PART I – THE PARTIES AND THE DECISION BELOW

1. The Respondent/Appellants by Cross-Appeal, Metropolitan Community Church of Toronto ("MCCT"), responds to the Attorney-General of Canada's ("AGC") appeal and cross-appeals from two orders issued by the Divisional Court of Ontario on August 30, 2002, following reasons released on July 12, 2002.[1] The Divisional Court found that the common law definition of marriage as "the voluntary union of one man and one woman to the exclusion of all others"[2] violated the equality rights guaranteed by the *Canadian Charter of Rights and Freedoms* ("*Charter*"),[3] and that such violation was not justified under section 1.

2. The Divisional Court panel, Smith A.C.J.S.C., Blair R.S.J. and LaForme J., was divided with respect to the appropriate remedy. Justice LaForme found that the Court should amend the common law definition immediately and substitute the words "any two persons" for the words "one man and one woman." Justice Smith ruled that the remedy should be suspended for 24 months to permit Parliament to legislate in a manner that brings the law respecting marriage into conformity with the *Charter*, and that if it failed to do so, the applicants including MCCT could re-apply to the Court for a remedy. Justice Blair ruled that the remedy should be suspended for 24 months to allow Parliament to act, failing which the Justice LaForme's definition will automatically take effect. In the result, the new common law definition will take effect on July 12, 2004 unless Parliament acts in the interim.

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[1] *Halpern and MCCT* v. *Canada (A.G.)*, [2002] 60 O.R. (3d) 321 (Div. Ct.) [hereinafter *Halpern*].

[2] *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130 (Ct. Div. & Matr.) [hereinafter *Hyde*].

[3] *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 [hereinafter *Charter*].

PART II – NATURE OF THE CASE AND ISSUES

Nature of the Case

3. On January 14, 2001, MCCT conducted two same sex marriages pursuant to the publication of banns. The Registrar General of Ontario ("Registrar") refused to register the marriages on the grounds that they did not conform to the common law definition of marriage. MCCT challenged this decision of the Registrar, arguing that the common law definition was no longer the definition of marriage, or alternatively, that such definition infringed upon its freedom of religion, its right to religious equality, the right to equality of gays and lesbians guaranteed by the *Charter*, and that such infringement was not justified under section 1 of the *Charter*.

4. This constitutional challenge was joined with the application of eight same sex couples ("Couples") that applied for marriage licences through the civil procedure from the City of Toronto, but were denied on the basis of the common law rule. MCCT was granted intervener status in that application. The Applicants challenged the constitutional validity of the common law definition of marriage. MCCT supported the Couples in their *Charter* challenge.

5. The Divisional Court found that the definition infringed the s. 15(1) equality rights of gays and lesbians, and that this infringement was not justified by s. 1. The Court found no infringement of MCCT's s. 2(a) rights and made no s. 1 analysis on that basis. The Court did not address MCCT's arguments with respect to its right to religious equality under s. 15(1).

Issues

6. MCCT agrees with the Divisional Court's finding that the *Hyde* definition of marriage is discriminatory and is contrary to s. 15(1) of the *Charter,* and that such discrimination is not justified under s. 1. MCCT's cross-appeal seeks to reverse the Divisional Court's judgment that the common law bar to same sex marriages does not violate MCCT's freedom of religion under s. 2(a), and the Court's failure

to address the issue of religious discrimination under s. 15(1) and seeks a declaration in this regard. In addition, MCCT also takes the position that the remedy proposed by Justice LaForme is the appropriate remedy, and, in fact, the only remedy available in the circumstances.

PART III – FACTS AND EVIDENCE

7. The facts discussed below consist either of findings made by the Divisional Court, or include facts not addressed by the Divisional Court. The evidence submitted by MCCT was in support of its s. 2(a) argument and was generally not the subject of any findings, whether adverse or favourable, in the Divisional Court. It is repeated below for that reason.

Metropolitan Community Church of Toronto

8. MCCT is a Christian Church. Under the leadership of Senior Pastor the Reverend Doctor Brent Hawkes, MCCT, with its 450 members, has grown to be the third largest congregation in the worldwide denomination to which it belongs, the Universal Fellowship of Metropolitan Community Churches ("UFMCC").[4]

9. UFMCC was established in 1968 with a central teaching that Christianity and homosexuality are compatible and with a mission consistent with this teaching. The foundation of the denomination's Christian theology is the belief that the traditional Christian view that homosexual acts are sinful is in error. It teaches that this view was based on misinterpretations of Scripture, as well as ancient, unscientific and outdated beliefs about the nature of human sexuality; beliefs that influenced early Christian attitudes toward sexuality in general, and homosexuality in particular. MCCT believes in the continuing process of revelation with respect to sexuality. Just as Christianity came to renounce its traditional support for slavery, its historic anti-Semitism and its religious

[4] *Halpern, supra* note 1 at 338, Blair J.; *Affidavit of Reverend Brent Hawkes, sworn January 28, 2001*, Application Record of the Applicant, MCCT, Vol. 1, Tab 3 at 31, paras. 4-5 [Hereinafter *Hawkes 1*].

condemnation of interracial marriage, MCCT teaches that Christianity can and should renounce its traditional condemnation of homosexual acts.[5]

MCCT's First Same Sex Marriages

10. MCCT has offered marriage to its heterosexual congregants for some time. Previously, MCCT offered "holy union" ceremonies in lieu of marriages to same sex couples, some of whom have been in relationships for 35 or 40 years. Reverend Dr. Hawkes estimates that he has performed over 250 "holy unions." However, many such couples demanded the right to a "marriage." MCCT felt constrained from performing marriages for same sex couples because it understood that the municipal authorities in Toronto would not issue a marriage licence to same sex couples, a licence which was thought to be a necessary legal requirement for a valid marriage.[6]

11. MCCT eventually learned that the ancient Christian tradition of publishing the banns of marriage was a lawful alternative under the laws of Ontario to a marriage licence issued by municipal authorities.[7] It decided to embrace this Christian practice, which allowed it to marry in accordance with its own religious beliefs without needing the cooperation of the municipal authorities.[8]

12. The concept of banns of marriage is an ancient one, with a lengthier pedigree than civil licences. As a Christian ritual it was formally adopted and codified by the Lateran Council of 1215. It involves a proclamation in the parish church of the couple of their intention to marry, by tradition during divine service on the three Sundays preceding the wedding. The aim was to detect impediments, such as a prior marriage or vow of celibacy, which might not be

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[5] *Halpern* and *Hawkes 1, ibid*.

