Court File No.: 29866

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF THE *SUPREME COURT ACT*, R.S.C., 1985, C. S-26

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH OF JULY 2003

FACTUM OF THE ATTORNEY GENERAL OF CANADA

Morris Rosenberg
Deputy Attorney General of Canada
Department of Justice Canada
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

Per: Peter W. Hogg, Q.C and Michael H. Morris
Tel.: (416) 973-9704
Fax: (416) 952-0298
E-mail: michael.morris@justice.gc.ca

Counsel for the Attorney General of Canada

Department of Justice Canada
Bank of Canada Building, East Tower
234 Wellington Street, 12th Floor
Ottawa, Ontario
K1A 0H8

Per: Graham Garton, Q.C.
Tel: (613) 957-4842
Fax: (613) 954-1920
E-mail: graham.garton@justice.gc.ca

Agent for the Attorney General of Canada

Ministère de la Justice
1200, route de l'Église, 2ème étage
Sainte Foy, Québec
G1V 4M1

Tel: (418) 643-5140
Fax: (418) 646-6449

Noël & Associés
Barristers and Solicitors
111 Champlain Street
Hull, Québec
H8X 3R1

Per: Sylvie Roussel

Tel: (819) 771-7393
Fax: (819) 771-5397
Email: s.roussel@noelassocies.com

Agent for Counsel for the Attorney General of Québec

Alberta Justice
Constitutional Law Branch
9833-109th Street, N.W. 5th Floor,
Edmonton, Alberta
T5K 2E8

Per: Nolan Steed, Q.C.

Tel: (780) 422-9336
Fax: (780) 425-0307
Email: nolan.steed@gov.ab.ca

Gowling Lafleur Henderson LLP
Barristers and Solicitors
160 Elgin Street 26th Floor
Ottawa, Ontario
K1P 1C3

Per: Henry S. Brown, Q.C.

Tel: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

Counsel for the Attorney General of Alberta

Agent for Counsel for the Attorney General of Alberta

Attorney General of British Columbia
P.O. Box 9044,
Stn Prov Government
Room 232, Parliament Building
Victoria, British Columbia
V8V 1X4

Tel: (250) 387-1866
Fax: (250) 387-6411

Burke-Robertson
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Per: Robert H. Houston, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for Counsel for the Attorney General of British Columbia

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. In this Reference, the Attorney General of Canada affirms the validity of proposed federal legislation that enacts a definition of certain aspects of marriage for civil purposes. The proposed law is an initiative on the part of the Government of Canada which, if enacted, would provide a uniform law across the country extending the capacity to marry to same-sex couples. The Attorney General of Canada argues that the proposed legislation is authorized by the power over "marriage" in s. 91(26) of the *Constitution Act, 1867*, and is consistent with the *Canadian Charter of Rights and Freedoms* ("*Charter*").[1] That part of the definition of marriage, which provides that marriage is the lawful union of one man and one woman, has been held by lower courts to discriminate on the basis of sexual orientation.

2. The proposed legislation deals only with marriage for civil purposes and has no effect on the freedom of religious officials to refuse to perform marriages that are not in accordance with their religious beliefs. This freedom is not only affirmed by the proposed legislation but is guaranteed by s. 2(a) of the *Charter*.

B. SUMMARY OF THE FACTS

i. The Reference

3. On July 16, 2003, the Governor in Council issued an Order in Council asking this Court to hear a reference on the Government's *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*. The Order in Council, filed in this Court on July 17, 2003, sets out questions relating to the constitutional validity of the proposed legislation, the operative clauses of which read as follows:[2]

> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

---

[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, ["*Charter*"] in the Book of Authorities of the Attorney General of Canada ["AGC Authorities"], Vol. III, Tab 40

[2] Order in Council P.C. 2003-1005 dated July 16, 2003, Annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, in the Record of the Attorney General of Canada ["AGC Record"], Vol. I, Tab 3, p. 9

ii. The *EGALE, Halpern* and *Hendricks* cases

4. This Reference was preceded by litigation challenging the constitutional validity of the opposite-sex requirement of marriage in the provinces of British Columbia, Ontario and Québec. In British Columbia and Ontario, each province's Court of Appeal has ruled that the common-law definition of marriage as the "union of one man and one woman" unjustifiably violates equality rights and is therefore unconstitutional. The two Courts of Appeal have changed the common-law definition to the union of "two persons".

5. In British Columbia, two separate petitions for declarations based on equality rights were filed – one by same-sex couples and the other by Equality for Gays and Lesbians Everywhere (EGALE) along with other same-sex couples. Both petitions were heard by Pitfield J. who, by judgment issued October 4, 2001, dismissed the petitions. The same-sex couples and EGALE appealed Pitfield J.'s decision to the British Columbia Court of Appeal. By judgment issued May 1, 2003, the British Columbia Court of Appeal allowed both appeals in its decision styled *EGALE Canada Inc. v. Canada (Attorney General)* ["*EGALE*"],[3] but suspended the remedy for two years.

6. In Ontario, two separate applications for declarations were filed – one by same-sex couples based on discrimination in relation to sexual orientation, and the other by the Metropolitan Community Church of Toronto (MCCT), which solemnized same-sex unions as marriages. In its application, MCCT relied upon discrimination in relation to sexual orientation, violation of freedom of religion and religious discrimination. By judgment issued July 12, 2002, the Divisional Court allowed the application on the grounds of discrimination in relation to sexual orientation, but suspended the remedy for two years. The application of the MCCT based on freedom of religion and religious discrimination was dismissed.

7. The Attorney General of Canada was granted leave to appeal the decisions on the equality rights violation to the Court of Appeal for Ontario. The couples and MCCT were granted leave to cross-appeal the decisions on the suspension of the remedy, and MCCT alone on freedom of religion and religious discrimination. By decision issued June 10, 2003, the Court of Appeal for Ontario in *Halpern v. Canada (Attorney General)* ["*Halpern*"][4] dismissed the appeals and allowed both cross-appeals on remedy by giving immediate effect to the change in the common-law definition of marriage. However, the Court of Appeal dismissed MCCT's cross-appeal on freedom of religion and religious discrimination.

