Court File No. 684/00

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

HALPERN *et al.*

Applicants

and

CANADA (A.G.) *et al.*

Respondents

Court File No. 39/2001

AND BETWEEN:

MCCT

Applicant

and

CANADA (A.G.) *et al.*

Respondents

SUPPLEMENTAL AFFIDAVIT OF WILLIAM N. ESKRIDGE, JR.
(Sworn August 2, 2001)

1. I am over the age of 18 years and am competent to testify to the matters contained herein. My professional background and qualifications to give evidence in the above-captioned case are set forth in Exhibit A, attached to my Affidavit of November 14, 2000, filed in this proceeding. I shall hereinafter refer to that affidavit as "First Eskridge Aff." This Supplemental

Affidavit will update the First Eskridge Affidavit and respond to factual and normative points raised in several affidavits filed by the government in the above-captioned proceeding.

A New Development: The Netherlands Has Legally Recognized Same-Sex Marriages

2. One purpose of this supplemental affidavit is to update my initial affidavit.

3. The Netherlands has become the first modern western state to recognize same-sex marriages as a matter of law. As amended by the Act on the Opening up of Marriage, Article 30(1) of the Dutch Civil Code now provides, "A Marriage can be contracted by two persons of different sex or of the same sex."[1] A new Article 77a sets forth procedures by which couples can convert their registered partnerships into marriages. It is estimated that as many as a half of the same-sex registered partners in The Netherlands plan to convert their partnerships into marriages. Shortly after midnight, April 1, 2001, Amsterdam Mayor Job Cohen presided over a wedding ceremony that converted the registered partnerships of four lesbian and gay couples into marriages, as allowed by the new law.

Response to the Affidavits of Katherine Young, John Witte, Jr., Sanford Katz, and Dwight Duncan

4. Another purpose of this supplemental affidavit is to respond to assertions made in the Affidavit of Katherine Young ("Young Aff."); the Affidavit of Dwight Gerald Duncan ("Duncan Aff."); the Affidavit of John Witte, Jr. ("Witte Aff."); and the Affidavit of Sanford N. Katz ("Katz Aff."), all filed in this proceeding by the attorneys for respondent, the Attorney General of Canada. My discussion in this part will focus on matters of likely historical fact and U.S. law that are presented or disputed by the affiants.

Many (More Than "A Few") Societies and Religions Have Recognized Same-Sex Marriage

5. The major theme of KatherineYoung's affidavit is that there is a "universal norm" whereby marriage can only be an "opposite-sex relationship intended to encourage the birth (and rearing) of children," Young Aff. ¶ 74; see id. ¶ 1. My earlier affidavit presented evidence that this is not the case: many cultures have clearly recognized same-sex relationships as (their cultures' equivalent of) marriages, and there is some but not conclusive evidence as to many more cultures. The Young Affidavit ¶ 101 says that "William Eskridge's purported examples of same-sex marriage have very limited value, because they only involve *a few examples or mere analogies to marriage*." (Emphasis supplied.) This is not true, and the little evidence Professor

[1] The Netherlands Civil Code, Book 1, art. 30(1), added by Act of 21 December 2000 concerning the opening up of marriage for persons of the same sex, *Staatsblad* 2001, nr. 9 (11 Jan. 2001). An unofficial translation of the Act on the Opening up of Marriage can be found at <rulijs.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html>.

Young presents does not support her proposition.

6. In my first affidavit, I provided evidence of dozens of cultures in which actual marriages were clearly recognized between persons of the same sex. (See, First Eskridge Aff. ¶ 16); (id. ¶¶ 17-18); (id. ¶ 27); (id. ¶ 29); (id. ¶ 30 n.40); (id. ¶ 32); (id. ¶ 35);(id. ¶ 38); (id. n.55); (id. ¶ 39); (id. ¶ 39). This is significantly more than "a few examples" of same-sex marriage. Professors Ford and Beach listed 49 societies which tolerated same-sex intimacy, many of which also recognized that such behavior occurs within the context of marriages (id. ¶ 32; see Duncan Aff. ¶ 16, listing such cultures). None of the four affidavits listed in ¶ 4 denies the social facts that these cultures recognized same-sex marriages.

