Court File No.: C39172
Court File No.: C39174

**ONTARIO COURT OF APPEAL**

B E T W E E N :

**HEDY HALPERN and COLEEN ROGERS,**
**MICHAEL LESHNER and MICHAEL STARK,**
**MICHELLE BRADSHAW and REBEKAH ROONEY,**
**ALOYSIUS PITTMAN and THOMAS ALLWORTH,**
**DAWN ONISHENKO and JULIE ERBLAND,**
**CAROLYN ROWE and CAROLYN MOFFATT,**
**BARBARA MCDOWALL and GAIL DONNELLY and**
**ALISON KEMPER and JOYCE BARNETT**

Applicants
(Respondents in Appeal)

and

**ATTORNEY GENERAL OF CANADA,**
**THE ATTORNEY GENERAL OF ONTARIO and**
**NOVINA WONG, THE CLERK OF THE CITY OF TORONTO**

Respondents
(Appellant)

and

**EGALE CANADA INC.,**
**METROPOLITAN COMMUNITY CHURCH OF TORONTO,**
**THE INTERFAITH COALITION ON MARRIAGE AND FAMILY AND**
**THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO**

Interveners

# FACTUM OF THE ATTORNEY GENERAL OF CANADA IN REPLY IN THE APPEALS AND RESPONSE TO THE CROSS-APPEALS

- and -

B E T W E E N :

**METROPOLITAN COMMUNITY CHURCH OF TORONTO**

Applicant
(Respondent in Appeal)

and

**ATTORNEY GENERAL OF CANADA and**
**THE ATTORNEY GENERAL OF ONTARIO**

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**THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO**

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# REPLY IN THE APPEALS

## PART I - OVERVIEW

1. Canada replies to the Responses of the *Halpern et al.* couples and MCCT on three issues:

(a) the mischaracterization of Canada's legal arguments regarding s. 15;

(b) the arguments of both Respondents regarding a freedom to marry; and

(c) the *Halpern et al.* couples' arguments on s.1 of the *Charter*.

## PART II - FACTS

### A. EVIDENCE

#### 1) Improper Attempts to Introduce Fresh Evidence

2. In their Responses, both the *Halpern et al.* couples and MCCT improperly attempt to introduce fresh evidence in their respective facta.[1] It is submitted that the Court should ignore all of this evidence.

#### 2) Improper Characterization of Canada's Evidence

3. The *Halpern et al.* couples mischaracterize Canada's evidence in a number of different and objectionable ways:

- Three affidavits prepared by the Interveners, the Association for Marriage and the Family in Ontario and the Interfaith Coalition on Marriage and Family, are misrepresented as part of Canada's evidence;[2]

- They assert that Canada's evidence portrays marriage as an institution that has been unchanging over time.[3] To the contrary, Canada's evidence portrays marriage as an institution that has evolved and changed tremendously over the

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[1] *Halpern et al.* couples factum, para. 64; MCCT factum, paras. 34, 39, 41, and footnotes
[2] *Halpern et al.* couples factum, para. 21
[3] *Halpern et al*. couples factum, para. 27

last 500 years, highlighting the single aspect that has remained constant – its opposite-sex nature;[4]

- They assert that Canada's evidence is children may be at risk.[5] Dr. Steven Nock's evidence does not contain any such claim. Rather, he states that no conclusion at all is possible at this time, because the 21 studies relied on to date do not meet the rigours of research methodology.[6] Canada's evidence neutralizes the unwarranted categorical statements of Drs. Bigner, Stacey and Biblarz, and removes this issue from the case;

- They assert that Canada's evidence establishing marriage as an opposite-sex institution is "empirically false"[7], but fail to address Canada's expert evidence of Drs. John Witte or Katherine Young, Bea Verschraegen, and Professors Stephen Cretney and Sanford Katz. Further, their assertion that Canada's argument about the nature of marriage is based on religious, majoritarian views[8] ignores the extensive objective historical, social and anthropological evidence of these witnesses and the others;

- They assert that a recent poll establishes that 65% of Canadians support equal *marriage* for same-sex couples, whereas the referenced poll establishes that 65% of Canadians support "equal *access* to marriage for same-sex couples".[9] (Italics added.) A poll that directly asks whether Canadians agree with the current opposite-sex definition of marriage showed that 67% support it;[10] and

- They characterize Canada's evidence about the possible consequences of changing the opposite-sex nature of marriage as "highly imaginative speculation", and a "flimsy footing" for not making the change.[11] Canada's evidence in this regard is expert opinion evidence of a prognostic nature, based on social and historical parallels, which was provided in support of the submission that a change warrants caution.[12]

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[4] **Affidavit of Edward Shorter**, Respondent's Record, Volume 2, Tab C-1, pp. 394-395, paras. 2-3
[5] *Halpern et al*. couples factum, paras. 40 & 143-144
[6] **Affidavit of Stephen Nock**, Respondent's Record, Volume 5, Tab L, pp. 1523-1524, paras 1-4
[7] *Halpern et al*. couples factum, para. 64
[8] *Halpern et al*. couples factum, paras. 67-68
[9] *Halpern et al*. couples factum, para. 65
[10] Respondent's Record, Supplementary Volume 3, Tab N-3, pp. 964-965
[11] *Halpern et al*. couples factum, para. 160
[12] **Affidavit of Edward Shorter**, Respondent's Record, Volume 2, Tab C-1, pp. 452-459, paras. 114-128, **Affidavit of Katherine Young**, Respondent's Record, Volume 2A, Tab F, pp. 737-744, paras. 102-115, **Affidavit of Douglas Allen**, Respondent's Record, Volume 4, Tab I, pp. 1278-1290, paras. 21 to 49

## PART III - ARGUMENT

### A. MISCHARACTERIZATION OF CANADA'S S. 15(1) ARGUMENT

4. The *Halpern et al.* couples seriously mischaracterize Canada's s.15(1) argument in two significant ways:

- They misunderstand Canada's submissions on equality rights as premised on "definitional preclusion" – that is, the intentional exclusion of classes of people by imposing definitional boundaries,[13] founded in this case on the discriminatory intent to privilege opposite-sex relationships at the expense of same-sex relationships;[14] and

- They misinterpret Canada's submissions regarding the *Halpern et al.* couples' personal perspectives in the application of the s.15 tests set by the Supreme Court.

5. With respect to the first point, Canada does not depend in any way on an argument of "definitional preclusion". Neither is the case based on semantics; rather, it is rooted in "difference" that flows from the existing biological and social realities.[15] The foundation of Canada's submission is the nature of the institution itself and its role and purpose as a very particular kind of human relationship – a publicly committed monogamous opposite-sex union. This foundation is overwhelmingly supported by the evidence filed by Canada, demonstrating its rich and complex social, historical and anthropological basis. This understanding of marriage has always been, and continues to be, constant across cultures and religions. As such, Canada's argument is properly characterized, not as "definitional preclusion", but as contextual and purposive precision – based in the evidence, history and the law.

6. With respect to the second mischaracterization, Canada has never argued that the *Halpern et al.* couples' feelings are "unreasonable and illegitimate", or that they are "simply irrational".[16] These allegations constitute gross distortions of Canada's argument. Correctly, Canada argued[17] that a contextual approach properly begins with the perspective of the claimants, which has to be taken *into account*. However, this subjective perspective then must be assessed objectively, requiring a

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[13] *Halpern et al*. couples factum, paras. 54–77
[14] See, in particular, *Halpern et al*. couples factum, para. 56
[15] ***Egan v. Canada***, [1995] 2 S.C.R. 513 at 536, para. 21, per LaForest J; see also ***Lavoie v. Canada***, 2002 SCC 23 ¶ 107-108, per Arbour J.
[16] *Halpern et al*. couples factum, paras 104–106

"contextualized look".[18] Contrary to the view of the Intervener, Canadian Human Rights Commission (CHRC) [19], context is a broad concept that includes not only the personal experiences of the couples but also the extensive societal experience with marriage.[20]

7. Canada submitted that the failure of LaForme J. to conduct an objective and contextualized assessment of the claimant's perspective, and his consequent findings about the institution of marriage by reference to those subjective feelings *exclusively*, constituted an error. Although the *Halpern et al.* couples' attempt to mischaracterize and discredit Canada's arguments, Canada does not in any way demean, belittle or de-legitimize the feelings of the *Halpern et al.* couples. However, the Court is required to put those feelings in a proper context, and scrutinize them in accordance with the tests set down by the Supreme Court of Canada.