---

[3] *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (C.A) ["*EGALE*"], AGC Authorities, Vol. I, Tab 8

8. After the decision of the Court of Appeal for Ontario, the British Columbia Court of Appeal amended its order, with the Attorney General of Canada's consent, and gave immediate effect to the change in the definition of marriage. As a result, in both provinces, same-sex couples have the legal capacity to marry, and are doing so.

9. In Québec, Hendricks and LeBoeuf, a couple, sought a declaratory judgment that the statutory opposite-sex requirement for marriage in that province violated s. 15(1).[5] By decision issued September 6, 2002, the Québec Superior Court granted the application in *Hendricks v. Québec (Procureur général)* ["*Hendricks*"],[6] but suspended the remedy for two years.

10. The Attorney General of Canada appealed the decision to the Québec Court of Appeal, but withdrew his appeal on July 15, 2003. The issue remains before the Québec Court of Appeal because other parties have also appealed the decision.

iii. Marriage in Canada

11. Under the *Constitution Act, 1867*, Parliament is given the power over "marriage and divorce" in s. 91(26) while the provincial legislatures are given the power over "the solemnization of marriage in the province" in s. 92(12).[7] Couples who wish to marry in Canada must meet both the federal requirements of capacity to marry and the solemnization requirements of the province or territory where they intend to marry.

12. In the late 18th century in British North America, marriages were lawful only when contracted before clergy of specific denominations, subject to limited exceptions.[8] Over the

---

[4] *Halpern v. Canada (Attorney General)*, (2003) 65 O.R. (3rd) 161 (C.A.) ["*Halpern*"], AGC Authorities, Vol. I, Tab 12

[5] *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup.Crt) ["*Hendricks*"], AGC Authorities, Vol. 1, Tab 14

[6] The Court declared three provisions inoperative: (i) the portion of Article 365 (para. 2) of the *Code civil du Québec/Civil Code of Québec*, L.Q./ S.Q., 1991, c. 64 (AGC Authorities, Vol. V, Tab 87) stating that marriage "may be contracted only between a man and a woman"; (ii) the *Federal Law – Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5, a federal statute applicable only in Québec (AGC Authorities, Vol. III, Tab 51); and (iii) the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1 (AGC Authorities, Vol. III, Tab 50). It is to be noted that Article 365 (para. 2) had already been repealed by *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 22, (AGC Authorities, Vol. V, Tab 91).

[7] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), ss. 91(26), 92(12), AGC Authorities, Vol. III, Tab 39

[8] For example, see *An Act for Regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication*, 31 George III, c. 5, s. i (1791)(N.B.) (AGC Authorities, Vol. III, Tab 56); *An Act to confirm and make valid certain Marriages heretofore contracted in the Country now comprised within the Province of Upper Canada, and to provide for the future Solemnization of Marriage within the same*, 33 George III, c. 5, s. i (1793) (AGC Authorities, Vol. IV, Tab 60); and *An Act to render, and make valid, certain Marriages, heretofore solemnized before Magistrates, and other Lay Persons*, 33 George III, c. 5 (1793)(N.S.), ss. i - iii (AGC Authorities, Vol. III, Tab 59). These Acts provided for the recognition of

course of the 19th century, registration of marriages for civil purposes was transferred from religious authorities to the colonial (and then provincial or territorial) vital statistics registrars.[9] Over this same time period, the ability to perform marriages was slowly extended by colonial legislation to religious officials of additional denominations.[10] Beginning in the late 19th century through to the 20th century, colonial (and then provincial or territorial) legislation began to specify procedures for the conduct of purely secular marriage ceremonies available to all.[11]

13. Currently, provincial and territorial solemnization requirements generally involve three steps: first, obtaining authorization to marry; second, going through a ceremony of marriage, either religious or civil; and third, registering the marriage with the provincial or territorial government.

14. In all provinces and territories, except for Québec,[12] authorization to marry can be obtained by securing a licence from the couples' local municipal office. This licence allows the couple to have their marriage solemnized in either a religious or civil ceremony. In several provinces and territories, a marriage can also be authorized by the publication of banns in a religious institution, in which case no licence is needed.[13]

---

marriages by secular officials (such as Magistrates or Justices of the Peace) only where recognized religious officials were unavailable in a given geographical area.

[9] For example, see *An Ordinance respecting Marriage in British Columbia*, 1865, No. 21, s. iv (B.C.) (AGC Authorities, Vol. III, Tab 53); *An Ordinance Respecting Marriages*, No. 9 (1878), s. xii (N.W.T.) (AGC Authorities, Vol. III, Tab 57); and *An Act relating to the Registration of Marriage Certificates, and to amend the Act hereinafter mentioned,* 55 Victoria, c. 7 (1891), s. 5 (P.E.I.), (AGC Authorities, Vol. IV, Tab 63)

[10] For example, see *An Act to regulate the Celebration of Marriages in Newfoundland*, 57 George III, c. 51 (1817), s. ii (Nfld.) [Quakers, Jews] (AGC Authorities, Vol. III, Tab 55); *An Act to make valid certain marriages heretofore contracted, and to provide for the future solemnization of matrimony in this Province*, 11 *George* IV, c. 36 (1830), s. iii (Upp. Can.) [Church of Scotland, Lutherans, Presbyterians, Congregationalists, and other Christian denominations] (AGC Authorities, Vol. IV, Tab 61); and *An Ordinance respecting Marriage in British Columbia*, 1865, No. 21, s. xi (B.C.) [Quakers, Jews], (AGC Authorities, Vol. III, Tab 53)

[11] For example, see *An Ordinance respecting Marriage in British Columbia*, 1865, No. 21, ss. iii – vi (B.C.) (AGC Authorities, Vol. III, Tab 53); *An Ordinance Respecting Marriages, No.9* (1878), s. 1 and *An Ordinance Respecting Marriages* 1898, R.O. c. 46, s. 3 (N.W.T.) (AGC Authorities, Vol. III, Tabs 57 & 58); *The Marriage Act*, R.S.A. 1922, c. 213, ss. 16 – 18 (Alta.) (AGC Authorities, Vol. III, Tab 52); *Marriage Act*, R.S.B.C. 1930, c. 41. ss. 16 – 21, (B.C.) (AGC Authorities, Vol. III, Tab 54); and *The Marriage Act*, R.S.O. 1950, c. 222, s. 25 (Ont.), (AGC Authorities, Vol. IV, Tab 62).

