “must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole.” Section 7 protects inherently personal choices that go to the core of what it means to enjoy individual dignity and independence.

*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at 893, para. 66; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307 at 340, para. 49; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 163-172; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368, para. 80.

58. Decisions concerning marriage must fall within this class of protected decisions. As the Supreme Court has recognized, the decision “touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals.” Any common law bar to civil marriage for same-sex couples is

therefore a form of state interference with a decision which should be inherent to the individual. “In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.”

*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 471, para. 95; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368, para. 80.

59. Moreover, the denial of equal marriage infringes on the “freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character ... to be non-conformist, idiosyncratic and even eccentric-- to be, in to-day’s parlance, “his own person” and accountable as such.” One aspect of a free life is the right to choose and develop one's life as a *married* individual. The failure to acknowledge the legal validity of same-sex marriages deprives gays and lesbians of the opportunity for full self-realization and self-fulfilment.

*R. v. Jones*, [1986] 2 S.C.R. 284 at 318-319.

**b. *The Security Interest***

60. In *Blencoe v. British Columbia (Human Rights Commission)*, the Supreme Court confirmed that the s. 7 right to security of the person extends beyond physical deprivations to protect the “psychological integrity of the individual.” “Serious state-imposed psychological stress” resulting from government interference with an individual interest of fundamental importance will contravene the s. 7 guarantee.

*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 343- 344, 356, para. 55-57, 82; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 56, 173.

61. The failure of the government to accord legal recognition to same-sex marriages is the direct cause, and a compelling contributing cause, of serious psychological harms and stresses to individual gays and lesbians. It is also a form of state interference with the psychological

integrity of the spouses, amounting to an unacceptable intrusion into the personal and intimate sphere of the relationship.

When I “came out” as a gay man twenty years ago, ... I felt I was destined to a life of discrimination. I worried I would be a social outcast, and probably grow old alone, not have kids, or get married. It was a very difficult time for me. ... I tried to fight being gay because the future appeared so bleak. However, I came to realize that being gay is simply a fundamental part of who I am.

Affidavit of Mike Stark, sworn June 9, 2000, at page 41; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 349-351, para. 68-73, at 343-344, para. 56-57; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 59-61.

*c. The Principles of Fundamental Justice*

62. This state restriction on the liberty and security of gay and lesbian individuals contravenes the principles of fundamental justice, because it infringes other *Charter* rights and freedoms without any rational governmental justification.

Where the deprivation of [a s. 7] right ... does little or nothing to enhance the state's interest (whatever it may be), it seems ... that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

*Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 594, 607; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 175 .

In this case, no compelling state interest whatsoever is served by the denial of the right to marry, and thus a violation of s. 7 is clear.

**v. Infringes Section 28 of the *Charter***

63. Section 28 states that “notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons”. Exclusion from marriage, which has been shown to be a violation of the freedom of expression, freedom of conscience, freedom of association, and the right to liberty and security of the person, draws a distinction on the basis of an individual’s sex that discriminates in a substantive sense. In this manner, sex discrimination creates the violation of constitutionally guaranteed rights and freedoms. This is contrary to s. 28 of the *Charter*, which guarantees that “[t]he justification for the infringement of a *Charter* right will have to be linked to considerations other than the sex of the party that has established an infringement of his or her *Charter* right.”

*R. v. Hess*, [1990] 2 S.C.R. 906 at 932.

64. The government’s argument demonstrates that the denial of equal marriage, and the infringement of *Charter* rights and freedoms, flows from sex discrimination. The government states that marriage must be between different-sex partners because of the “complementarity” of men and women. This “complementarity” of male and female is unexplained, but it seems that the government wishes to justify discrimination in marriage by asserting that men and women have different “natures” and characteristics, brought together in marriage.

Affidavit of Dr. Koppelman, to be sworn, at para. 13, 25; Affidavit of Dr. Barnes, sworn Nov. 20, 2000, at page 132; Affidavit of Prof. Wolfson, to be sworn, at para. 22, 23, 24; Affidavit of Carolyn (C.J.) Rowe, sworn Nov. 9, 2000, at 64.