7. For example, in ¶ 81 of her affidavit, Professor Young agrees that "some" Native American societies recognized same-sex marriages; there in fact have been many. But Professor Young then claims that "at least some [of the Native societies] limited the number of these marriages." She cites one source for this proposition, Robert Baum, "Homosexuality and the Traditional Religions of the Americas and Africa," in *Homosexuality and World Religions* 11-12 (Arlene Swidler ed. 1993), but the source does not support her assertion. Professor Baum does not quite say, as Professor Young suggests, that the Mohave "controlled" the number of berdaches; he says, instead, that ritual and dreams (by four other men as well as the berdache) were a key part of the transition of a man to a berdache. Professor Young then says the Lakota berdaches "were not allowed to marry each other; they could become only the second 'wives' of other men." This is a misstatement. Professor Baum actually (p. 12) says this:

> Transgendered men and women often married people of the same sex. Such marriages have been described as early as the midsixteenth century. Their spouses were considered heterosexual, because they had married people of a different gender. There appears to have been little stigma attached to such marriages. For example, the distinguished Lakota warrior and religious leader, Crazy Horse, had two *winkte* [berdache] wives. Usually male berdache became second wives of their husbands, because reproduction was an essential part of most households. As second wives, berdache engaged in sexual relations with their husbands and assisted the women in household work. They were also allowed to adopt children. Female berdaches were more likely to enter into monogamous marriages [with women]. ... Among the Lakota, it was important that the transgendered woman, *koskalata*, be ritually bound to her mate with the blessing of the goddess Double Woman ... .

The Baum article – the only source cited by Professor Young – does not support her position. Moreover, the dozens of articles and books cited in First Eskridge Aff. ¶¶ 27-32 refute Professor Young's unsubstantiated attempt to marginalize berdache marriages. At most, my sources would support the narrower point that not all Native American cultures recognized such marriages – but *many* [several dozen] did.[2]

[2] Duncan Aff. ¶ 24 refers to an earlier article Duncan and a co-author wrote on the historical evidence for same-sex marriage, including Native American marriages between berdaches and persons of their same sex. Peter Lubin & Dwight Duncan, "Follow the Footnote or the Advocate as

8. Young Aff. ¶ 82 and Duncan Aff. ¶¶ 26-27 concede that at least two Roman emperors (Nero and Elagabulus) married men but seek to trivialize that concession as a socially disapproved "royalty exception" to ordinary rules for marriage. As I had originally emphasized, First Eskridge Aff. ¶17, Suetonius, Dio Cassius, and Tacitus did not approve of these marriages; see Duncan ¶¶ 28-33 for an exaggerated version of this assertion. These Roman historians were moralists, whose disapproval may or may not have reflected wider social attitudes, but no one disputes the facts they reported: there were legal same-sex marriage ceremonies during the imperial era. Moreover, there is evidence that contemporaries did approve of the relationship between Hadrian and Antinous, see First Eskridge Aff. ¶ 17 & n.20, a fact that Duncan does not dispute. Citing an authority written 300-400 years after the same-sex marriages in question, Duncan Aff. ¶ 34 & n.18 says that the Emperor was "not bound by statutes" and therefore maintains that same-sex marriage was not "commonplace" during Roman times. Id. ¶ 43. This misunderstands the claim I made in First Eskridge Aff. ¶ 18: "Other evidence indicates that same-sex marriages were not limited to imperial fiat." That claim is supported by the evidence I cited, and the leading historian of the period reads the evidence the way I do. Eva Cantarella's *Bisexuality in the Ancient World* (1992), is a scrupulous review of the evidence for Rome. She addresses the precise issue raised by Duncan and concludes that same-sex relationships and marriages were customary among the Romans well into the first century A.D. She says (id. at 162):

> The nature of ordinary people's behaviour has already emerged from our reading of the *Satires* of Martial and Juvenal. Leaving aside the exaggerations inevitably linked with this literary genre, which describes and castigates their customs, the Romans at this time obviously cultivated habits which fell nothing short of those of their more powerful fellow citizens [i.e., the emperors and nobility].

See also id. at 148-56 (Cantarella's discussion of Martial and Juvenal, including their personal disgust with men who took the role of wives in relations and marriages with other men).