## B. FREEDOM TO MARRY

8. Canada appealed against the legal error of LaForme J. in conflating a freedom analysis with the equality rights analysis, by applying an unfounded *assumption* of a general "freedom to marry" (without a proper s.2(a) analysis) to his s.15(1) analysis. MCCT did not respond to the substance of this specific appeal ground, but raised the full issue of a freedom to marry under ss.2(a), 2(d) and s.7 of the *Charter*, which is answered here. Although the *Halpern et al.* couples never argued a claim of "freedom to marry" under s.2(a), in their Response they now rely on this "freedom" in their s.15(1) analysis, falling into the same error as LaForme J. More erroneously, the couples have asserted[21] that their "fundamental right to marry" has been "acknowledged" by the Supreme Courts of Canada and the U.S., and international law.

9. The issue of a freedom to marry begs the question in this case. First, any Canadian decision that might imply a freedom to marry was made in the context of

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[17] Factum of the Appellant, the Attorney General of Canada ("AGC"), paras. 68–73
[18] ***Lavoie v. Canada***, 2002 SCC 23 ¶ 46, per Bastarache J.
[19] CHRC factum, paras. 14-26
[20] See the following cases for examples of when the subjective views of the claimant(s) did not meet the s.15 test: ***Law v. Canada***, [1999] 1 S.C.R. 497 at 560, para. 104; ***Winko v. B.C.***, [1999] 2 S.C.R. 625 at 685-6, para. 97; ***Delisle v. Canada***, [1999] 2 S.C.R. 989 at 1024-5, para. 45, per Bastarache J.; ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 at 1002, para. 90; ***Nova Scotia v. Walsh***, 2002 SCC 83 ¶ 62; ***Gosselin v. Québec***, 2002 SCC 84 ¶ 69
[21] *Halpern et al*. couples factum, paras. 41-43, 100 and 117–120

opposite-sex unions. Second, in the U.S., in spite of the 36 year old decision of *Loving v. Virginia*[22], relied on by both Respondents, no state in the United States provides recognition of same-sex marriages and no U.S. Court and no U.S. Court has ever ordered such recognition based on the 14th amendment.[23] (Canadian decisions that rely on this case have never drawn this conclusion from it either.[24]) The Superior Court of the Commonwealth of Massachusetts recently reaffirmed this point in a counterpart case to present one:

> Thus, based on the history discussed above and actions of the people's elected representatives, this court cannot conclude that "a right to marry is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institution. Neither …. is a right to same-sex marriage … implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed".[25]

10. Third, international law has denied any similar claim based on a freedom to marry. In the recent decision of the UNHRC (July, 2002), the claim was dismissed against New Zealand for its refusal to provide marriage for same-sex couples. The UNHRC established that the purpose of the freedom to marry provided by the *Covenant on Civil and Political Rights* was "to recognize as marriage only the union between a man and a woman wishing to marry each other".[26]

11. A freedom to marry does not exist on any *Charter* ground. Ss.2(a) and (d) guarantee freedom *from* state interference, not freedoms *to* demand state action. Canada's submissions to MCCT's appeal based on the s.2(a) right to freedom of

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[22] ***Loving v. Virginia***, 388 U.S. 1 (1967)

[23] Despite this fact, ***Loving v. Virginia*** is frequently used by same-sex marriage advocates as authority for their arguments; see D. Coolidge, "Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy", (1998) 11 *B.Y.U. Journal of Public Law* 1, particularly, 1-4

[24] ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 at 169, para. 236; ***Miron v. Trudel***, [1995] 2 S.C.R. 418 at 448-9, para.42; ***McKinney v. University of Guelph*** (1987), 63 O.R. (2d) 1 (C.A.) at 44; ***EGALE v. Canada*** (2001), 88 C.R.R. (2d) 322 (B.C.S.C.) at 354, paras. 149-151

[25] ***Hilary Goodridge and other vs. The Department of Public Health and another***, Superior Court, Civil Action No. 2001-1647-A, May 7, 2002, at 20-21, quoting ***Baehr***, 852 P.2d at 57

[26] See ***Communication No. 902/1999, Joslin et al. v. New Zealand*** (views adopted 30 July 2002, 75th Sess.), Report of the Human Rights Committee, 75th Sess., U.N. Doc. No. CCPR/C/75/D/902/1999 (Jurisprudence)). See also ***Rees v. United Kingdom***, [1986] 9 E.H.R.R. (European Court of Human Rights) 56 at 68, paras. 49–50

religion, in its Response, apply equally to the other *Charter* freedoms and are relied on.[27] The present case does not present rare, exceptional circumstances identified by the Supreme Court of Canada in *Dunmore*[28] in which positive state action may be required. As to s. 7, the Supreme Court of Canada has clearly established that it does not protect against the breach of other *Charter* rights and freedoms; otherwise the content of the other *Charter* rights would be subsumed by it, potentially trivializing them.[29] Specifically, s.7 does not ground any freestanding right to dignity, reputation or freedom from stigma.[30]

## C. THE S.1 ANALYSIS SHOULD BE APPLIED

12. The *Halpern et al.* couples mischaracterize Canada's argument in many instances with respect to its s.1 *Charter* argument. Of course Canada does not take issue with the fact that in *Swain* the Supreme Court of Canada stated that "it may not be strictly necessary to go on to consider the application of section 1". Rather, Canada underscores the fact that, ultimately, the Court felt compelled to conduct a s.1 analysis once it found that the common law rule in that case breached s.7 of the *Charter.* Most notable is that the Court based the appropriateness of conducting the s.1 analysis on the fact that the case invoked s.52:

> However, this appeal does involve a s. 52(1) challenge to the existing common law rule and, in my view, there are good reasons to go on to consider the application of s. 1 in this case, within the guidelines enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103. The *Oakes* test provides a familiar structure through which the objectives of the common law rule can be kept in focus and alternative means of attaining these objectives can be considered. Furthermore, the constitutional questions were stated with s. 1 in mind. While this is not, in and of itself, determinative, the Court has had the benefit of considered argument under s. 1 both from the immediate parties and from a number of interveners. In my view, it would be both appropriate and helpful for the Court to take advantage of these submissions in considering the objective of the existing rule and in considering whether an alternative common law rule could be fashioned which would be less intrusive to the conduct of an accused's defence. Finally, earlier in these reasons I stated that any consideration of societal interests in not convicting a person who was insane at the time of the offence ought to be left to the s. 1 analysis and ought not to be brought into the s. 7 analysis of the principles of fundamental justice. Having said

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[27] *Infra*, paras. 21-32
[28] ***Dunmore v. Ontario***, [2001] 3 S.C.R. 1016 at 1046-1049, paras. 23-26
[29] ***New Brunswick v. G.(J),*** [1999] 3 S.C.R. 46 at 77, para. 59
[30] ***Blencoe v. B.C.***, [2000] 2 S.C.R. 307 at 355, para. 80

> this, I feel compelled to address these interests under s. 1 of the *Charter*.[31]

13. A second reason that a s.1 analysis should be applied is that this case involves *Charter* rights, not *Charter* values. In their factum, the *Halpern et* al. couples argue that the "case at bar is a *Charter* Rights case".[32] Canada agrees - government authority was invoked. (The pleadings were framed on the basis of either the refusal by government – based on the common law – to issue marriage licences or to register their religious unions as marriages.) The reasons of Cory J in the *Hill* case support the proposition that in cases involving a *Charter* challenge to government action (or inaction), based on the common law, the Court should undertake a full s.1 analysis.