[12] In Québec, before the solemnization of a marriage can occur, whether it be pursuant to a civil or religious ceremony, the officiant must post a notice for 20 days before the date fixed for the ceremony, at the place where the marriage is to be solemnized: *Code civil du Québec/ Civil Code of Québec*, L.Q./S.Q., 1991, c. 64, as amended, Article 368 and *Rules Respecting the Solemnization of Civil Marriages and Civil Unions*, C.C.Q., 1991, c. 64, Rule 1, (AGC Authorities, Vol. V, Tabs 88 & 89).

[13] *Marriage Act*, R.S.O. 1990, c. M.3, s. 17 (AGC Authorities, Vol. V, Tab 83); *The Marriage Act*, R.S.M. 1987, c. M50, s. 8 (AGC Authorities, Vol. IV, Tab 71); *Marriage Act*, R.S.Y. 2002, c. 146, ss. 19-23 (AGC Authorities, Vol. V, Tab 95); *Marriage Act*, R.S.N.B. 1973, c. M-3, s. 11 (AGC Authorities, Vol. V, Tab 78); *Marriage Act,* R.S.N.W.T. 1988, c. M-4, s. 22 (AGC Authorities, Vol. V, Tab 79); and at the time of division, effective April 1, 1999, Nunavut adopted NWT's legislation, (AGC Authorities, Vol. V, Tab 97).

15. Once a marriage has been authorized (by licence or banns), the ceremony of marriage may be either religious or civil. A religious ceremony can be performed by a provincially or territorially registered official. A civil ceremony can be performed by a judge, a justice of the peace, or an official such as a marriage commissioner.

16. After a marriage ceremony, the official who performed the marriage forwards the marriage registration form or declaration[14] to the province's or territory's registration office. If the requirements of both federal and provincial or territorial law have been met, the provincial or territorial office registers the marriage and issues a marriage certificate to the couple.

iv. Demography

17. The Canadian demographics for marital status and religious affiliation provide context for the issues under consideration. Marriage currently remains the predominant family structure in Canada, with 70% of 2001 Census families consisting of married couples.[15] However, since the late 1980s, the proportion of married couples has decreased in relation to other family types.[16] The 2001 Census also, for the first time, provided the incidence of common-law same-sex relationships, which comprised 0.5% of Canadian couples.[17]

18. The Canadian population remains predominantly Christian, with the reported figure of 72%. Since 1991, the proportion of persons identified as Christian has decreased (by 2% for Catholics and 6% for Protestants) while the proportion of persons identified with all other religious affiliations has increased by 2.1%.[18] In 76% of marriages conducted in 2000, couples chose religious rather than civil ceremonies.[19] Important provincial and territorial variations underlie these national statistics.[20]

v. Same-sex relationships in other countries

19. Canada would not be the first country to confer the capacity to marry for civil purposes on same-sex couples. The Netherlands was the first country to "open up" the civil institution of marriage to same-sex couples, effective April 1, 2001. Belgium has since taken this step, effective June 1, 2003. Both countries effected this change to their civil definitions of marriage

---

[14] *Code civil du Québec/ Civil Code of Québec*, L.Q./ S.Q., 1991, c. 64, as amended, Article 375, AGC Authorities, Vol. V, Tab 88
[15] *Affidavit of Jim Sturrock,* sworn October 6, 2003, at para. 15 ("*Affidavit of Jim Sturrock*"), AGC Record, Vol. I, Tab 6, p.17
[16] *Affidavit of Jim Sturrock*, at para. 15, AGC Record, Vol. I, Tab 6, p. 17
[17] *Affidavit of Jim Sturrock*, at para. 25, AGC Record, Vol. I, Tab 6, pp. 20-21
[18] *Affidavit of Jim Sturrock*, at para. 19, AGC Record, Vol. I, Tab 6, pp. 18-19
[19] *Affidavit of Jim Sturrock*, at para. 22, AGC Record, Vol. I, Tab 6, pp. 19-20

by amendments to their respective Civil Codes. Both Codes now provide, quite simply, that a marriage can be contracted by two people of different sex or of the same sex. As well, seven other European countries have enacted other legal institutions to formally recognize same-sex relationships.[21]

PART II – POINTS IN ISSUE

20. The Reference asks three questions:

(a) Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

(b) If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

(c) Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

---

[20] *Affidavit of Jim Sturrock*, at para. 22, AGC Record, Vol. I, Tab 6, pp. 19-20

[21] *Affidavit of Cornelis Waaldijk*, sworn October 4, 2003, at paras. 13-16, 41-43, 58-65, AGC Record, Vol. I, Tab 9, pp. 56-57, 66-67, 72-75

PART III – ARGUMENT

QUESTION 1: THE PROPOSED LEGISLATION IS WITHIN THE EXCLUSIVE LEGISLATIVE AUTHORITY OF PARLIAMENT

21. The first question on this Reference is as follows:

> Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

22. Clause 1 of the proposed legislation would, if enacted by Parliament, change one aspect of the legal capacity to marry for civil purposes, by stipulating that marriage "is the lawful union of two persons to the exclusion of all others." The proposed legislation is within Parliament's exclusive authority to legislate in relation to capacity to marry. It follows that the proposed legislation is constitutional, as it falls within the scope of the word "marriage" found in s. 91(26) of the *Constitution Act, 1867*.

i. Parliament has jurisdiction under section 91(26) over capacity to marry

23. The distribution of legislative power in the *Constitution Act, 1867* is exhaustive. This means that every matter, existing now or in the future, can be found within the legislative competence of either Parliament or the provincial legislatures.[22] As a result, either Parliament or the provincial legislatures must have the power to extend marriage to include same-sex couples.