Historian of Same-Sex Marriage," 47 Catholic Univ. L. Rev. 1271, 1290-99 (1998). The article is an attachment to the Duncan Affidavit. In this article, Lubin and Duncan (id. at 1291-92 & n.102) miss most of the important points of George Devereux's "Institutionalized Homosexuality of the Mohave Indians," 9 Human Biology 498, 520 (1937), because they emphasize Professor Devereux's personal opinion that berdaches and their marriages were an "abscess of fixation." The apparent editorializing by Professor Devereux – who was writing in the most antihomosexual decade of the last century, the 1930s – ought to be discounted, and his factual reporting of the Mohave's attitudes emphasized. Thus, while Professor Devereux seems personally disgusted by "homosexuals" and most approving of "normal sexuality," id. at 520, he was scholarly enough to report that the Mohave themselves had "little or no objection to homosexuality," id. at 498. More important, he reports that male berdaches were socially accepted as spouses for men, id. at 511, 513-14, and female berdaches were accepted as spouses for women, id. at 514-15, although Professor Devereux claims these marriages were less stable than male-female ones. Id. Lubin & Duncan, *supra*, at 1292-95, also question whether berdaches were "homosexuals." Native cultures did not have a concept of "homosexuality" that modern western culture does; once the western concept colonialized Native culture, the berdache tradition did decline, Williams, *Spirit and Flesh*, *supra*, at 175-200, although it survives to this day. See id. at 201-29.

9. In addition to the cultures which clearly recognized same-sex marriages referred to at ¶ 6 of this Supplemental Affidavit, there are additional examples where there is more indirect evidence of socially recognized same-sex marriages or socially accepted same-sex unions. (See, First Eskridge Aff. ¶¶ 11-12); (id. ¶ 13); (id. ¶ 14 & n.9); (id. ¶¶ 15-16); (id. ¶¶ 23-25); (id. ¶¶ 34-35); and (id. ¶¶ 36-37). In my initial affidavit, I did not present any of these unions as unequivocal examples of same-sex *marriages*, and so I agree with the general claim in Young Aff. ¶ 84, that these examples are ambiguous. Ambiguity, of course, means that they may have been same-sex marriages, but we cannot know with the level of certainty we have for the societies identified in ¶ 6 of this Supplemental Affidavit. The examples listed in this paragraph are either possible examples of marriage (Egypt, Mesopotamia, Hittites, Medieval Christianity) or are social analogues (Japanese and Greek warrior unions, relationships in China).[3]

The History of Marriage in the West Reflects Evolution Away from the Natural Law Model Insisted Upon by Professor Young

10. The affidavit of John Witte, Jr. makes many valid historical points. For example, Professor Witte says that "pre-Christian Roman law and culture, both in the Republic and the Empire, sometimes tolerated such sexual practices as fornication, concubinage, sodomy, polygamy, and homosexual relations." Witte Aff. ¶ 22. This is a fair characterization, but could be stated more neutrally. Professor Cantarella maintains that the late Republic and the early Empire were quite friendly to same-sex intimacy and households, even going so far as to call them marriages. Cantarella, *Bisexuality in the Ancient World, supra*, at 139-76. She cogently argues that this tolerance steadily eroded as the Empire declined, and that both Christian and non-Christian philosophers in the period 100-500 A.D. embraced marriage between a man and a woman as the exclusive norm. See id. at 186-203.[4]

11. As Professor Witte observes, the Roman Catholic and Protestant traditions followed a relatively rigid conception of proper sexual conduct and marriage. That tradition dictated civil marriage rules in Canada and other western countries until the nineteenth century. The rules entailed by that tradition were not only that the couple consist of a biological man and biological

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[3] Professor Young found herself confused that I did not label all my examples as marriages (Young Aff. ¶ 87). I refer her and this Court to the definitions I laid out in my original affidavit, distinguishing same-sex *marriages* from *relationships*. Same-sex *unions* include both categories and is itself therefore an omnibus category. See First Eskridge Aff. ¶ 4. I make and document the claim of same-sex marriages for the examples in ¶ 6 and make at most a possible claim for some of those in ¶ 8.

[4] Thus, the Christian tradition regarding marriage was as much influenced by non-Christian influences as by that religion's Scriptural heritage. For example, Christ Himself was not married, nor were most of His Apostles; He spoke very little about that institution and never said a critical word about people attracted to persons of their own sex. Moreover, the Christian tradition of marriage is complicated by the undisputed existence of enfraternization liturgies described in First Eskridge Aff. ¶¶ 23-25.

woman, but also that marriages be preceded by formal betrothals and (in some states) published banns; that marriage not be between first cousins or other persons related by blood or family affiliation identified in the Mosaic law; that persons who were impotent, sterile, or diseased could not marry, or their marriages could be annulled; that married couples could not divorce except upon a showing of specified cause; and that sexual conduct outside marriage – including fornication or sodomy between unmarried persons – and antiprocreative conduct inside or outside marriage – namely, contraception and abortion – were serious criminal offenses. Witte Aff. ¶ 56.

