CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T

No. 500-05-059656-007

Michael Hendricks and René Leboeuf,

Petitioners

vs.

Attorney-General of Quebec and Attorney-General of Canada,

Respondents

Any clerk of the Superior Court designated by the Minister of Justice to celebrate civil marriages,

Co-Respondent

and

The Francophone Evangelical Protestant Alliance of Quebec and the Catholic League for the Rights of Man,

Intervenants

and

The Coalition for the Recognition of Same Sex Spouses,

Intervenant

Petitioners' Plan of Argument

Introduction

1. Overview of the relationship between Petitioners. Review of Petitioners' testimony as to the conjugal and permanent nature of their relationship.

2. Explanation of why Petitioners seek civil marriage as a public statement of their commitment vis-à-vis the community at large, with the dignity that it may afford them in their union. Petitioners claim right to marry is fundamental to human dignity: *Loving vs. State of Virginia*.

3. Review *Civil Code* articles on what civil marriage is (and what it is not: no obligation to procreate, now or in the past).

4. Overview of impugned legislation: article 365 *Civil Code of Quebec*, federal statutes Bill C-23 *Act to Modernize Statutes of Canada*, and Bill S-4 *Federal Law – Civil Law Harmonization Act* purporting to legitimize the *Civil Code* provision *post facto*.

B.N.A. Act, Division of Powers

5. Explanation that the legislative competence in this area lies with Parliament and not with the National Assembly.

6. Explanation that passage of federal statute S-4 confirms lack of constitutional power of the National Assembly to have passed article 365 *C.C.Q.* Hence, article 365 *C.C.Q.* must be declared unconstitutional. The rest of these arguments will then concentrate solely on establishing discriminatory nature of Bills C-23 and S-4 so that they are also declared unconstitutional. However, we must not neglect unconstitutionality of article 365 *C.C.Q.*: All three statutes must be overturned for Petitioners to be able to have the legal right to marry.

7. Response to "frozen rights" argument of Judge Pitfield in *Egale vs. Canada*; explanation of "living tree" doctrine in approaching *B.N.A. Act* [if the other parties cite the B.C. judgment in support of their position].

8. Rejection of the absurdity of applying the Charter to Canadian society in 2001 based on Canadian society prior to Confederation: *Big M Drug Mart*, *Morgentaler*, *Edwards* [Persons case], *M. vs. H.*

9. Inapplicability of analogy to constitutional cases on aboriginal rights and confessional school board cases: the *B.N.A. Act* provides for substantive rights to aboriginals and to confessional school boards, whereas sections 91 and 92 only speak to the concept of division of legislative powers. Hence, the government may NOT take away rights granted "as per 1867" to aboriginals and confessional school boards, but this does not mean that section 91 and 92 headings have frozen meanings based on Canadian society at the time. Categories may be broadened to adapt to the evolution of society and to preserve minority rights. *Reference An Act to Amend the Education Act, Attorney General for Canada vs. Attorney General for Quebec.*

10. Discussion of the "definition" of marriage at Confederation, from civil law point of view. Review of *Civil Code* of 1866. Marriage at the time was solely a religious institution, and moreover was a homogeneous patriarchal institution devoted to the systematic subjugation of women and erasure of their civil rights. This conception of the "institution of marriage" is, fortunately, entirely gone, as is the argument that society in 1867 should limit rights and freedoms in 2001! Review evolution of *Civil Code* since 1866.

11. In addition, the conception of marriage in 1867 included "lifelong permanence" ["indissoluble union"] which is a concept that no longer exists, by reason of the *Divorce Act*, which applies in Quebec as well as the rest of Canada.

12. Subsidiarily, the conception of marriage in 1867 included "voluntariness" which is a concept that remains valid in Quebec, but nowhere else in North America, where "common law marriages" have essentially denuded the concept of "voluntariness" of any real meaning. *Quaere* as to why Quebec has steadfastly denied rights to "common law spouses": antiquated reasoning or philosophical principle?

Breach of Charter Right, Federally *and* Provincially

13. As per *M. vs. H. (inter alia)*, three questions must be answered to determine if there is discrimination: (1) is there a distinction based on personal characteristics of claimants in purpose or effect; (2) is there differential treatment by reason of an enumerated or analogous ground in s. 15; (3) does the differential treatment discriminate in a substantive sense, by imposing a burden or denying a benefit which would promote or perpetuate stereotypes that the claimants are less worthy of recognition and dignity. (Subsidiarily, if article 365 was *intra vires*, the prohibition against same sex marriage is discriminatory within the meaning of s. 10 of the *Quebec Charter* as well).