24. Under the *Constitution Act, 1867*, Parliament is given the power over "marriage and divorce" in s. 91(26), while the provincial legislatures are given the power over "the solemnization of marriage in the province" in s. 92(12).[23] It is generally understood that Parliament has jurisdiction over "capacity",[24] such as prohibited degrees of consanguinity[25] or

---

[22] *A.G. Ont. v. A.G. Can. (Reference Appeal)*, [1912] A.C. 571 (P.C.) at 581, 583-84 (AGC Authorities, Vol. I, Tab 2); *Bank of Toronto v. Lambe* (1887), 12 A.C. 575 (P.C.) at 587 (AGC Authorities, Vol. I, Tab 6); *Union Colliery Co. v. Bryden,* [1899] A.C. 580 (P.C.) at 584-5 (AGC Authorities, Vol. II, Tab 31); *A.G. Can. v. A.G. Ont. (Labour Conventions)*, [1937] A.C. 326 (P.C.) at 353-4 (AGC Authorities, Vol. I, Tab 1); and *Jones v. A.G.N.B.*, [1975] 2 S.C.R. 182 at 195 (AGC Authorities, Vol. II, Tab 16)

[23] *Constitution Act, 1867,* 30 & 31 Victoria, c. 3 (U.K.), ss. 91(26) and 92(12), AGC Authorities, Vol. III, Tab 39

[24] H.R. Hahlo, *Nullity of Marriage in Canada* (Toronto: Butterworths, 1979), pp. 5-44, AGC Authorities, Vol. II, Tab 35

[25] *Teagle v. Teagle,* [1952] 3 D.L.R. 843 (B.C.S.C.) at 845-6, AGC Authorities, Vol. II, Tab 29

the existence of a prior marital relationship.[26] The provinces have jurisdiction over pre-ceremonial requirements[27] and the qualifications of the person performing the ceremony.[28]

25. With respect to capacity, English law on marriage initially established which marriages were prohibited. These prohibitions were based on such factors as minimum age of consent, free and informed consent, and a table of prohibited degrees arising either by blood or by marriage prepared in 1563 by Archbishop Parker of the Church of England and reflected in the statutes of Henry VIII. At the time of Confederation, these prohibitions were part of the law of Canada, apart from Québec, although the law in force in that province was essentially the same.[29]

26. In the late nineteenth century, the Parliament of Canada began to legislate to supplant certain aspects of the pre-existing law in relation to capacity. In 1882, for example, Parliament passed legislation repealing the prohibition against marriage between a man and the sister of his deceased wife.[30] In 1990, Parliament replaced the old law on prohibited degrees of consanguinity with the *Marriage (Prohibited Degrees) Act*, which provided that persons may not marry if they are lineally related by consanguinity or adoption or if they are brother and sister by consanguinity or adoption.[31]

27. Parliament, therefore, has historically legislated with respect to certain aspects of the capacity to marry. The legislative proposal before the Court in this Reference would be another exercise of the same federal jurisdiction.

ii. Parliament's jurisdiction should be given a purposive interpretation

28. Section 91(26) should be given a purposive interpretation. A purposive interpretation of a constitutional provision should begin with an examination of "...the meaning of its words, considered in context and with a view to the purpose they were intended to serve".[32] This approach requires an examination of the facts leading up to and surrounding the adoption of the

---

[26] *Helens v. Densmore,* [1957] S.C.R. 768 at 778-9 per Cartwright J. (for the majority), at 784 per Rand J., AGC Authorities, Vol. I, Tab 13
[27] *Alspector v. Alspector,* [1957] O.R. 454 (C.A.) at 462, 464-5, AGC Authorities, Vol. I, Tab 4
[28] *Gilham v Steele,* [1953] 2 D.L.R. 89 (B.C.C.A.) at 90 per O'Halloran J., at 92-3 per Robertson J., and at 98-99 per Bird J., AGC Authorities, Vol. I, Tab 10
[29] Bill S-14, *An Act respecting the laws prohibiting marriage between related persons,* 2nd sess., 34th Parl. (Minutes of Proceedings and Evidence of Legislative Committee, 8 November 1990, House of Commons), AGC Record, Vol. IV, Tab 33, p. 578
[30] *An Act concerning Marriage and a Deceased Wife's Sister*, S.C. 1882, c. 42, AGC Authorities, Vol. III, Tab 41
[31] *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, AGC Authorities, Vol. III, Tab 49
[32] *R. v. Blais*, 2003 SCC 44 at para. 16, AGC Authorities, Vol. II, Tab 24

constitutional provision. Relevant evidence would include anything showing the rationale for which the provision was included in the Constitution. This would include records of negotiations, statements by individuals involved in the drafting process, debates, and events preceding the adoption of the provisions that highlight a relevant issue.[33]

29. The constitutional debates on marriage in the legislative assembly of the old Province of Canada are not directly helpful on the present issue. Certainly, it was never suggested that marriage might include same-sex unions. However, a driving force behind the allocation of the marriage power to Parliament was the desirability of a uniform law of marriage across the country.[34] The idea was to avoid a patchwork situation with its concomitant problems of recognition and enforcement of marriages.

30. This perspective is reflected in the judgment of Rand J. in *Helens v. Densmore*, a case concerning the validity of provincial legislation prescribing the capacity of divorced persons to marry. He stated:[35]

> That being the provincial law before Confederation, it became thereafter the law as if enacted by Parliament. As paramount law, it would determine the capacity for marriage of the person affected throughout Canada; and there could be no question of a Province not giving it recognition. Apart from questions of solemnization, with one source of law for marriage and divorce, personal capacity or incapacity is the same throughout the nation.

iii. Parliament's jurisdiction should be given a progressive interpretation

31. The purposive approach supports a progressive interpretation of the Constitution. The word "marriage" appears in s. 91(26) as a head of legislative power intended to provide a basis for nationwide rules of capacity. Such a general and broad power is inevitably going to be affected by changes in social attitudes towards relationships. The interpretation of the power should reflect this reality.