65. This thesis is advanced by a comparative religion professor, Katharine Young, who is a witness for the government. She invokes the idea of sexual difference as a strain between men

and women that must be bridged by marriage. Heterosexual marriage is presented as so difficult to maintain that, unless there are coercive barriers to same-sex relationships – like denying access to important social institutions like marriage – all women will become lesbian. This is highly imaginative science fiction fantasy.

66. The idea of “complementary” defined male and female qualities is based on sexist stereotype. Such generalizations about the “essential natures” and characteristics of men and women have traditionally been invoked to justify the exclusion of women from the public sphere. We now recognize that individual men and women can and do possess a wide range of qualities, characteristics, and “essential natures.” The government’s argument is based on undefined, antiquated generalizations about the natures of the sexes – basically, sexist stereotype. Moreover, and as importantly, this analysis again suggests that gay or lesbian couples are somehow “un-complementary”. Whatever that means, the assertion is that same-sex relationships are somehow less good than heterosexual relationships.

67. If s. 28 is infringed because the government seeks to justify the denial of rights and freedoms on the basis of the sex of claimant, the protections of this guarantee are, by the plain language of the section, without limitation. Neither s. 1 nor s. 33 is applicable. Any violation of s. 28 must be corrected.

#### **F. THE INFRINGEMENT IS NOT DEMONSTRABLY JUSTIFIED**

68. As noted previously, where the government relies on a common law rule, the *Charter* is directly applicable. Since the *Charter* is the supreme law of Canada, any law

inconsistent with it, including a common law rule on which government action is based, is of no force or effect. Any common law principle which derogates *Charter* rights must therefore be amended by the courts that fashioned the rule. There is no impugned legislative provision for the court to strike down, read in, or read down, and “[t]here is no room for judicial deference in dealing with the common law: the task of making “difficult choices” falls squarely on the Court.”

*R. v. Swain*, [1991] 1 S.C.R. 933 at 947, 968, 978.

69. A common law rule is simply judge-made law so it is unnecessary to attempt to justify the rights violation. The court may proceed to cure the infringement by fashioning a new rule, which complies with constitutional requirements, without considering s. 1 justifications. In *R. v. Swain*, in the context of examining a common law rule that was found to violate s.7 of the *Charter*, Chief Justice Lamer (as he then was) held that:

[B]ecause this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. ... [I]t could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

... I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not

an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

*R. v. Swain*, [1991] 1 S.C.R. 933 at 978; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at 1171.

70. Since any common-law bar to same-sex marriage is discriminatory, the violation of equality rights may simply be cured by re-fashioning the common law rule without recourse to the usual s. 1 test. In the event this Court does wish to consider s. 1, the Applicant Couples will address the government's purported justificatory rationales by way of their Reply Factum, in accordance with the directions of The Honourable Madam Justice Lang, and appropriately reflecting that the onus is on the government to attempt to justify its discrimination.

**G. REMEDY: *CHARTER* MUST NOT TO BE REDUCED TO EMPTY WORDS**

71. Although remedial issues will be addressed more fully in the Reply, it is important to reiterate at the outset a central theme that runs through the evidence and this Factum. The only means to constitutionally correct the rights violation is to recognize the freedom of same-sex couples to enter into civil marriage itself. Since the violation stems specifically from the denial of equal marriage, any other remedy will fail to vindicate the rights and freedoms of the Applicant Couples.

72. If this Court finds there is no statutory or common law bar, or reformulates the common law, there is no law to be ruled invalid and therefore no possibility of suspension of any declaration of invalidity. The licences must issue and the requested declaration be granted.

73. If the Court instead determines there is a common law rule, and therefore decides this issue on the basis of the violation of *Charter* rights and freedoms, the rule may simply be declared invalid. No suspension of this remedy is appropriate, because there is no threat to the rule of law or public order and no denial of a benefit to deserving persons. In fact, in the circumstances, it would actually defy the rule of law to grant a suspension. The government specifically seeks to suspend the declaration so that it may adopt an unconstitutional “alternative” to equal marriage. If it cannot defeat the Applicant Couples with its legal arguments, it declares that it intends to thwart their equality claim by remedial evasion.