14. Explanation of protection against discrimination by reason of sexual discrimination offered by Federal *Charter*, Provincial *Charter*, *Universal Declaration of Human Rights*. Sexual orientation as an "analogous ground" of discrimination within the meaning of s. 15: *Egan*, *Miron vs. Trudel*, *Vriend*,

M. vs. H.

15. Explanation of why prohibition against same sex marriage is discriminatory within the meaning of the Charters: absence of social respect and acceptance; absence of access to marital institutions such as alimony and family patrimony; absence of protection to either partner upon relationship breakdown; absence of protection for children being raised in same sex unions.

16. Explanation of what marriage is in a secular state. In a secular state, marriage must be non-discriminatory. In religion, marriage is very often discriminatory. Protection is already granted to religious adherents to continue to let religious form of marriage obey discriminatory religious rules, as extension of freedom of religion. Secular state however cannot sanction such discriminatory rules: freedom of religion includes freedom from religion. *Big M Drug Mart*, Rabbi Greenberg's affidavit.

17. The cause of the differential treatment of gays and lesbians is not the "institution" of marriage, as Respondents may argue, but rather the recent laws of the secular state. These laws are subject to *Charter* scrutiny. Both the federal and provincial laws were in fact promulgated AFTER the passing into law of the federal and provincial *Charters*. Insofar as the federal statutes are concerned, these were passed AFTER the Supreme Court judgments recognizing the legitimacy and dignity of same sex relationships. Finally, these statutes were passed with the specific purpose of NOT granting recognition to same sex relationships.

18. Denying gays and lesbians access to the status of being "married" de-legitimizes and diminishes their relationships in the community at large and vis-à-vis each other. The societal values of mutual commitment, fidelity and succour (as set out in the *Civil Code*) which are the essence of marriage provide dignity and esteem to those individuals who have the freedom to choose this way of life. Without this choice, the relationships of gays and lesbians are marginalized: a gay or lesbian relationship is necessarily viewed as somehow *aberrant* because it cannot found a "marriage, a "family", a "respectable" or "decent" home. Review Calhoun.

19. Whatever else any of the expertises of either side may opine, there is consistency in the recognition of the existence of homosexual conjugality, and homosexual parenting. Same sex couples want to raise children together, in stable unions. Review Robinson, Barnes.

20. Explanation of the evolution of recognition of same sex relationships, whether by jurisprudence (*Egan*, *Miron vs. Trudel, Vriend*, *M vs. H*), or by statute (Quebec statute Bill 32 *Loi modifiant les diverses dispositions legislatives* etc., federal statute Bill C-23, Ontario Bill 5, etc.). Such statutory recognition has been a direct result of jurisprudential initiatives declaring certain laws to be unconstitutional.

21. *M. vs. H.*: Supreme Court's recognition that same sex unions are intimate relationships of economic interdependence meriting recognition and dignity. Such relationships are marked by conjugality and permanence. The Supreme Court recognizes that hence, "common law unions" must be recognized; all this reasoning applies to "marriages". The remedies afforded by *M. vs. H.*, which have led to broad statutory modifications, do NOT provide protection for Quebecois gays and lesbians. Despite *M. vs. H.*, the impact of prejudice remains entire for Quebecois gays and lesbians [and continues in part for gays and lesbians elsewhere in Canada].

Oakes, Proportionality Test of section 1 of the Charter

22. If the Attorney General for Canada raises a section 1 argument, at that time, Petitioners will indicate what their reply will be. In any event, the burden of satisfying the criteria in *Oakes* rests entirely upon the shoulders of the Attorney General for Canada. Moreover, there is no expertise that demonstrates a "pressing social purpose" of promoting heterosexual unions at the expense of homosexual unions.

23. It is ludicrous to buy into the Attorney General's argument that exclusion of gays and

lesbians from marriage somehow meets the "pressing social purpose" of promoting heterosexuality, or heterosexual unions, or heterosexual parenting.

24. The heart of the Attorney General's argument is that procreation is at the heart of marriage. This is false in today's Canadian society, whatever social ideals may have existed in the past. This argument insults and denigrates entire swaths of Canadian society: all older couples who have married at an age when reproduction is not longer possible; all infertile couples whose marriages also merit respect; all youthful, fertile couples who *choose* to abstain from procreation: 40% of married couples do *not* have children (Lapierre-Adamcyk).

25. This argument flies in the face of the fundamental right of reproductive freedom for women, acknowledged by the Supreme Court in *Morgentaler*.

26. Today, if a woman chooses to have children, it is because it is her profound and intimate wish and aspiration, and not because of the strictures and dictates of society, religion, or antiquated notions about marriage (Eichler).