32. The interpretation of s. 91(26) should not be restricted to what that provision meant in 1867. That would invoke notions of "originalism" and "frozen concepts". This Court has consistently endorsed a progressive approach as a fundamental tenet of constitutional

---

[33] This Court considered this kind of evidence in *R. v. Blais*, 2003 SCC 44 at paras. 19-31, AGC Authorities, Vol. II, Tab 24.
[34] *Parliamentary Debates,* 3rd sess., 8th Prov. Parl. (February 3, 1865), AGC Record, Vol. IV, Tab 32 at 567-570; see also: F. Chevrette and H. Marx. *Droit constitutionnel* (Montréal: Les Presses de l'Université de Montréal, 1982), p. 656 (AGC Authorities, Vol. II, Tab 33) and P.W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., Vol. 1, (Toronto: Thomson Carswell, 1997), pp. 26-1 to 26-2, AGC Authorities, Vol. II, Tab 38.
[35] *Helens v. Densmore,* [1957] S.C.R. 768 at 784, AGC Authorities, Vol. I, Tab 13

interpretation, often expressed as the "living tree" principle.[36] Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power".[37]

33. The Constitution must be continuously adapted to new conditions and new ideas.[38] This requires an assessment of relevant factors occurring since Confederation that could result in a change to its interpretation. A progressive analysis has been used in the past to accommodate social, economic and technological developments that did not exist, and could not have been contemplated, when the constitutional provision at issue was entrenched.[39] As noted recently by this Court in the *Ward* decision:[40]

> The Constitution must be interpreted flexibly over time to meet new social, political and historic realities...

34. Laskin, C.J.C., for the majority of this Court in *R. v. Zelensky*, also stressed the importance of re-examining the scope of the heads of power, in this case the federal criminal power, when faced with new or altered social conditions: [41]

> We cannot, therefore, approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the modes of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this court to re-examine courses of decision on the scope

---

[36] *Reference re: Meaning of the word "Persons" in Section 24 of the British North America Act,* [1930] A.C. 124 (P.C.) at 136-7 (AGC Authorities, Vol. II, Tab 28); *Ontario (Attorney General) v. Canada (Attorney General),* [1947] A.C. 127 (P.C.) at 154 (AGC Authorities, Vol. II, Tab 22); *Attorney General of British Columbia v. Canada Trust Co.*, [1980] 2 S.C.R. 466 at 478-9 (AGC Authorities, Vol. I, Tab 5); and see also: *Halpern*, at 175 – 176, paras. 42 – 46 (AGC Authorities, Vol. I, Tab 12).

[37] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, per Dickson J. (as he then was), at 155 (AGC Authorities, Vol. II, Tab 15); *R. v. Blais*, 2003 SCC 44 at para. 40 (AGC Authorities, Vol. II, Tab 24)

[38] *Martin Service Station Ltd. v. MNR,* [1977] 2 S.C.R. 996 at 1006 (AGC Authorities, Vol. II, Tab 21); L. Walton, "Making Sense of Canadian Constitutional Interpretation" (2000-2001), 12 N.J.C.L. 315, pp. 318, 332 (AGC Authorities, Vol. II, Tab 36); P.W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., Vol. 1 (Toronto: Thomson Carswell, 1997), pp. 15-44 to 15-45 (AGC Authorities, Vol. II, Tab 38)

[39] *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155 (AGC Authorities, Vol. II, Tab 15); *Reference re: Meaning of the word "Persons" in Section 24 of the British North America Act,* [1930] A.C. 124 (P.C.) at 136-7 (AGC Authorities, Vol. II, Tab 28); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 248-9, para. 52 (AGC Authorities, Vol. II, Tab 27); *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158 at 180-1 (AGC Authorities, Vol. II, Tab 26); *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 365 (AGC Authorities, Vol. II, Tab 18); *Attorney General of British Columbia v. Canada Trust Co.*, [1980] 2 S.C.R. 466 at 478-9 (AGC Authorities, Vol. I, Tab 5); P.W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed., Vol. 1, (Toronto: Thomson Carswell, 1997), pp. 15-44 to 15-45 (AGC Authorities, Vol. II, Tab 38); F.L. Morton & R. Knopff, "Permanence and Change in a Written Constitution: The "Living Tree" Doctrine and the *Charter of Rights*", (1990) *Supreme Court Law Review* 533, p. 544 (AGC Authorities, Vol. II, Tab 34)

[40] *Ward v. Canada (Attorney General),* [2002] 1 S.C.R. 569 at 583-4, para. 30, AGC Authorities, Vol. II, Tab 32

[41] *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 951, AGC Authorities, Vol. II, Tab 25

> of legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*.

iv. Parliament has the jurisdiction to confer capacity to marry on same-sex couples

35. A progressive approach to constitutional interpretation is particularly applicable in dealing with gay and lesbian individuals and couples, as there has been such a marked change in public attitudes and public policy since Confederation. Although same-sex relationships obviously existed at the time the Constitution was enacted, there was never the slightest contemplation of the recognition of same-sex marriage. Marriage between persons of the same sex could not realistically have been considered as an issue until the *Criminal Code* was modified to decriminalize homosexual sex between consenting adults, which did not occur until 1969, more than 100 years after Confederation.[42]

36. Today, governments in Canada not only acknowledge the existence of common-law same-sex couples, but also extend to them virtually all of the benefits and obligations for which common-law opposite-sex couples are eligible.[43] In Québec, Ontario and British Columbia, s. 15(1) of the *Charter* has been interpreted as requiring that same-sex couples be permitted to marry. In the Netherlands and Belgium, capacity to marry for civil purposes has been "opened up" to same-sex couples. Other countries may follow. As well, seven other European countries have enacted other institutions to recognize same-sex relationships.[44]

37. As noted by the Court of Appeal for Ontario, marriage is an institution that is monogamous in nature, and is based on intimacy, companionship, social recognition and economic benefits. It also has the goal of being permanent and encouraging the birth and rearing of children.[45] In the 21st century, marriage can include same-sex couples who want to unite in this institution and whose unions share in the current understanding of the essence of marriage, including in some cases the rearing of children. A progressive approach would accommodate the expansion of the term "marriage" in s. 91(26) to include same-sex couples.