> When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s.1 framework for justification is not appropriate. *It must be remembered that the Charter "challenge" in a case involving private litigants does not allege the violation of a Charter right.* It addresses a conflict between principles.
>
> …Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. *In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the justification for the impugned statute or common law rule*. [Emphasis added][33]

## D. SECTION 1 TESTS

14. The *Halpern et al.* couples assume that a lesser standard of s.1 justification is required in the event that the Court embarks on a s.1 analysis for a common law rule. The policy underlying this idea, which negates deference to the legislature and is articulated in *Swain* and *R. v. Robinson*[34], is not applicable to this case. Unlike those cases, the common law rule relating to marriage in Canada is infused with legislative intention[35] although the opposite sex requirement for marriage, *simpliciter*, has not been legislated. The Court below was correct to perform a full s.1

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[31] ***R. v. Swain***, [1991] 1 S.C.R. 933 at 979-80
[32] *Halpern et al*. couples factum, para. 169
[33] ***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 at 1171, paras. 97-98
[34] ***R. v. Robinson***, [1996] 1 S.C.R. 683 at 708-9, para. 42
[35] ***Modernization of Benefits and Obligations Act***, S.C. 2000, c.12, s.1.1, Respondent's Record, Volume 10, Tab P 32, p. 3257, ***Federal Law-Civil Law Harmonization Act, No. 1***, S.C. 2001, c.4 (Bill S-4), Respondent's Record, Supplementary Volume 1, Tab E 6

analysis (in spite of its uncertainty that it was strictly necessary) and this Court should feel compelled to do likewise. The full analysis should include deference to legislative intent, because unlike the law at issue in *Swain* and *Robinson*, legislative intent is evidenced in related legislation. Further, *Swain* and *Robinson* are criminal cases, where courts traditionally accord less deference to the legislature.[36]

15. In support of its s.1 submission, Canada also argues that nowhere in the Record, or otherwise, is it established that the objective of the common law opposite-sex requirement for marriage is to discriminate against same-sex couples. The contrary assertion by the *Halpern et al.* couples and erroneously suggested by Laforme J. ignores the pre-legal nature and history of the institution of marriage. It implies that its character as an opposite-sex institution was only developed recently in response to the equality claims brought by gay and lesbian individuals in the past few decades. It ignores the legal rules that have developed around the institution of marriage as an opposite-sex union.[37] This conclusion disregards Canada's voluminous evidence and does a disservice to the rich history of the institution of marriage and the purposes behind its opposite-sex nature. As noted by Mr. Justice Blair:

> It may well be that historically marriage has almost universally been conceived as a union of a man and a woman. Undoubtedly, this historical fact has had much to do with the needs of procreation and with the necessity for society to provide a setting in which children could be born, raised and protected, and through which human life could be sustained and perpetuated. The 'family' has long been perceived as the ideal unit for these purposes, and since procreation – until relatively recently, at least – has been the product of physical sexual intercourse between a man and a woman, the 'family' has classically been considered to be founded on a heterosexual union.[38]

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[36] ***McKinney v. University of Guelph***, [1990] 3 S.C.R. 229 at 305

[37] ***Corbett v. Corbett (Ashley)***, [1970] 2 All E.R. 33 at 48-49; ***Heil v. Heil***, [1942] S.C.R. 160 at 164; ***Miller v. Miller***, [1947] O.R. 213 (C.A.) at 215, 222; ***Gajamugan v. Gajamugan*** (1979), 10 R.F.L. (2d) 280 (H.C.J.) at 282-283; ***Jones v. Jones***, [1948] O.R. 22 (S.C.) at 25-27; ***Mourant v. Mourant*** (1952), 6 W.W.R. 96 at 96 (B.C.S.C.); ***R. v. C.J.F.*** (1996), 149 N.S.R. (2d) 91 (C.A.) at 99-100, paras. 19-25; ***R. v. M.S.*** (1996), 111 C.C.C. (3d) 467 (C.A.) at 482-483, paras. 47-52, leave to appeal refused, [1997] S.C.C.A. No. 500; ***Egan v. Canada,*** [1995] 2 S.C.R. 513 at 537, para. 25; ***R. v. Hawkins***, [1996] 3 S.C.R. 1043 at 1074, para. 49; and see H.R. Hahlo, ***Nullity of Marriage in Canada*** (Toronto: Butterworths, 1979) at 35-41

[38] ***Halpern v. Canada*** (2002), 60 O.R. (3d) 321 (Div.Crt) ["***Halpern***"] at 357, para. 67, per Blair R.S.J.

# RESPONSE TO THE CROSS-APPEALS

## PART IV - OVERVIEW

16. This response addresses the arguments of the Cross-Appellants, and the Interveners that support their position in the appeals and cross-appeals, namely, EGALE, the CHRC and the Canadian Coalition of Rabbis for Same-Sex Marriage.

17. All religions in Ontario (and Canada) are free to conduct religious ceremonies and recognize the relationships they choose according to the tenets of their faith. The freedom of religion that s.2(a) embodies is a freedom *from* state coercion or compulsion to recognize or adhere to any faith, tradition or custom, rather than a right to compel the state to act. There may be exceptional circumstances that require positive acts to effect the s.2(a) right, but those are not the circumstances of this case. The freedom of expression protected by s.2(b) is similar. Further, the freedom of expression does not include a constitutionally protected right to marry.

18. The remedy for a constitutional breach in the circumstances of this case, with its broad social policy implications for one of the most fundamental and foundational institutions in Canadian society, is to return the matter to Parliament for its determination. The result in this case does not point to a single remedial legislative option. The current Parliamentary study and the international experience with the issue demonstrate the varied solutions and their complexity. The majority of the Divisional Court understood these principles and its remedy was correct and reasonable.

## PART V - FACTS

19. No additional facts are relied on in this Response.

## PART VI - POINTS IN ISSUE

20. Canada addresses four issues in response to the cross-appeals:

(a) the common law opposite-sex nature of marriage does not infringe the s.2(a) freedom of religion of the members of MCCT;

(b) the common law opposite-sex nature of marriage does not infringe the s.2(b) freedom of expression of the members of MCCT;

(c) the common law opposite-sex nature of marriage does not infringe the s.15(1) equality rights of the members of MCCT as a religious institution; and

(d) the remedy granted by the Divisional Court was the correct remedy in the circumstances, in the event that this Court dismisses Canada's appeals.

## PART VII - STATEMENT OF ISSUES AND ARGUMENT

### A. S. 2(A) FREEDOM OF RELIGION

#### 1) Introduction

21. The Divisional Court was correct in its unanimous decision that the common law definition of marriage does not breach MCCT's, or any other individual's, freedom of religion protected by s. 2(a) of the *Charter*. Laforme J. based his reasons on the following determinations, which are the subject of MCCT's cross-appeal:[39]

- "While the definition of marriage may hold religious significance for some Canadians, it does not follow that Canada is therefore obliged to give recognition to all religious definitions of marriage. In my view failure to provide state recognition through civil recognition of all forms of religious marriage does not constitute constraint within the meaning of s. 2(a) of the *Charter*." In this respect there is no state action complained of;[40]

- This case is analogous to *Adler v. Ontario*[41] "…where the Supreme Court considered whether Ontario was obliged by s.2(a) to provide public funding to foster and facilitate religious education for all diverse religious groups in the province. The Court rejected the claim on the grounds that s.2(a) enshrined no right to positive state facilitation of religious practice or belief";[42] and

- "…the definition of marriage does not protect one religion over another. Rather…it has the same impact on individual members of the MCCT as it does

[39] While MCCT did receive leave to appeal the Court's unanimous determination on s.2(a), it neither sought, nor received, leave to appeal the determination that the common-law definition of marriage does not breach MCCT's, or any individual's, s.2(d), or 7 *Charter* rights. See Appeal Book, Tab 5, pp. 26-30

[40] ***Halpern***, at 434, para. 215, per LaForme, J.

[41] ***Adler v. Ontario***, [1996] 3 S.C.R. 609 at 702–703, para. 175

[42] ***Halpern,*** at 434-435, para. 216, per LaForme, J.

on same-sex couples belonging to other denominations that may celebrate or formalize their relationships within their own denominations."[43]

**2) <u>Section 2(a) Does Not Protect the Right to State Endorsement of a Religious View</u>**

22. MCCT complains that the state "purports to extend the fiat of those traditional churches into MCCT's sanctuary, for no other reason than the sexual orientation of the persons seeking to be married" while honouring the marriage doctrine of those traditional churches through state recognition.[44] MCCT also complains that the recognition of another church's marriage ritual provides an "endorsement" of the legitimate status of that church, legally and socially, over another.[45] This appeal ground profoundly misconceives the interests engaged and protected by s.2(a).