12. Professor Witte further argues that an "Enlightenment contractarian model of marriage was adumbrated in the eighteenth century, elaborated theoretically in the nineteenth century, and implemented legally in the twentieth century." Id. ¶ 57. Under this model, the "essence of marriage . . . was not its sacramental symbolism, nor its covenantal associations, nor its social service to the community and commonwealth. The essence of marriage was the voluntary bargain struck between two parties who wanted to come together into an intimate association." Id. "On the strength of these contractarian convictions, Enlightenment thinkers advocated the abolition of much that was considered sound and sacred in the Western legal tradition of marriage." Id. ¶ 58.

13. Thinking about marriage changed within both churches and governments in the West as a result of the Enlightenment approach. For the two most prominent examples, both church and state in North America have abandoned traditionalist views that the wife and children are under the formal legal control of the husband and that people of different races or with little income cannot marry. See Nancy Cott, *Public Vows: A History of Marriage and the Nation* (2000). A third rule, the bar to same-sex marriages, is now being challenged, based on the same pro-choice philosophy. "Homosexual, bisexual, and other intimate associations have gained increasing acceptance at large, and at law." Witte Aff. ¶ 62.

14. Professor Witte's affidavit suggests a problem with the normative relevance of Professor Young's affidavit. Even if, as she erroneously claims, few cultures in world history recognized same-sex marriages and even if we strike every example of such marriages listed in ¶ 6 of this Supplemental Affidavit, same-sex marriage could be defended as a normative matter along the Enlightenment lines described by Professor Witte. That is, if lesbian and gay couples – couples that dared not speak their names until the last generation even in relatively tolerant Canada – could benefit from the commitment and child-rearing protections of civil marriage, e.g., Robert Champagne, *Jim Egan: Canada's Premier Gay Activist* (1987) (describing such a couple and their legal campaign for state recognition); note 12 above, then the contractarian philosophy of the Enlightenment would require that the state extend this option to them. This is the logic that impelled Denmark and other countries to adopt registered partnership laws, see First Eskridge Aff. ¶ 64, and The Netherlands to recognize same-sex marriages this year.

15. The logic of Professor Witte's affidavit has a broader reach, for the great religions Professor Young trumpets as supporting her "universal norm" of man-woman-only marriage are

themselves now debating the issue of same-sex marriage under the premises of their traditions. The Metropolitan Community Churches (MCC) have been conducting same-sex marriage ceremonies for more than 30 years. William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 193-96 (1996) (appendix). The MCC are not traditional mainstream churches, for they were founded within the Judeo-Christian tradition to minister to gender and sexual minorities, but more established churches have been moving in the same direction. Unitarian Universalist, Congregational, Methodist, Presbyterian, and Apostolic Churches have performed same-sex marriage ceremonies within their religions, as have Roman Catholic priests and Reformed Jewish rabbis. See id. at 196-210, 213-15. Quaker meetings all over the country sanction same-sex marriages or unions. See id. at 210-13. Although few traditional denominations formally allow same-sex marriages as a matter of course, the movement of religious opinion on this issue has been (slowly) toward recognition. The closest parallel to this steady movement of religious opinion was the abandonment by American religions of their opposition to different-race marriage in the twentieth century. In short, Professor Young's "universal norm" of no-same-sex-marriage is not universally recognized and is increasingly under question even within the organized religions Professor Young touts as exemplars of that norm (Judaism, Roman Catholicism, Protestantism).

16. Professor Witte also says there has been a "growing reaction to *undue* contractualization in marriage, particularly in the United States." Witte Aff. ¶ 62. Most of the criticism of "undue" contractualization has been to no-fault divorce, which undermines the married couple's mutual commitment by making exit assertedly too easy and which has contributed to a paupered underclass of deserted mothers and children. I can see the logic of that objection, from the perspective of the unitive as well as procreative goals one might attribute to marriage. I do not see the logic of excluding loving and committed lesbian and gay couples from this institution. Such couples would strengthen rather than weaken the institution.