38. Indeed, the Courts of Appeal of British Columbia and Ontario have held that the meaning of "marriage" within s. 91(26) extends to same-sex couples. Those courts have held "that

---

[42] *Criminal Law Amendment Act,1968-1969,* S.C. 1968-1969, c. 38, s. 7, AGC Authorities, Vol. III, Tab 46
[43] For example, see the *Modernization of Benefits and Obligations Act,* S.C. 2000, c. 12, AGC Authorities, Vol. III, Tab 50
[44] *Affidavit of Cornelis Waaldijk*, sworn October 4, 2003, paras. 13-16, 41-43 and 58-67, AGC Record, Vol. I, Tab 9, pp. 56-57, 66-67, 72-76
[45] *Halpern,* at 187, 199, paras. 93, 94, 154, AGC Authorities, Vol. I, Tab 12

'marriage' refers only to a topic or 'class of subjects' of potential legislation, it cannot contain an internal frozen-in-time meaning that reflects the presumed framers' intent as it may have been in 1867." It must be interpreted "as describing a subject for legislation, not a definite object".[46] Clause 1 of the proposed legislation is, therefore, within the legislative authority of the Parliament of Canada.

v. The proposed legislation is limited to marriage for civil purposes

39. Clause 2 of the proposed legislation states: "Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs".

40. Clause 2 is within the legislative authority of the Parliament of Canada. The clause is merely declaratory of the scope of the proposed legislation, as Clause 1 already limits the legislation to marriage "for civil purposes". As suggested by this Court in *Kitkatla Band v. British Columbia*, legislation may contain declaratory clauses that explain the intended scope of the legislation without needing a particular head of power to sustain them.[47]

41. Clause 2 makes clear that the proposed legislation imposes no new obligations on religious officials. They remain free to refuse to perform marriages that are not in accordance with their religious beliefs.

Conclusion on Question 1

42. The Attorney General of Canada accordingly submits that the proposed legislation is entirely within the legislative authority of the Parliament of Canada. The answer to question 1 of the Reference is yes.

QUESTION 2: CLAUSE 1 OF THE PROPOSED LEGISLATION IS CONSISTENT WITH THE *CHARTER*

43. The second question on this Reference is as follows:

> [...] is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

---

[46] *EGALE,* at 19 - 20, para. 69 [quoting Laforme J., in *Halpern v. Canada* (2002), 60 O.R. (3d) 321 (Div.Crt) at 407, para.106], AGC Authorities, Vol. I, Tab 8; see also *Halpern*, at 175-76, paras. 42-46, AGC Authorities, Vol. I, Tab 12.

[47] *Kitkatla Band v. British Columbia*, [2002] 2 S.C.R. 146 at 178-9,180, paras. 71, 74, AGC Authorities, Vol. II, Tab 17

44. The proposed legislation must be considered against the backdrop of the *EGALE, Halpern* and *Hendricks* decisions, which all held that a definition of marriage which denies same-sex couples the capacity to marry is inconsistent with s. 15(1) of the *Charter*. The proposed legislation removes this unconstitutional discrimination by conferring the capacity to marry on same-sex couples. It accepts that gay and lesbian individuals can "form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples".[48]

45. Clause 1 of the proposed legislation, by enacting a more inclusive definition of marriage, is consistent with the *Charter*.

46. The Attorney General of Canada does not yet know what arguments will be advanced against the proposed legislation. The Attorney General of Canada proposes to address possible arguments against the proposed legislation under ss. 2(a) and 15(1) of the *Charter,* in case those provisions are relied upon by opponents of the proposed legislation.

(a) The proposed legislation does not impair freedom of religion

(i) The proposed legislation does not affect freedom of religious belief

47. Section 2(a) of the *Charter* protects "freedom of conscience and religion".

48. The interest engaged and protected by s. 2(a) of the *Charter* is freedom to hold one's religious beliefs. This freedom has been characterized by this Court as the absence of coercion or constraint. If a "person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."[49]

49. In *Big M Drug Mart,* the Supreme Court of Canada elaborated upon the core values underlying the s. 2(a) freedom:[50]

> 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

---

[48] *Egan v. Nesbit,* [1995] 2 S.C.R. 513 at 604, para. 180 per Cory J. (in dissent), AGC Authorities, Vol. I, Tab 9; see also: *M. v. H.*, [1999] 2 S.C.R. 3 at 57-8, para. 73 per Cory and Iacobucci, JJ., AGC Authorities, Vol. II, Tab 20.

[49] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336, AGC Authorities, Vol. II, Tab 23; *Delisle v. Canada,* [1999] 2 S.C.R. 989 at 1015, para. 26, AGC Authorities, Vol. I, Tab 7

[50] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346-347, AGC Authorities, Vol. II, Tab 23

> 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 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.

50. Clause 1 explicitly limits the proposed legislation to marriage "for civil purposes". For greater certainty, clause 2 goes on to provide that: "Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs". It is clear, therefore, that it is not the intention of the proposed legislation to affect the freedom of religious officials to refuse to conduct marriages that are not in accordance with their religious beliefs or impose a duty on them to conduct them.

51. The civil purpose of the state in recognizing marriage is: to support a key societal institution; to protect individuals; to identify benefits; and to impose legal obligations. In *EGALE*, the British Columbia Court of Appeal, quoting a Law Commission of Canada report, said:[51]

> The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support and voluntarily assume a range of legal rights and obligations.

52. In carrying out this civil purpose, the state must identify a common set of characteristics that it is prepared to recognize as marriage, some of which may be consistent with, and some in conflict with, various religious and secular definitions of marriage.