23. The interest engaged and protected by s.2(a) of the *Charter* is freedom to hold one's religious beliefs. Freedom has been characterized by the Supreme Court of Canada as the *absence* of coercion or constraint; protection from state action, not state inaction. 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."[46] Freedom of religion in s.2(a) encompasses absence of coercion or constraint in relation to the manifestation of religious beliefs and practices. These freedoms might require positive state action only in those rare cases where such action is necessary to protect the freedom itself.[47]

24. In *Big M Drug Mart*, the Supreme Court elaborated upon the core value underlying the s.2(a) freedom:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own… It may perhaps be that freedom of conscience and religion extends beyond these principles *to prohibit other sorts of governmental involvement in matters having to*

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[43] ***Halpern**,* at 435, para. 217, per LaForme, J.
[44] MCCT Factum, para. 76
[45] MCCT Factum, para. 77
[46] ***R. v. Big M Drug Mart Ltd***., [1985] 1 S.C.R. 295 at 336; see also ***Delisle v. Canada,*** [1999] 2 S.C.R. 989 at 1015, para. 26
[47] ***Haig* v. *Canada,*** [1993] 2 S.C.R. 995 at 1039-40, paras. 79-80

> *do with religion*. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, *it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose*[48] [Emphasis added]

25. More recently, the Supreme Court has made it clear in *Trinity Western* that the core value protected in s.2(a) is freedom of *belief*. Trinity Western University, a private religious college, imposed community standards that condemned and banned homosexual practices among its students in the education degree program. As a result, the British Columbia College of Teachers refused to accredit its teacher education program. The Court addressed the balance between the private college's right to impose its religious community standards and the public interest in having schools free from discrimination:

> In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.[49]
>
> … the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them".[50]

26. *Trinity Western* does not assist the Cross-Appellants; quite the contrary, *Trinity Western* emphasizes that the interest engaged and protected by s.2(a) - the right to freely hold a religious view - is distinct and to be kept separate from the interest protected by s.15(1) – the right to be free from discrimination in conduct. In conflating the two, MCCT seeks to expand the right to be free from state interference with an individual's practice of religion into a right to exact concessions of recognition or endorsement of his religious practice from the state, contrary to the *Adler* decision.[51]

27. MCCT claims a right beyond the scope of religious freedom, that is, a positive state act endorsing MCCT's religious practice by according its same-sex unions civil recognition as "marriages". This is analogous to the claim made in *Adler* where the

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[48] ***R. v. Big M Drug Mart Ltd***., [1985] 1 S.C.R. 295 at 346-347, para. 123
[49] ***Trinity Western University v. B.C. College of Teachers***, [2001] 1 S.C.R. 772 at 810, para. 29
[50] ***Trinity Western University v. B.C. College of Teachers***, [2001] 1 S.C.R. 772 at 814, para. 36
[51] ***Adler v. Ontario,*** [1996] 3 S.C.R. 609 at 702–703, para. 175, per Sopinka J. and at 713, paras. 199-200, per McLachlin J.

Supreme Court considered whether Ontario was obliged by s.2(a) to provide public funding to foster and facilitate religious education for all diverse religious groups in the province. The Court rejected the claim on the grounds that s.2(a) enshrined no right to positive state facilitation of religious practice or belief:

> *…failure to act in order to facilitate the practice of religion cannot be considered state interference* with freedom of religion. The fact that no funding is provided for private religious education cannot be considered to infringe the appellants' freedom to educate their children in accordance with their religious beliefs where there is no restriction on religious schooling. *… there are many spheres of government action which hold religious significance for religious believers. It does not follow that the government must pay for the religious dimensions of spheres in which it takes a role.* The appellants' argument would lead to an obligation by the state to fund parallel religious justice systems founded on canon law or talmudic law, for example. *These are clearly untenable suggestions*. [Emphasis added.][52]

28. The allegation that s.2(a) requires the state to "endorse" the belief of all religious groups about marriage on an equal basis confuses the s.2 freedom analysis with the comparative analysis that occurs under s.15(1). *Big M Drug Mart* and *Edwards Books* were decided before s.15(1) was in force. As Sopinka, J. noted in *Adler*, and as the Supreme Court, since, has made clear:

> … while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard. In this case, the state has not restricted the appellant's freedom of association by creating a statutory regime which does not apply to him.
>
> It is because of the very nature of freedom that s.2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance.[53]

29. MCCT alleges the Divisional Court erred in relying upon *Adler*, since "the rights of separate schools in Ontario were expressly protected in the *Constitution Act, 1867*", while "there was no equivalent section in the present case".[54] This distinction has no relevance to the present case since s.93(1) did not *prevent* Ontario from funding the other religious schools if it chose to; Ontario simply was not obliged to do so by s.2(a).

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[52] ***Adler v. Ontario,*** [1996] 3 S.C.R. 609 at 702-703, para. 175, per Sopinka J.
[53] ***Delisle v. Canada***, [1999] 2 S.C.R. 989 at 1014-5, paras. 25-26
[54] MCCT factum, para. 83

S.2(a) is not a discrimination clause that was "waived" or overridden in *Adler* by virtue of s.93(1) of the *Constitution Act, 1867*. *Adler* is clearly applicable to the present case, and the Court correctly relied upon it.

### 3) Finding on State Action

30. MCCT alleges that the Divisional Court erred in finding there was no government action in this context[55] and characterizes the refusal of the government to register their documents as government action. MCCT has misinterpreted or distorted the purpose of the Court's statement on government action and taken it out of context. There was no dispute, and the Court clearly recognized (in upholding the s.15(a) discrimination claim) that the denial of registration constituted government action. The narrow point rightly made by LaForme J. in this context was that the failure of the state to act by extending recognition to MCCT's marriage was not *interference* that could be complained of as violating any protection extended by s.2(a). This proposition, properly understood in its context, is entirely correct.

### 4) The Definition of Marriage Does Not Constitute Religious Coercion

31. The religious practices of MCCT or members of its congregation are not affected by state coercion resulting from the opposite-sex requirement for marriage. In contrast to the laws against polygamy,[56] there is no legal bar to the religious formalization of same-sex unions. The government has not restricted or sought to interfere with MCCT's decision, or that of any denomination,[57] to celebrate same-sex unions as "marriages" within their church or synagogues, respectively. Thus, MCCT's statement that "the state imposes…religious views of marriage on an unwilling minority" is simply not true.[58]

32. While the institution of marriage may hold religious significance for some Canadians, it does not follow that Canada is, therefore, obliged to give recognition to all

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[55] MCCT Factum, para. 80
[56] See for example, section 293 of the ***Criminal Code of Canada,*** R.S.C. 1985, c.C-46
[57] See Factum of the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage ("the Liberal Coalition"), para. 24, alleging that the equality rights of "clergy" to perform same-sex marriages is interfered with. No such right can possibly be grounded in the circumstances of this case.
[58] MCCT factum, para.92

religious ideas or definitions of marriage or that its failure to provide recognition is a form of coercion. This case is not at all analogous to *Big M Drug Mart*, where the Supreme Court of Canada found the *Lord's Day Act to* constitute a clear form of coercion upon non-Christians by imposing, through state action, a positive limitation on an individual's right to work based upon an explicitly Christian understanding of a religious day of rest.[59] Equally inapplicable is this Court's decision in *Freitag v. Penetanguishene (Town)*[60] where a Town Council's practice of commencing meetings by asking councillors to rise and recite the Lord's Prayer was found to infringe the s.2(a) rights of non-Christians. This positive state act of religious coercion bears no resemblance to the present case.

**5) <u>MCCT's s. 15(1) Argument – Discrimination as a Religious Institution</u>**

33. MCCT continues to argue in appeal that the opposite-sex definition of marriage discriminates on the grounds of religion. This claim is based, primarily, upon MCCT's assertion, that since the opposite-sex definition of marriage was historically linked to a traditional Christian understanding, it discriminates against those religious groups which no longer share that understanding.[61] This allegation both ignores the historical evidence and is unfounded in theory. The opposite-sex nature of marriage reflects a widely held social understanding of a particular relationship in Canada, which must be assessed on its own terms. The fact that it may or may not coincide with the religious views of some groups and not others, or that it may have historically evolved from a universally-held religious understanding, like, for example, the meaning of certain *Criminal Code* offences, does not render it suspect automatically.[62]

34. Religious marriages do not necessarily meet the requirements of legal registration, just as civil marriages, by definition, do not meet the religious requirements of marriage. Not all civil marriages are recognized by religious institutions, just as not all religious marriages can be registered as marriages under Canadian law.[63] If MCCT's claim of religious discrimination is correct, then in order not to discriminate on religious

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[59] ***R. v. Big M Drug Mart***, [1985] 1 S.C.R. 295 at 337, paras. 97-98
[60] ***Freitag v. Penetanguishene (Town)***, (1999), 47 O.R. (3d) 301 (C.A.) at 307, para. 18 (cited in the Factum of the Coalition of Liberal Rabbis, para. 18)
[61] MCCT factum, paras. 122-127
[62] See for example, ***Commission scolaire de Chambly v. Bergevin,*** [1994] 2 S.C.R. 525 at 540

grounds, the state would be obliged to extend civil recognition of marriage to all alternative religious understandings of marriage, including polygamous marriages or refuse it where the marriage would have been bared on religious grounds such as divorce or marriage between first cousins. This is, obviously, an untenable suggestion.[64]

35. Finally, the opposite-sex nature of marriage does not discriminate by protecting one religion over another. It has the same effect on individual members of MCCT who wish to celebrate same-sex unions, as it does on same-sex couples belonging to all other denominations, including, for example, some Jewish liberal congregations.[65]

## B. REMEDY

### 1) Legislative Options for Formally Recognizing Same-Sex Relationships

#### *(a) Introduction*

36. There is an array of unique ways, across Canada and around the world, in which jurisdictions have chosen to formally recognize same-sex unions, to the extent that they have chosen to do so. Extremely significant is the fact that, in no jurisdiction, have these changes been made by courts. Instead, each jurisdiction's legislative body has crafted the changes by means of comprehensive law reform.