27. Moreover, this argument insults and denigrates gay and lesbian couples who do wish to procreate, notwithstanding societal or biological hurdles. Society accepts when heterosexual couples resort to medically assisted procreation (review *Civil Code* articles specifically permitting this), and yet the Respondents propose that it is valid to discriminate against gays and lesbians because they would need to resort to medically assisted procreation. It is as if the Respondents are unwilling to conceive that gays and lesbians may wish to form families and raise children, *like everyone else*, whatever the methodology used. The children born of such methods are entitled to the same protection of law as any other children.

28. Children who are <u>adopted</u> by heterosexual couples are entitled to the fullest protection of law, even if there is no biological link between them and their "parents". Children who are born of medically assisted procreation, and may have only a partial biological link to one or the other "parent" are also protected at law. "Illegitimate" children are now entitled to the full protection of law. In sum, there is no way to discriminate against children born in any circumstance, <u>except</u> for children born to and/or raised by gay or lesbian parents. This is an affront to decency.

29. The Attorney General's arguments on maintaining discrimination by reason of "pressing social purpose" fail miserably on the criterion of "rational connection". Indeed, the arguments are irrational and based on pernicious "heterosexism": exclude gays and lesbians from marriage because of the "uniqueness" of heterosexual coupling that situations it "above" gay and lesbian coupling.

30. The minority should not be required to sacrifice normal aspirations of adult life: falling in love, forming lasting relationships, raising children together as part of the love they have for each other, and moreover supporting each other throughout life. Such sacrifices cannot be required of the minority in order to enable the suddenly fragile majority of heterosexuals to feel that they "own" this unique role in society.

31. The Attorney General argues in favour of preserving the supremacy of heterosexual unions over homosexual ones, otherwise, heterosexuals will be discouraged from marrying and bearing children, as if the impetus to marry and procreate is to express one's innate superiority over gays and lesbians! We argue marriage exists and continues to exist because of the positive drive to consecrate romantic love in a publicly declared union, to form a lasting relationship, to create something greater than the sum of the two individuals, and often to bear children.

32. Perhaps we are incurable romantics, but it strikes us that an individual marries by reason of his or her love for the romantic partner, not to make a statement "AGAINST" people with a different sexual orientation. Marriage is to build a future together, that one's union is a Good, and that it merits respect from the community. If one is ashamed of one's relationship, there is no desire to marry. To the extent that gays and lesbians have had for many years to live their relationships in hiding and in shame,

it has been impossible for them to dream of marriage. The decriminalization of homosexuality dates back only 30 years! It is the rapid and dramatic evolution of social tolerance of open gay and lesbian relationships that has permitted them openly to declare a profound wish to join society in *all* its institutions and laws.

33. In the event the Attorney General raises a "minimal intrusion" argument by proposing RDPs or PACS, Petitioners will respond that this is impossible in Quebec (Robinson, Eichler). Moreover, Bill C-23 does not help either.

34. There is vast public acceptance for recognition of same sex marriage (Léger poll June 2001). The argument that allowing same sex marriage would make heterosexuals abandon the institution of marriage simply does not hold, or heterosexuals would not indicate such broad tolerance. Acceptance of same sex marriage is already so broad-based in society at large, that allowing it would not destabilize society, but to the contrary would add to social cohesion.

35. Our country of Canada is a world leader in civil liberties. Canada should be a role model for other states. The failure of other states to be as advanced as we are does not justify the perpetuation of discrimination against gays and lesbians (Wintemute).

Remedy

36. Petitioners claim open access to marriage for gay and lesbian couples, since there is no other institution like marriage that *is* marriage. The plethora of statutory rights conferred in miscellaneous laws does *not* provide the same protection as marriage, whether to the spouses themselves or to their children: family patrimony, alimony, etc. (Robinson)

Expertises to which Petitioners will refer:

37. Petitioners will refer to the following expertises: Robinson, Barnes, Eichler, Calhoun, Mercier, Winemute, Rabbi Greenberg.

38. Petitioners will also refer to the non-expert affidavits.

39. At such time as the other parties indicate which expert affidavits they will rely upon, Petitioners reserve their rights to contest the validity of same, insofar as numerous expertises are manifestly inadmissible at law.

N.B. This plan of arguments is not limitative or exhaustive, insofar as the Attorneys General have never provided a written contestation of our Motion nor any indication of what their arguments will be in this case. In fact, to prepare this plan of arguments, Petitioners have had to rely on what the Attorney General of Canada has been arguing in the other provinces, which is not necessarily the same as what will be argued here.

N.B. Petitioners wish to add the Léger poll and the Québec government's text "Le sexe n'a plus d'importance" to the evidence.

MONTREAL, October 15 2001

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Attorneys for Petitioners