53. In *Halpern*, the Court of Appeal for Ontario had to address an argument brought by the MCCT that the failure to extend the civil recognition of marriage to same-sex unions violates the religious freedom of individuals and congregations who celebrate those unions. MCCT argued that, when the civil definition of marriage accords with one religious view of marriage, and not another, this diminishes the status of those religious marriages not accorded a civil status. The Court of Appeal disagreed, emphasizing the distinction between marriage for civil purposes and marriage for religious purposes:[52]

> In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity

---

[51] *EGALE*, at 43, para. 154 (AGC Authorities, Vol. I, Tab 8), citing *Beyond Conjugality, Recognizing and supporting close personal adult relationships* (Law Commission of Canada, Ottawa, 2002), p. 130, AGC Authorities, Vol. II, Tab 37

[52] *Halpern,* at 177, para. 53, AGC Authorities, Vol. I, Tab 12

> or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.

54. Equally here, what is at issue is not the validity or invalidity of various forms of religious marriage, but the state's decision to extend legal recognition for civil purposes to same-sex unions.

55. If religious officials were required to perform a ceremony that did not accord with their religious beliefs, religious freedom would clearly be impaired. The proposed legislation does not, however, impair religious freedom as religious officials have a right, already protected by s. 2(a) of the *Charter* and made explicit by clause 2 of the proposed legislation, to refuse to solemnize a marriage that is not in accordance with their religious beliefs. Those religious officials who do not believe that marriage should include same-sex unions are not compelled to solemnize them. The proposed legislation does not, therefore, constitute coercion within the meaning of the judicial interpretation of s. 2(a) of the *Charter.*

56. The Court of Appeal in *Halpern* held that the opposite-sex definition of marriage, which excluded recognition of the same-sex unions celebrated by the MCCT, did not violate s. 2(a):[53]

> In sharp contrast to the situation in *Big M Drug Mart*, the common-law definition of "marriage" does not oblige MCCT to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common-law definition of "marriage" that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there is nothing in the common-law definition of "marriage" that obliges MCCT to perform only heterosexual marriages.

57. Equally here, the expansion of the definition of the civil capacity of marriage to include unions of same-sex couples does not violate the rights of anyone opposed to such unions on a religious basis. In fact, unlike the situation complained of by the MCCT (whose same-sex unions were excluded by the common-law definition), opposite-sex unions continue to be included, as before, within the proposed new definition. Those whose religious beliefs prescribe a narrower definition of marriage are free to hold those beliefs and will not be required to act inconsistently with those beliefs.

---

[53] *Halpern,* at 178, para. 57, AGC Authorities, Vol. I, Tab 12

(ii) Religious freedom does not entitle one group to demand state endorsement of its beliefs to the exclusion of others

58. The proposed extension of marriage to same-sex unions does not constitute an endorsement by the state of any particular religious view of marriage, to the exclusion of any other. Furthermore, s. 2(a) cannot be invoked to demand that the state endorse a particular religious view of marriage: s. 2(a) enshrines no right to positive state facilitation of religious belief or practice.[54]

59. Section 2(a) enshrines no right to demand that the state withhold recognition or accommodation of practices that might be contrary to particular religious beliefs.[55] Enforcement of religious conformity through legislation or government action is no longer a legitimate object of government and is in fact directly contrary to the protection found in s. 2(a). As Dickson, C.J. notes in *Big M Drug Mart*:[56]

> In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the *Charter*, it is no longer legitimate. With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. The state shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.

60. Recently, the Supreme Court made it clear in *Trinity Western* that the core value protected in s. 2(a) is freedom of belief, and this freedom is broader than the right to act on a religious belief. [57] This freedom certainly does not extend to a right to compel others to act, or to limit their ability to act, in accordance with a religious belief.

61. Furthermore, as Prowse J. noted in the British Columbia Court of Appeal in *EGALE*, there is no hierarchy of rights: the religious freedom of those opposed to recognizing same-sex unions as marriages does not trump the equality rights of those couples seeking recognition of their unions as marriages:[58]

> As noted by Lemelin J. in *Hendricks*, there is no hierarchical list of rights in the *Charter*, and freedom of religion and conscience must live together with s. 15

---

[54] *Adler v. Ontario,* [1996] 3 S.C.R. 609 at 702-703, para. 175, per Sopinka, J., AGC Authorities, Vol. I, Tab 3
[55] *Grant v. Attorney General of Canada* (1995) 125 D.L.R (4th) 556 (Fed. C.A.) at 557-8; leave to appeal to the Supreme Court of Canada refused, [1995] S.C.C.A. No. 394, AGC Authorities, Vol. I, Tab 11
[56] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 351, AGC Authorities, Vol. II, Tab 23
[57] *Trinity Western University v. B.C. College of Teachers*, [2001] 1 S.C.R. 772 at 814-5, para. 36, AGC Authorities, Vol. II, Tab 30
[58] *EGALE,* at 38, para. 133, AGC Authorities, Vol. I, Tab 8

> equality rights. One cannot trump the other. In her view, shared by the court in *Halpern*, the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs. Similarly, the rights of religious groups to freely practise their religion cannot oust the rights of same-sex couples seeking equality, by insisting on maintaining the barriers in the way of that equality.

62. Clause 1 of the proposed legislation does not, therefore, impair freedom of religion as guaranteed by s. 2(a) of the *Charter*.

(b) The proposed legislation does not discriminate on the ground of religion

63. Section 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

64. The proposed legislation removes from the law of marriage the discrimination on the ground of sexual orientation identified in *EGALE, Halpern* and *Hendricks*. The proposed legislation is consistent with s. 15(1) of the *Charter*.

65. Any conceivable attack, based on s. 15(1), upon the extension of marriage to include same-sex couples would fail at the threshold of the equality analysis.[59] The proposed legislation draws no distinction, imposes no differential treatment, denies no benefit and imposes no burden based on any listed or analogous ground, including different religious understandings of marriage.