The Modern Unitive Goal of Marriage Is Equally Applicable to Same-Sex Couples

17. Professor Katz's affidavit surveys some of the American judicial decisions rejecting or (nowadays) accepting constitutional arguments against state bars to same-sex marriages. Based on his survey, however, Professor Katz maintains that family law in the United States is developing "two models of committed and regulated adult relationships: marriage and domestic partnerships. Marriage as a heterosexual relationship is being affirmed. Domestic partnership as a relatively new model is designed to meet the economic and social needs of persons who do not meet the statutory requirements for marriage but have decided to live together in committed relationships." Katz Aff. ¶ 63. This is not a blatantly wrong characterization of developments in the United States, but I think Professor Katz's account requires supplementation and an occasional correction. More important, the parallel between U.S. and Canadian constitutional law that is implicit in the Attorney General's offering of Professor Katz's affidavit is inapt and, in my opinion, offensive to Canada and its tradition of tolerance.

18. Professor Katz's account of the history of same-sex marriage litigation in the United States is incomplete in some respects. For example, his dichotomy between domestic partnership (gays) and marriage (straights) is wrong and unstable. It is wrong, in part because most domestic partnership laws are open to straight couples, as are other new institutions that are being created in the United States, such as reciprocal beneficiaries in both Hawai'i and Vermont. It is unstable, because the trend in the United States (slow but sure) and in Europe is toward state recognition of same-sex relationships, and Professor Katz gives the Court no reason to believe that this trend will not result in recognition of same-sex marriages in some states. This is, for example, precisely what happened in The Netherlands, which recognized registered partnerships in 1998 and then added same-sex marriage this year.

19. Professor Katz's affidavit leaves the reader with the impression that the U.S. Supreme Court's "right to marry" cases have reaffirmed the natural law idea of marriage as man-woman, with a goal of procreation. Katz Aff. ¶¶ 15-21. One caption reads: "Marriage is a heterosexual institution." To make his case, however, Professor Katz omits any mention of the most recent Supreme Court right to marry decision and therefore misleads the reader into thinking that the Supreme Court insists on traditional marriage as the baseline. In *Turner v. Safley*, 482 U.S. 78 (1987), the U.S. Supreme Court extended the right to marry to state prisoners and, without dissent, overturned a barrier (but not a bar) to marriages by prison inmates. The Court's articulation of the right to marry in *Turner* emphasized the unitive rather than procreative goals of marriage. Even prisoners who could not sexually consummate their marriages could derive myriad spiritual and legal benefits from such unions, including "expressions of emotional support and public commitment," "spiritual significance," sexual consummation (for most inmates), and "government benefits" such as social security and property rights. Id. at 95. *Turner* is a key case, in part because it characterized the goals of civil marriage in terms that Professor Witte's typology would consider "Enlightenment" rather than "Tradition." The goals of civil (not necessarily religious) marriage are state reinforcement or reward for the couple's interpersonal commitment. Those goals, of course, apply to same-sex couples just as they do to different-sex couples. *Turner* is also a key decision, because it is a governing Supreme Court precedent that arguably supersedes traditionalist state court decisions seeking to protect traditionalist marriage against liberalization (see Katz Aff. ¶¶ 25-30). Finally, the contrast between *Turner* and Professor Katz's general stance is striking: a convicted rapist has a presumptive right to marry a woman whom he might brutalize and rape (*Turner*), while loving and committed lesbian and gay couples have no such right (Professor Katz). Is this a defensible constitutional regime?

20. The Katz Aff. ¶¶ 41-45 also responds to what is called the "sex discrimination argument for same-sex marriage," which draws on the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). The Court in *Loving* ruled that the state could not deny a black-white couple a marriage license because of the *race of one partner*. Thus, a black person could marry another black person, but the same black person could not marry a white person. Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 *NYU L. Rev.* 197 (1994), persuasively argues that the same-sex marriage bar is *sex discrimination*

in the same way that the different-race marriage bar was *race discrimination*. When the state denies a marriage license to a woman because she wants to marry another woman, but would give her the license if she wanted to marry a man, that is discrimination because of the sex of one partner. Because the U.S. Constitution has been construed to render sex a quasi-suspect classification – almost as suspicious as race – Professor Koppelman maintains that the same-sex marriage bar must be supported by strong state justifications, such as third-party harms which the state cannot produce.[5]