37. The Netherlands and Belgium have legislated the extension of marriage to same-sex unions. All other countries that have addressed this issue have expressly chosen to retain marriage as an opposite-sex institution, with some setting up a separate registration system for same-sex couples and/ or legislatively recognizing common-law same-sex couples for specific benefits and obligations. In Canada, the provinces and territories (except Nunavut), and the federal government, have extended benefits and obligations to common-law same-sex couples on the same basis as to common-law opposite-sex couples. In addition, four provinces now have formal partnership regimes.

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[63] Examples of the former include civil marriages by Jewish partners where a "get" was not obtained, marriages where one or both of the partners was divorced, marriages between first cousins (not prohibited under the *Marriage (Prohibited Degrees) Act*, but under Catholic doctrine).
[64] ***Adler v. Ontario***, [1996] 3 S.C.R. 609 at 702–703, para. 175
[65] See for example, the Factum of the Liberal Coalition, paras. 7 and 10, where it is stated that many Jewish liberal Rabbis also wish to celebrate and formalize same-sex unions as marriages.

### *(b) Approaches within Canada*[66]

38. Provincial jurisdiction over common law relationships (or *de facto* unions in Québec) stems from the power over property and civil rights in s.92(13) of the *BNA Act*.[67] Four provinces – Québec, Nova Scotia, Manitoba and Alberta – enacted laws to formally recognize same-sex unions. Québec and Nova Scotia enacted legislation that allows gay and lesbian couples as well as unmarried opposite-sex couples to record their relationships in a civil registry. Manitoba's similar legislation will come into force on a day fixed by proclamation. Alberta enacted the *Adult Interdependent Relationships Act* that provides for the legal recognition of partnership contracts between two unmarried adults, whether in a conjugal relationship or not. However, Alberta, in its *Marriage Act*, has defined marriage to be exclusively opposite-sex for the purpose of solemnization. Under the approach taken by these four provinces, upon registration (Québec, Nova Scotia, and Manitoba) or under contract (Alberta), couples are subject to the same benefits and obligations under provincial law as married couples.

39. A second approach to the recognition of same-sex unions is to extend a broad spectrum of government legislated benefits and obligations to "common-law" same-sex couples on the same basis as common-law opposite-sex couples. Generally, under this approach, couples are subject to the same benefits and obligations once they have cohabited in a conjugal relationship for a specified period of time in the applicable statute. The period of time generally depends on the policy behind the legislation. In some cases, the benefits and obligations are effective immediately if there is a child of the relationship. In addition to the four provinces above, Ontario, British Columbia and Saskatchewan, as well as the federal government, have adopted a similar appproach.

40. The third approach is a response to the Supreme Court of Canada's decision in *M. v. H*. New Brunswick, Newfoundland and Labrador, and the Northwest Territories have extended their legislated family law benefits and obligations (for example, support obligations) to common-law same-sex couples. Prince Edward Island and the Yukon have enacted similar legislation but it is not proclaimed in force as yet.

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[66] See **Chart, Provincial and Territorial Legislative Recognition of Same-Sex Relationships**, AGC Compendium of Evidence

[67] ***British North America Act***, ***1867***, s.92(13), Respondent's Record, Vol. 6, Tab P1

Newfoundland and Labrador has also extended benefits and obligations under six pension related statutes and under workers compensation legislation.

41. While the approaches vary, Parliament and other legislative bodies have made it clear that their enactments extending benefits and obligations to same-sex couples is to be understood and interpreted as having no impact upon the definition of marriage as the union of one man and one woman.[68]

### *(c) International Approaches*[69]

42. In October 2001, the Netherlands enacted legislation to allow a form of marriage for same-sex couples. The only other country in the world to also have enacted legislation allowing same-sex couples to marry is Belgium.[70] However that legislation must still receive Royal Assent to come into force (expected in June 2003). The legislation setting up same-sex marriage in both countries maintains some differences as to how opposite-sex and same-sexcouples are treated under the law. For example, each of the laws specifies that same-sex marriage is valid only for domestic purposes, and there are differences with respect to the legal relationship to children.

43. Before legislating marriage for same-sex couples, both the Netherlands and Belgium first chose to legislate a registered partnership model open to any two unmarried and unregistered persons (with conditions similar to marriage, for example, consanguinity rules), which still is in effect today. A different approach followed by the Nordic countries (Denmark (including Greenland), Sweden, Norway, Finland and Iceland) and Germany is a domestic partnership regime but for same-sex couples only. allowing them to register their relationships and become subject to most of the benefits and obligations of marriage.

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[68] ***Modernization of Benefits and Obligations Act***, S.C. 2000, c.12, s.1.1

[69] See **Chart, International Context - Legislative Recognition of Same-Sex Relationships**, AGC Compendium of Evidence (Note that this chart is only current until March of 2001.)

[70] ***Projet de Loi ouvrant le mariage a des personnes de même sexe et modifiant certaines dispositions du Code civil****, Doc. 50 1692/001*, Joint Supplementary Volumes of Legislative Material, Volume 2, Tab 21

44. Another approach is that of France with its PACS system (pacte civil de solidarité). This approach provides for the registration of private contracts between two unmarried and unrelated individuals, making them subject to some of the same benefits and obligations as those for married couples.

45. As for Canada, different federal states have had different approaches adopted within the country as a whole. In the United States, for example, the federal government and a significant number of state legislatures have passed "Defence of Marriage Acts" to confirm the choice of individual states to retain the opposite-sex nature of marriage. Only two states – Hawaii and Vermont – have enacted legislation to provide same-sex couples, amongst others, with many of the benefits and obligations accorded to married couples through the recognition in Hawaii of a registered partnership and, in Vermont, a civil union or reciprocal beneficiaries relationship. Both states provide that two unrelated opposite-sex individuals may not register or enter into a civil union, so that there is no officially recognized alternative to marriage. In other countries, such as Spain, benefits and obligations have been extended to same-sex couples at the state, provincial or regional level through registered partnership models. Each approach, however, is unique as it has been created to fit the particular society and to comply with the specific constitutional and legal structures of each.

46. A number of countries, including some noted above, have extended some or most of the benefits and obligations associated with marriage to "common-law" same-sex couples (and common-law opposite-sex couples in certain countries) by means of legislation specifically deeming certain relationships to be the legal equivalent of marriage once certain requirements have been met, such as a set period of cohabitation. In some jurisdictions (for example, Hungary), the legislation applies to most benefits and obligations, while, in others, the legislation has a limited scope applicable only to certain benefits and obligations, such as in criminal law.

47. The vast majority of countries do not have a registration system and have not provided common-law opposite-sex and same-sex couples with legislated access to many of the benefits and obligations accorded to married couples. Nevertheless, certain of those countries, such as England and Wales, recognize same-sex couples within the

common law. In these jurisdictions, whenever the court has to apply principles of the common law or doctrines of equity that depend on an assessment of the parties' intentions towards one another (as opposed to recognition by a third party such as the state) the fact that the relationship is between two members of the same sex will not adversely affect the outcome of the decision.[71] With respect to family relationships, the courts will avoid discriminating against a partner in a same-sex relationship, within the limits of the relevant statutory provision.

***(d) Conclusion***

48. The Netherlands (subject to Belgium's stature receiving Royal Assent) is the only country that has legislated to legally recognize a form of marriage for same-sex couples. As governments domestically and internationally have addressed the issue with a wide variety of models, the Divisional Court was correct not to determine Parliament's remedial choice.

**2) <u>General Remedy Principles</u>**

49. Where legislative intention has been exhibited in an impugned provision, the Court should choose a remedy that intrudes to the least possible extent into the legislative domain, while at the same time respecting the purposes of the *Charter*.[72]

50. The remedy requested by the *Halpern et al*. couples, for a declaration that "any law, practice or policy of government that prohibits the otherwise lawful marriages of same-sex couples is of no force and effect",[73] is clearly inappropriate. What has been challenged in this litigation is the common law opposite-sex requirement for marriage and no other statutory provision or common law rule. The remedy requested by the *Halpern et al*. couples is also imprecise and it is one that would have a substantial and wide-ranging impact on federal and provincial legislation, requiring consultations and the institutional capacities of legislative bodies at both levels of government.