66. The proposed legislation concerns itself with the legal definition of marriage for civil purposes and does not touch religious marriage. Religious marriage remains a matter for the conscience of religious officials, and not a matter of law. Religious marriages do not necessarily meet the requirements for legal registration. Equally, marriages that would satisfy the civil requirements do not necessarily meet a particular religion's requirements for marriage.[60]

67. The locus of religious belief is in the individual conscience of religious adherents and not in the civil law. By including same-sex unions, while continuing to include opposite-sex unions within the definition of marriage, the proposed legislation does not differentiate between groups

---

[59] *Law v. Canada,* [1999] 1 S.C.R. 497 at 547-552, para. 88, AGC Authorities, Vol. II, Tab 19

[60] Examples include marriage between Jewish partners where a "get" had not been obtained or between Catholic partners, where either had been divorced or the two are related as first cousins (the latter prohibited by Catholic doctrine, but not by the *Marriage (Prohibited Degrees) Act)*.

that might hold a religious understanding of marriage that is more specific or particular than the civil definition. In particular, religious officials who believe marriage should only embrace opposite-sex unions remain free to refuse to solemnize any other unions. The opposite-sex unions that they do solemnize will continue to be recognized as marriages for civil purposes, provided these unions meet all of the legal requirements.

68. In *Halpern*, the Court of Appeal found that the opposite-sex requirement of marriage discriminated against same-sex couples on the grounds of sexual orientation. As part of that decision, however, it specifically rejected an argument made by the MCCT that the common-law definition of marriage discriminated against any group on the grounds of religion:[61]

> For now, it appears clear to us that any potential discrimination arising out of the differential treatment of same-sex marriages performed by MCCT is based on sexual orientation. This differential treatment is not based on the religious beliefs held by the same-sex couples or by the institution performing the religious ceremony. For this reason, we conclude that MCCT has failed to establish religious discrimination under s. 15(1).

69. The exclusion from the common-law definition of marriage of the same-sex unions solemnized by the MCCT, in accordance with that Church's beliefs, was found not to be in breach of religious freedom in *Halpern*. Under the proposed legislation, the addition of same-sex unions to the definition of marriage for civil purposes is an inclusive change that does not discriminate against those holding different religious understandings of marriage.

70. The recognition of same-sex unions does not marginalize or stigmatize any individual belonging to a religious or cultural group that may hold a different understanding of marriage. Clause 2 specifically respects and affirms the right of religious officials not to solemnize same-sex unions as marriages, while clause 1 continues to include opposite-sex unions within the civil definition of marriage.

Conclusion on Question 2

71. The Attorney General of Canada, accordingly, submits that clause 1 of the proposed legislation is consistent with the *Charter*. The answer to question 2 of the Reference is yes.

---

[61] *Halpern*, at 178, para. 58, AGC Authorities, Vol. I, Tab 12

QUESTION 3: PARAGRAPH 2(A) OF THE CHARTER PROTECTS RELIGIOUS OFFICIALS FROM BEING COMPELLED TO PERFORM A MARRIAGE BETWEEN TWO PERSONS OF THE SAME SEX

72. The third question on this Reference is as follows:

> Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

73. In *Big M Drug Mart*, this Court made it clear that the core of the interest protected by s. 2(a) is the freedom from being compelled to act contrary to one's beliefs or conscience:[62]

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. [...] Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

74. A decision by a religious official to perform or not to perform a marriage ceremony, based upon religious beliefs and conscience about marriage, is at the core of religious freedom. Coercing a religious official to perform a marriage ceremony, contrary to his or her religious beliefs, cannot be justified in order to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Such coercion would be contrary to s. 2(a) of the *Charter*.[63] That section, therefore, protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.

Conclusion on Question 3

75. The Attorney General of Canada, accordingly, submits that the answer to question 3 of the Reference is yes.

---

[62] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336-7, AGC Authorities, Vol. II, Tab 23
[63] See: *EGALE*, at 38, 49, paras. 133, 181 (AGC Authorities, Vol. 1, Tab 8); see also *Halpern*, at 195, para. 138, AGC Authorities, Vol. 1, Tab 12.

PART IV – SUBMISSIONS CONCERNING COSTS

76. The Attorney General of Canada seeks no order as to costs.

PART V – NATURE OF ORDER SOUGHT

77. The questions on the Reference should be answered as follows:

(a) Question 1: yes

(b) Question 2: yes

(c) Question 3: yes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 24th day of October, 2003.

Peter W. Hogg, Q.C.

Michael H. Morris
Of Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

Legislative Authority (continued):	**Cited at Paragraphs**
An Ordinance Respecting Marriages, No. 9 (1878)(N.W.T.)	12
An Ordinance Respecting Marriages, 1898, R.O. c. 46 (N.W.T.)	12
An Act relating to the Registration of Marriage Certificates, and to amend the Act hereinafter mentioned, 55 Victoria, c. 7 (1891)(P.E.I.).	12
The Marriage Act, R.S.A. 1922, c. 213 (Alta.)	12
Marriage Act, R.S.B.C. 1930, c. 41 (B.C.)	12
The Marriage Act, R.S.O. 1950, c. 222 (Ont.)	12

PART VII – STATUTES RELIED ON

Tab

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

2. *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

Federal Legislation:

3. *Criminal Law Amendment Act,1968-1969,* S.C. 1968-1969, c. 38, s. 7

4. *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, ss. 1-4

Provincial Legislation:

5. *Marriage Act*, R.S.N.B. 1973, c. M-3, s. 11

6. *Marriage Act*, R.S.M. 1987, c. M50, s. 8

7. *Marriage Act,* R.S.N.W.T. 1988, c. M-4, ss. 22-26 (At the time of division, effective April 1, 1999, Nunavut adopted the Northwest Territories' legislation).

8. *Marriage Act*, R.S.O. 1990, c. M-3, s. 17

9. *Marriage Act*, R.S.Y. 2002, c. 146, ss. 19-23

10. *Code civil du Québec/ Civil Code of Québec*, L.Q./ S.Q., 1991, c. 64, Articles 365, 368, 375

11. *Rules Respecting the Solemnization of Civil Marriages and Civil Unions*, C.C.Q., 1991, c. 64, Rule 1

12. *An Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6, s. 22