21. Professor Katz responds to the miscegenation analogy in two ways. First, he says that race is not an essential characteristic of marriage, while sex is. Katz Aff. ¶ 44. That response is factually false as to sex: the cultural recognition of same-sex marriages all over the world (including Native American tribes in Canada and the U.S. and now in The Netherlands) undermines his confident assertion that sex-based discrimination is "essential" to civil marriage. The response is normatively false as to race: Virginia had always considered race discrimination essential to its normative vision of marriage; its courts held that such marriages were unnatural and would create a "mongrel race." See Eskridge, *Case for Same-Sex Marriage* 154-59 (reporting the justifications for anti-miscegenation laws in Virginia as well as most other states for most of American history). The analogy eerily holds up. Professor Katz responds, second, that the goal of anti-miscegenation laws was to affirm and enforce the superiority of the white race, while the goal of same-sex marriage bars is not to affirm and enforce the superiority of men over women. As a practical matter, Professor Koppelman has shown that same-sex marriage bars do have that effect: same-sex marriage would have particularly liberating effects for women and would undermine the functional inequality that persists in most different-sex marriages. See also William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 218-28 (1999), which makes this point in greater detail. In any event, the same-sex marriage bar certainly affirms the superiority of straight over gay relationships, a goal that is questionable under Canadian Charter jurisprudence.

22. I am impelled, finally, to ask a question that Professor Katz also neglects: What is the relevance of United States Supreme Court and state court opinions on same-sex marriage for Canada? The analogy between U.S. equal protection law and Canadian law interpreting section 15 of the Charter is an analogy that does not hold up under neutral scrutiny. As to matters of sexuality and gender equality, the United States is a poor model. The United States allows gay men and lesbians to be arrested and discriminated against in many jurisdictions because of their identities or their consensual conduct.[10] The United States excludes bisexuals, lesbians, and gay men from its armed forces. The United States has no national law prohibiting discrimination on the basis of sexual orientation as to any private actor (several states and many cities have such laws). The United States has a number of statutes explicitly discriminating on the basis of sexual

[5] Although Professor Katz does not cite Professor Koppelman's article – easily the leading treatment of this issue – and instead limits his reference to doctrinaire, arguably sectarian scholarship which has tried to limit the equality principle of *Loving* (see Katz Aff. nn.57-58, 62-63), he also, to his credit, says that "the great majority of academic literature ... apparently endorses this analogy." Id. ¶ 41.

orientation, including DOMA and the military ban. The United States openly discriminates on grounds of sexual orientation in its funding of the arts. This antigay track record is in striking contrast to the legislative record in Canada, which does not discriminate on the basis of sexual orientation and prohibits most private enterprises from doing so as well. The stand Canada and its Supreme Court have taken against antigay prejudice is an example the United States ought to follow, not vice-versa.

23. If this Court and other Courts in Canada wish to look to practice outside your country, I respectfully urge you to take a truly transnational rather than narrowly American perspective. See Regina v. Keegstra, [1990] 3 S.C.R. 697 (rejecting U.S. approach to hate speech and following international consensus more protective of victims). Countries most like Canada in tolerating sexual and gender minorities (The Netherlands, Denmark, Sweden – not the United States) have recognized either same-sex marriage or its equivalent. One reason is that treating lesbian and gay relationships as second-class disrespects a productive group of citizens who are no longer willing to accept unequal treatment. Another reason is that these other countries are not willing to credit religious, sectarian arguments as a basis for gross discriminations against sexual and gender minorities.[11]

Concluding Thoughts

24. A feature shared by the affidavits of ProfessorsYoung, Katz, and Duncan is a problematic understanding of tradition and its relationship to norms and law in a changing society. Professors Young and Duncan, most of all, view tradition as static, when in fact it is evolutive. Roman tradition was once acquiescent in same-sex relationships, later recognized them as marriages (at least in some instances), and then prohibited them with a vengeance.[6] Professors Young and Duncan view other cultures through their own lenses, simplifying traditions of those cultures and attributing homophobic attitudes that are either inappropriate or anachronistic. Thus, while the most salient tradition in most cultures has been different-sex marriage, the goals of marriage and the understanding of gender role have been capacious enough to include same-sex couples, such as *berdaches* and their same-sex spouses.

24. As before, I hope the foregoing information and analysis are helpful to the Court, and to the state as well. I appreciate the opportunity to share my further thoughts.

[6] In contrast, Professor Witte understands that tradition is evolutive and presents a nuanced account of the evolution of modern Christian thinking about marriage and its adaptation to Enlightenment thinking.

I solemnly affirm, under the penalties of perjury, that the contents of the foregoing paper are true based on my knowledge, information, and belief.

Sworn before me at the City of)
Toronto , in the Municipality of Metropolitan)
Toronto)
on August 2, 2001)
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WILLIAM N. ESKRIDGE, JR.

Commissioner for Taking Affidavits

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