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[71] ***Affidavit of Stephen Cretney***, Respondent's Record, Volume 1, Tab A, p.37-38, para.59
[72] ***Osborne v. Canada (Treasury Board),*** [1991] 2 S.C.R. 69 at 104-105; ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 707, 715
[73] *Halpern et. al.* couples factum, para. 204

51. The Supreme Court has provided guidance as to how courts should proceed to choose among the remedy options[74]. In *Schachter,* the Court set out a blueprint for *Charter* remedies and the criteria for employing severance and reading in[75] – warranted only in the clearest cases. Courts must be careful to ensure that the severance or reading in would not constitute an unacceptable intrusion into the legislative domain. The criteria set out in *Schachter* are not met in this case.

52. Blair R.S.J. correctly noted that "[r]emedial precision does not mean, simply, ease of exchange between the language to be inserted – here, the sought-after exchange of the words "two persons" for the words "one man and one woman". Remedial precision has to do with whether the objective of the legislation (or, in this case, the common law) can be met with the least interference and without unacceptable intrusion into the legislative domain"[76]

### 3) Proper Remedy in this Case

#### *(a) Repercussions on Other Laws*

53. A fundamental change to the definition of marriage would require changes to federal and provincial laws related to marriage, to the recognition abroad of Canadian marriages as well as to all federal and provincial statutes and regulation that grant benefits and obligations based on the current concept of marriage. Given the significance of the repercussions, Canada submits that the legislatures ought to be given the opportunity and time to address these questions in a more comprehensive fashion.[77]

#### *(b) Appropriateness of a Suspension of the Declaration of Constitutional Invalidity*

54. Should this Court uphold the decision of the lower court and find that the common law definition of marriage breaches the *Charter* and is not saved by s.1, the appropriate remedy in this case is to suspend the declaration of constitutional invalidity to allow Parliament the opportunity and sufficient time to institute legislative reform.

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[74] ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 702-715, paras. 43-79; ***M. v. H***., [1999] 2 S.C.R. 3 at 84-85, paras 137-139
[75] ***Schachter v. Canada ,*** [1992] 2 S.C.R. 679 at 718, para. 85
[76] ***Halpern***, at 370-1, para. 118-119, per Blair R.S.J.
[77] ***M. v. H***, [1999] 2 S.C.R. 3 at 87, para. 147

Canada submits that this case is one that involves a profound, not incremental, change to the law requiring judicial restraint, and a legislative response.

### *(c) The Applicability of the "Incremental Change" Test*

55. The *Halpern et al.* couples argue that there are two types of cases involving the *Charter* and its application to the common law.[78] Canada understands the necessity for a distinction between cases involving a *Charter* challenge to government action based on the common law and cases involving private disputes, where no government action is at issue and the Court is asked to change the common law to render it compliant with *Charter* "values". In the latter cases, because there is no *Charter* breach, the common law rule can only be examined by the court in light of *Charter* values.[79]

56. Canada disagrees, however, with the *Halpern et al.* couples' contention that the Supreme Court has dealt with these two types of cases differently at the remedy stage, "requiring" the common law be changed in those cases involving a *Charter* challenge to government action. The suggestion that judicial caution at the remedy stage is only a consideration in cases where government action is not challenged is wrong. The distinction drawn by Cory J. in the *Hill* case pertains to the need for caution in *applying the Charter at all* to the common law in private disputes:

> Care must be taken not to expand the application of the *Charter* beyond that established by s.32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.
>
> *Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking Charter values into account. Far-reaching changes to the common law must be left to the legislature* [Emphasis added].[80]

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[78] *Halpern et al.* couples factum, para. 169
[79] See ***RWDSU v. Dolphin Delivery Ltd***., [1986] 2 S.C.R. 573 at 602-603
[80] ***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 at 1170-1171, paras. 95-96

57. The *Halpern et al.* couples erroneously present *R. v. Salituro* as the "leading *Charter* Values case"[81] on the basis that it *did not* involve any government action. *R. v. Salituro* clearly *did* involve government action. The accused's estranged wife was called as a witness for the Crown prosecution, despite the existing common law rule of spousal incompetency. Cory J. in the *Hill* case also confirmed that *R. v. Salituro* is a case where government action was involved:

> Since 1986, this Court has subjected the common law to *Charter* scrutiny in a number of situations where government action was based on a common law rule: *B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214; *R. v. Swain,* [1991] 1 S.C.R. 933; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835.[82]

58. *Salituro* is directly applicable to the present case. Moreover, there is no distinction to be drawn between the "*Salituro*" line of cases and the "*Dagenais/Swain/ Daviault*" line of cases, as suggested by the *Halpern et al.* couples and by the intervener EGALE.[83] Rather, the following general principle is derived from the entire body of case law: changes to the common law should only be made when to do so would not upset the appropriate balance between judicial and legislative action and when such changes would be incremental in nature. As noted recently by the Supreme Court:

> … any change to the common law should be incremental. Proposed modifications that will have complex and far-reaching effects are in the proper domain of the legislature (see *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61; *Friedmann Equality Developments v. Final Note Ltd.,* [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 43).[84]

and

> In the past, this Court has considered the conditions which must be present to effect a change in the common law in several cases (see, e.g., *Vetrovec v. the Queen*, [1982] 1 S.C.R. 811; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Jobidon,* [1991] 2 S.C.R. 714; *R. v. Salituro*, [1991] 3 S.C.R. 654; *R. v. B. (K.G.),* [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210. ….From these cases, several principles have emerged. A change in the common law must be necessary to keep the common law in step with the evolution of society …, to clarify a legal principle …or to resolve an inconsistency … In addition, the change should be incremental, and its consequences must be capable of assessment.

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[81] *Halpern et al*. couples factum, para. 171
[82] ***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 at 1166, para. 84
[83] *Halpern et. al*. couples factum, paras. 169-172; Factum of EGALE, paras. 32-33
[84] ***R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,*** 2002 SCC 8 ¶ 16

> … On the other hand, courts will not intervene where the proposed change will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately measured.[85]

59. In light of the above cases, the majority of the Divisional Court was correct in the remedy it imposed. Justice Laforme, however, erred when he held that "having found that the common law rule and its definition of marriage breach the applicants' s.15(1) *Charter* rights to be treated equally, it seems to me that the authorities virtually require that a new common law rule must be reformulated"[86] To the contrary, the authorities clearly indicate that a *Charter* breach by a common law rule does not change the criteria that require Parliament to fashion the remedy.[87]

***(d) The Need for Judicial Restraint***

60. In a constitutional democracy, it is the legislature, as the elected branch of government, that should assume the major responsibility for law reform. Major revisions of legal rules, i.e. the common law, with complex or uncertain ramifications are best left to the legislature. The Supreme Court of Canada has explained the need for judicial caution as follows:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[88]

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[85] ***Friedmann Equity Developments Inc. v. Final Note Inc.,*** [2000] 1 S.C.R. 842 at 871, paras. 42-43

[86] ***Halpern***, at 454, para. 303, per Laforme J.

[87] See ***R. v. Salituro***, [1991] 3 S.C.R. 654 at 675, para. 49; ***Hill v. Church of Scientology,*** [1995] 2 S.C.R. 1130 at 1171, para. 96

[88] ***Watkins v. Olafson***, [1989] 2 S.C.R. 750 at 760-761, para.14; ***R. v. Salituro,*** [1991] 3 S.C.R. 654 at 666, 670, paras. 29, 37; ***R. v. Hawkins***, [1996] 3 S.C.R. 1043 at 1071-1072

61. In *R. v. Salituro*, Iacobucci J. indicated that the *extent* to which the law will be changed indicates whether the legal reform properly falls within the purview of the legislatures or the judiciary. He described this consideration as a question of whether the change would be "incremental" or whether it would be one that may have "complex ramifications":

> Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins, supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[89]

62. Quoting *Salituro*, the majority of the Divisional Court correctly concluded that, in the present case, it is not possible for the Court to change the common law definition of marriage without upsetting the proper balance between judicial and legislative action.[90]

63. Laforme J., however, erred in finding that it was appropriate for the court to change the long-standing common law definition of marriage. He incorrectly based his decision on the findings that such a change would be "straightforward" and "simple"[91] and that changing the definition to include a union between persons of the same sex is merely a small or incremental extension of the existing law.[92] Blair R.S.J. understood the potential confusion between the simple or incremental nature of the linguistic amendment and incremental nature of the substantive change wrought by the amendment:

> The linguistic change proposed seems simple and straightforward enough on its face. It may even follow logically from the earlier conclusions I have drawn. However, the consequences and potential reverberations flowing from such a transformation in the concept of marriage, it seems to me, are

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[89] ***R. v. Salituro***, [1991] 3 S.C.R. 654 at 670, para. 37

[90] ***Halpern***, at 329-330, paras. 9-10, per Smith A.C.J.S.C.; at 365-6, paras. 102-103, per Blair R.S.J.