*Schachter v. Canada*, [1992] 2 S.C.R. 679 at 719

74. In *Schachter v. Canada*, the Supreme Court of Canada emphasized that a delayed declaration of invalidity should only be issued in extremely limited circumstances:

A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation.

*Schachter v. Canada*, [1992] 2 S.C.R. 679 at 716

In this case, none of the requirements for a suspension is present. The federal government has already extended the immediate material benefits of marriage to same-sex couples, and provincially, where such recognition has not already been granted, legislatures will be forced to do so as a result of constitutional litigation based on existing principles. Given the extent of spousal recognition, the government cannot argue any threat to the rule of law in immediately recognizing the full equality of same-sex relationships in marriage. Declaring the common law invalid would not result in a deprivation of the benefit to any other group without benefiting the persons whose rights have been violated, because the declaration would simply allow equal access without

discriminatory limitation. Accordingly, there are no legitimate grounds for a suspension of the declaration of invalidity.

75. Whenever a declaration of invalidity is temporarily suspended, the rationale is, as the Court ruled in *Schachter*, “to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations.” In this case, the government is asking for a suspension so that it can consider policy options that will continue to infringe the *Charter* rights and freedoms guaranteed to the Applicant Couples. There is only one option that will comply with the *Charter*: full and equal marriage recognition.

*Schachter v. Canada*, [1992] 2 S.C.R. 679 at 719

76. Accordingly, if gays and lesbians are going to see their rights vindicated, and an end to the numerous egregious harms caused by the denial of a fundamental right, there can be no suspension of the remedy. The Applicant Couples, their children and other gay and lesbian families must finally achieve the full acknowledgment of their human dignity and equal rights by celebration of their relationships in civil marriage.

[G]roups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the *Charter* will be reduced to little more than empty words.

*Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 559-560, para. 122

## H. CONCLUSION

77. The Applicant Couples have demonstrated that same-sex couples must be free to marry since any exclusion of gays, lesbians and bisexuals, an already disadvantaged group, from this fundamental social institution is unconstitutional. In particular, the Applicants have shown:

7. There is no statutory impediment to the issuance of marriage licences to the Applicant Couples or other same-sex couples who otherwise meet the requisite criteria;
8. There is no common law rule preventing the issuance of marriage licences;
9. Even if there was a bar to marriage between persons of the same sex at common law, this Court may reformulate the law to conform with *Charter* values;
10. Further, any common law rule denying equal marriage would be unconstitutional as it would offend the *Charter's* guarantees of equality, freedom of expression, association, conscience and religion, and the right to liberty and security of the person. These many egregious infringements cannot be demonstrably justified in a free and democratic society. The exclusion of same-sex couples serves no pressing, nor even legitimate, governmental objective.
11. Marriage licences must issue to the Applicant Couples.

I have faith that one day I will have the same opportunity to participate in legal marriage in the same manner as straight persons. I have faith that I will not have to prove that I am an intelligent, compassionate human being with the same wants and needs as everyone else. I have faith that society will stop judging people based on their sexual attraction and start looking at the values that we each cherish and believe./

All I wish for is to be treated in the same fashion as my parents, siblings and friends. I am, after all, a human being with the same values and the same capacity to love as anyone.

Affidavit of Gail Donnelly, sworn Aug. 15, 2000, at page 84-85.

#### **PART IV – ORDER REQUESTED**

The Applicant Couples seek:

- (a) An order in the nature of mandamus directing the Clerk of the City of Toronto to issue a marriage licence to each of the Applicant Couples;
- (b) A declaration that any law, policy or practice of government, whether federal, provincial or municipal, that restricts otherwise lawful marriages between two persons of the same-sex is contrary to the *Canadian Charter of Rights and Freedoms* and of no force or effect;
- (c) Costs of this Application for Judicial Review on a total indemnity basis payable by Canada and Ontario; and
- (d) Such further and other relief as this Honourable Court deems just.

SUBMITTED THIS 28<sup>TH</sup> DAY OF AUGUST 2001,

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