[91] ***Halpern***, at 453, para. 294, per Laforme J.

[92] "In my opinion, the change in issue in the within case is incremental - …", ***Halpern***, at 453, para. 294, per Laforme J.

> extremely complex. They will touch the core of many people's belief and value systems, and their resolution is laden with social, political, cultural, emotional and legal ramifications. They require a response to a myriad of consequential issues relating to such things as inheritance and property rights, filiation, alternative biogenetic and artificial birth technologies, adoption and other marriage-status driven matters. The courts are not the best equipped to conduct such a balancing exercise, in my opinion. This is not an incremental change in the law. It is a profound change.
>
> The apparent simplicity of a linguistic change in the wording of a law does not necessarily equate with an incremental change in the law. To say that altering the common law meaning of marriage to include same-sex unions is an incremental change, in my view, is to strip the word 'incremental' of its meaning".[93]

64. In light of the far-reaching and complex nature of changing the common law opposite-sex requirement for marriage, it is submitted that this is the quintessential case requiring judicial restraint in favour of legislative action. Mr. Justice Blair's conclusion is sound:

> When a law is measured against the benchmark of *Charter* values and found to be wanting, the courts are cautious about rewriting statutes and reformulated principles of common law to amend or replace that law. This is particularly so where the ramifications of the change required are far-reaching and uncertain, and where the change touches diverse but deeply-held values and mores of a socio-political, cultural, religious nature. Here, it is not simply a matter of filing in a gap left in the common law but a finding of constitutional invalidity. It is a matter of crafting a solution that bridges a chasm of community, social and moral principles.[94]

### *(e) Alternatives to be Considered by Parliament*

65. The *Halpern et al.* couples, MCCT and EGALE all argue that the only possible remedy is the reformulation of the common law; there are no other possible alternatives.[95] This narrow position ignores a number of necessary considerations.

66. The Supreme Court of Canada has recognized that the pursuit of equality in the distribution of benefits and obligations flowing from consenting and committed marriage-like relationships does not require the elimination of the meaning or essence of

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[93] ***Halpern***, at 364, paras. 97-99, per Blair R.S.J.
[94] ***Halpern***, at 368, para. 111, per Blair R.S.J
[95] *Halpern et al.* couples factum, paras 176 and 180; MCCT Factum, paras. 166-183, EGALE factum, para. 67

marriage as a special kind of monogamous opposite-sex union.[96] The majority of the court below also understood that a number of policy options existed.[97] Similarly, the Vermont Supreme Court in *Baker v. State* found that the need to ensure equality of benefits and protections between married couples and same-sex couples did not require a re-definition of marriage. It only required that the legislator craft a solution that made such benefits and protections available to same-sex couples. The means by which that was accomplished was left to the legislature.[98]

67. The *Halpern et al.* couples, MCCT and EGALE all pre-judge some possible alternatives to marriage that are currently before the Parliamentary Committee.[99] The existence of these possible approaches and the Committee reference support the submission that a remedy in this case is best left for Parliament's process and consideration, subject to guidance from the Court.

68. At present, the alternatives that the federal government is reviewing are simply possible approaches. It is premature to engage in any detailed *Charter* analysis of the specific legislative alternatives. In general, however, several of the possible approaches under review are capable of achieving the goal of substantive equality under the *Charter*. The *Halpern et al.* couples' own expert, William Eskridge, gave his opinion that domestic partnership regimes are equivalent to same-sex marriage.[100] Many countries in Europe, as previously described, have adopted registered partnership regimes that grant recognition status and benefits of marriage to same-sex couples.[101] In Canada, several provinces have enacted civil union regimes that also confer status and benefits on same-sex couples.[102]

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[96] ***Egan v. Canada,*** [1995] 2 S.C.R. 513 at 539, paras. 27-8***; Miron v. Trudel,*** [1995] 2 S.C.R. 418 at 501-2, para. 159

[97] ***Halpern*** at 329, para. 6, per Smith, A.C.J.S.C.

[98] ***Baker v. State of Vermont,*** [1999] 744 A. 2d 864 (Vt. 2000); and see ***Egan v. Canada****,* [1995] 2 S.C.R. 513 at 536, para. 22; ***Miron v. Trudel,*** [1995] 2 S.C.R. 418 at 501-502, para. 159

[99] *Halpern et. al*. couples factum, paras. 184-192, MCCT Factum, paras. 168-187, EGALE factum, para. 67-72

[100] ***Supplemental Affidavit of William N. Eskridge, Jr.*** Reply Evidence of Applicant Couples, Tab. 4, p. 178, para. 23

[101] ***Affidavit of Bea Verschraegen***, Respondent's Record, Volume 3, Tab G, pp. 823, 831-3, 835-6, 847-9, 867-8, paras. 109, 127-129, 134-135, 158-160, 200-202

[102] *Infra*, paras. 38-41

69. Blair R.S.J.[103] and LaForme J.[104] erred in expressing concerns about the ability of civil union regimes to meet the requirements of the *Charter.* Canada agrees with the position of Smith A.C.J.S.C. that the court should not comment on the constitutionality of such regimes in advance; "the court should not be seen to prejudge the constitutionality of such legislative response in circumstances where the precise details of the legislation are not before the court".[105]

### *(f) Appropriateness of the 24 Month Suspension*

70. Canada submits that the Divisional Court was correct in suspending its declaration of constitutional invalidity for a period of twenty-four months.[106] Not only does the case law support longer periods of suspension,[107] this period of time is well justified for three reasons: (1) the need to consult[108]; (2) the need for more than one level of government to legislate; and (3) the need for thorough Parliamentary debate and full consideration of the range of possible remedial approaches and their impact on related statutes, and time for drafting legislation and completing all of the steps in the legislative process. The time periods suggested by the *Halpern et al. couples* (one month) and by EGALE (three months) are much too short to allow a proper and fulsome consultation and debate, let alone passage through the legislative process.[109]

71. Canada also notes that EGALE refers to the *Libman*[110] case and to the Court declaring Quebec's *Referendum Act* to be unconstitutional without suspending this declaration. It is noted that this *Act* concerned the holding of referendums, that, like elections, occur infrequently and exclusively at the government's discretion. By contrast, individuals require marriage licences and marriage registrations daily.

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[103] ***Halpern***, at 374, para. 130, per Blair R.S.J.
[104] ***Halpern***, at 450, para, 282, per Laforme J.
[105] ***Halpern***, at 330, para. 13, per Smith A.C.J.S.C.
[106] K. Roach, "Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed declarations of Invalidity", (2002) 35 *U.B.C.L. Rev*. 211
[107] ***Corbière v. Canada***, [1999] 2 S.C.R. 203 (18 months); ***Dunmore v. Ontario***, [2001] 3 S.C.R. 1016 (18 months); ***R. v. Powley*** (2001), 53 O.R. (3d) 35 (C.A.), leave to appeal granted by the SCC (12 months); ***Schafer v. Canada*** (1997), 35 O.R. (3d) 1 (C.A.) (2 years)
[108] K. Roach, *Constitutional Remedies in Canada*, loose-leaf (Aurora: Canada Law Book, 2000) at 15.80; ***R. v. Powley*** (2001), 53 O.R. (3d) 35 (C.A.) at 90, para. 177
[109] *Halpern et al.* couples factum, para. 214(d) ; EGALE factum, para. 75
[110] ***Libman v. Québec***, [1997] 3 S.C.R. 569, relied on in the EGALE factum, para. 74

72. In considering the appropriate length of a suspension, it is important to note that all stakeholders should participate in any fundamental changes to the definition of marriage. All Canadians, regardless of their beliefs and ideology, have a stake in the nature of this foundational social institution as it has implications for both adults and children and for the functioning of society generally.[111] Furthermore, contrary to the *Halpern et al.* couples' contentions, there is no evidence of a broad based support for the recognition of marriage for same-sex partners. To the extent that polls may be relied on, the polls on this issue vary considerably depending on the questions asked.[112]

73. The suspension ordered in the present case was also appropriate in light of Canada's evidence that changing the institution of marriage could have profound and unforeseen consequences. These must be considered by the legislature in remedying any constitutional breach found by the court. For example, Professor Katherine Young posited that changing the universal features of marriage could lead to increased polarization of men and women. Professor Douglas Allen noted previous legislative changes to the institution of marriage resulted in some unfavourable outcomes along with the positive ones. Professor Edward Shorter suggested that if we begin inserting players into legal marriage whose own values may be at odds with one of its core missions, we may undermine that sense of mission for all, and end up undermining and diminishing the institution of marriage. This evidence points to the need for caution when changing such a fundamental institution as marriage.[113]

### *(g) Inappropriateness of an Exemption for the Respondents*

74. While a suspension of the judgment is a necessary part of the remedy in this case, the additional remedy of an exemption *from the suspension* requested by the

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[111] ***Affidavit of Margaret Somerville***, Respondent's Record, Volume 4, Tab J, pp.1349-1358, paras. 35-39

[112] ***Cross-Examination of John Fisher***, Respondent's Record, Supplementary Volume 3, Tab N, pp. 910, 916-917, Q 90, 113-118; Exhibits 2, 3 and 5, Decima Research poll and Leger Marketing poll, Respondent's Record, Supplementary Volume 3, Tabs O 1 and O 2

[113] ***Affidavit of Katherine Young***, Respondent's Record, Volume 2A, Tab F, pp. 737, 743, paras. 102, 114; ***Affidavit of Douglas Allen***, Respondent's Record, Volume 4, Tab I, pp. 1271, 1274, 1278-9, 1297, paras. 1-3, 11, 21-22, 67, ***Affidavit of Edward Shorter***, Respondent's Record, Volume 2, Tab C-1, pp. 458-459, para. 128

*Halpern et al.* couples is neither warranted nor appropriate.[114] This exemption would, in effect, determine the ultimate remedy for the couples despite the Court having provided Parliament with a period to arrive at its own remedial option. As noted by the Supreme Court in *Schachter*, referring to the decision of McLachlin J. in *Seaboyer:*

> In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption but concluded that neither technique was appropriate in the case before her…She stated, at p. 628:"Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption."[115]

## PART VIII - ORDER SOUGHT

75. The Attorney General of Canada respectfully requests that the two appeals be allowed, the two cross-appeals be dismissed and that costs follow the event on a substantial indemnity basis. The *Halpern et al.* couples have not established any reason that warrants consideration of costs on a total indemnity basis, let alone to justify the making of an award on such an exceptional basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this March 28, 2003.

Roslyn J. Levine, Q.C.,
Solicitor for the Appellant and Respondent in the Cross-appeals, the Attorney General of Canada

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[114] ***Corbière v. Canada***, [1999] 2 S.C.R. 203 at 225-226, paras. 22-23, per McLachlin J. and at 281-282, paras. 111-113, per L'Heureux-Dubé J.; ***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519 at 573-9, paras. 107-113, per Lamer C.J., dissenting; ***R. v. Seaboyer***, [1991] 2 S.C.R. 577 at 629; ***R. v. Edwards Books and Art Ltd***., [1986] 2 S.C.R. 713 at 783

[115] ***Schachter v. Canada,*** [1992] 2 S.C.R. 679 at 708, para. 60

# SCHEDULE "A"

## List of Authorities Referred To

***Adler v. Ontario***, [1996] 3 S.C.R. 609

***Baker v. State of Vermont,*** [1999] 744 A. 2d 864 (Vt. 2000)

***Blencoe v. B.C.***, [2000] 2 S.C.R. 307

***Commission scolaire de Chambly v. Bergevin,*** [1994] 2 S.C.R. 525

***Communication No. 902/1999, Joslin et al. v. New Zealand*** (views adopted 30 July 2002, 75th Sess.), Report of the Human Rights Committee, 75th Sess., U.N. Doc. No. CCPR/C/75/D/902/1999 (Jurisprudence))

***Corbett v. Corbett (Ashley)***, [1970] 2 All E.R. 33

***Corbière v. Canada***, [1999] 2 S.C.R. 203

***Delisle v. Canada***, [1999] 2 S.C.R. 989

***Dunmore v. Ontario***, [2001] 3 S.C.R. 1016

***EGALE v. Canada***, (2001), 88 C.R.R. (2d) 322 (B.C.S.C.)

***Egan v. Canada,*** [1995] 2 S.C.R. 513

***Freitag v. Penetanguishene (Town)***, (1999), 47 O.R. (3d) 301 (C.A.)

***Friedmann Equity Developments Inc. v. Final Note Inc.***, [2000] 1 S.C.R. 842

***Gajamugan v. Gajamugan*** (1979), 10 R.F.L. (2d) 280 (H.C.J.)

***Gosselin v. Québec***, 2002 SCC 84

***Haig* v. *Canada,*** [1993] 2 S.C.R. 995

***Halpern v. Canada (Attorney General)*** (2002), 60 O.R. (3d) 321 (Div.Crt.)

***Heil v. Heil***, [1942] S.C.R. 160

***Hilary Goodridge and other vs. The Department of Public Health and another***, Superior Court, Civil Action No. 2001-1647-A, May 7, 2002

***Hill v. Church of Scientology,*** [1995] 2 S.C.R. 1130

***Jones v. Jones***, [1948] O.R. 22 (S.C.)

***Lavoie v. Canada***, 2002 SCC 23

***Law v. Canada***, [1999] 1 S.C.R. 497

***Libman v. Québec***, [1997] 3 S.C.R. 569

***Lovelace v. Ontario***, [2000] 1 S.C.R. 950

***Loving v. Virginia***, 399 U.S. 1 (1967)

***M. v. H***., [1999] 2 S.C.R. 3

***McKinney v. University of Guelph*** (1987), 63 O.R. (2d) 1

***Miller v. Miller***, [1947] O.R. 213 (C.A.)

***Miron v. Trudel***, [1995] 2 S.C.R. 418

***Mourant v. Mourant*** (1952), 6 W.W.R. 96

***New Brunswick v. G.(J),*** [1999] 3 S.C.R. 46

***Nova Scotia v. Walsh***, 2002 SCC 83

***Osborne v. Canada (Treasury Board),*** [1991] 2 S.C.R. 69

***R. v. Big M Drug Mart Ltd***., [1985] 1 S.C.R. 295

***R. v. C.J.F.*** (1996), 149 N.S.R. (2d) 91 (C.A.)

***R. v. Edwards Books and Art Ltd***., [1986] 2 S.C.R. 713

***R. v. Hawkins***, [1996] 3 S.C.R. 1043

***R. v. M.S.*** (1996), 111 C.C.C. (3d) 467 (C.A.)

***R. v. Morgentaler***, [1988] 1 S.C.R. 20

***R. v. Powley*** (2001), 53 O.R. (3d) 35 (C.A.)

***R. v. Robinson***, [1996] 1 S.C.R. 683

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

***R. v. Seaboyer***, [1991] 2 S.C.R. 577

***R. v. Swain***, [1991] 1 S.C.R. 933

***Rees v. United Kingdom***, [1986] 9 E.H.R.R. 56 (European Court of Human Rights)

***Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,*** 2002 SCC 8

***Rodriguez v. British Columbia***, [1993] 3 S.C.R. 519

***RWDSU v. Dolphin Delivery Ltd***., [1985] 2 S.C.R. 573

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

***Schafer v. Canada*** (1997), 35 O.R. (3d) 1 (C.A.)

***Trinity Western University v. B. C. College of Teachers*** [2001] 1 S.C.R. 772

***Watkins v. Olafson***, [1989] 2 S.C.R. 750

***Winko v. B.C.***, [1999] 2 S.C.R. 625

**Secondary material**

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K. Roach, *Constitutional Remedies in Canada*, loose-leaf (Aurora: Canada Law Book, 2002)

# SCHEDULE "B"

## Relevant constitutional provisions

1. ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act, 1982*** (U.K.), 1982, c. 11, ss. 1, 2(a), 2(d), 7 and 15(1)

2. ***Constitution Act 1867,*** 30 & 31 Victoria, c.3 (U.K.), ss. 91-92, 93

## Relevant statutory provisions

### Federal legislation

3. ***Criminal Code of Canada,*** R.S.C. 1985, c. C-46, s.293

4. ***Federal Law-Civil Law Harmonization Act, No. 1,*** S.C. 2001, c.4 (Bill S-4)

5. ***Modernization of Benefits and Obligations Act***, S.C. 2000, c.12, s.1.1

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

FORM 4C – BACKSHEET - Rules of Civil Procedure, Rule 4.02(3)

C39172, C39174

HALPERN et al. AND THE ATTORNEY GENERAL OF CANADA et al

Respondents on Appeal Appellant

**COURT OF APPEAL FOR ONTARIO**

Proceeding Commenced at Toronto

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