[6] *The Bible*: New Revised Standard Version [hereinafter, *The Bible*], at John 2: 1-11; *Hawkes 1*, *supra* note 4, paras. 9, 50, 53; *Affidavit of Dr. Daniel Cere, sworn April 12, 2001,* Record of the Intervener, The Interfaith Coalition on Marriage and Family, Tab 1 at 4, 26, paras. 5, 65 [hereinafter *Cere*].

[7] *Marriage Act,* R.S.O. 1990, c. M.3, s. 5 [hereinafter *Marriage Act*].

[8] *Hawkes 1*, *supra* note 4 at 47, para. 54.

revealed by the more informal weddings that had often taken place prior to that time.[9]

13. The practice of banns was continued by the Anglican Church following Henry VIII's break with Rome over the dissolution of his marriage with Catharine of Aragon. When marriage was first regulated in England by *Lord Hardwicke's Act* in 1753, the aim reflected in the official title of the Act was to avoid "clandestine marriages." The Act emphasized the need for banns for a valid marriage, except for the Quakers and the Jews.[10]

14. Although *Lord Hardwicke's Act* did not apply to Upper Canada, the legislature of Upper Canada endorsed the practice of banns as the usual method of creating a legal marriage in its first marriage law.[11]

15. Eventually, when the statute recognized the validity of marriages by other Christian denominations, provision was made for the issuance of licences by the civil authorities as a substitute for the publication of banns.[12] The authority of churches to marry by publication of banns has been continued in every Ontario statute to the present day.[13]

16. Reverend Dr. Hawkes published the banns of marriage for two couples, Kevin Bourassa ("Kevin") and Joe Varnell ("Joe"), and Elaine ("Elaine") and Anne Vautour ("Anne"), on three separate Sundays during divine service at MCCT, namely December 10 (International Human Rights Day), December 17, and

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[9] *Affidavit of Jacqueline Murray, sworn January 24, 2001*, Application Record of the Applicant, MCCT, Vol. 1, Tab 6 at 96-97 [hereinafter *Murray*].

[10] *An Act for the Better Preventing of Clandestine Marriages*, 26 Geo. II 7, c.33 [hereinafter *Lord Hardwic1ke's Act*].

[11] Lord Hardwicke's Act, ibid. s. 18; An Act to Confirm and Make Valid Certain Marriages Now Comprised Within the Province of Upper Canada, and to Provide for Future Solemnization of Marriage Within the Same, 33 Geo. III, c.5 [hereinafter Ontario Marriage Act of 1793]. A substitute of a public notice was required where the marriage was by justice of the peace, such marriages being permitted only while there was a shortage of clergy.

[12] *An Act to Extend the Provisions of the Marriage Act of Upper Canada to Ministers of All Denominations of Christians,* 10 & 11 Vic., c. 18 [hereinafter *Marriage Act of 1847*].

[13] *Marriage Act, supra* note 7.

December 24, 2000. Elaine is herself a Deacon at MCCT. No lawful objections were received to the proposed marriages.[14]

17. On January 14, 2001 Reverend Dr. Hawkes presided at the wedding of Elaine to Anne and of Kevin to Joe at MCCT. He registered the marriages in the Church Register, and issued marriage certificates to the couples.[15]

18. In compliance with the laws of Ontario, MCCT submitted the required documentation for these marriages to the Office of the Registrar General pursuant to the *Vital Statistics Act*[16] and the Regulations under the *Marriage Act.*[17] The Registrar refused to accept the documents for registration, citing an alleged federal prohibition on same sex marriages. As a result, MCCT launched its application to the Divisional Court.

The Importance of Marriage to Members of MCCT

19. Marriage is an important concept to Christians. Christians believe that Jesus Christ performed His first miracle during a wedding at Cana. The importance of marriage to members of MCCT is enormous. Elaine and Anne said:

> We love one another and are happy to be married. We highly value the love and commitment to our relationship that marriage implies. Our parents were married for over 40 and 50 years respectively, and we value the tradition of marriage as seriously as did our parents.[18]

20. For Christians, marriage is founded on love, and on freedom of choice. As with many other Canadians, for members of MCCT the capacity to marry and the

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[14] *Hawkes 1*, *supra* note 4 at 47, para. 56; *Affidavit of Elaine Vautour and Anne Vautour, sworn January 24, 2001*, Application Record of the Applicant, MCCT, Vol. 1, Tab 5 at 83, para. 1 [hereinafter *Vautour*].

[15] *Hawkes 1*, *supra* note 4 at 48, para. 57.

[16] *Vital Statistics Act,* R.S.O. 1990, c. V.4, s. 19(1).

[17] *Marriage Regulations*, R.R.O. 1990, Reg. 738, s. 2.

[18] *Vautour, supra* note 14 at 85, para.18.

right to marry the person of one's choice is an incident of full membership in society: of " full personhood."[19] The couples married at MCCT had this to say:

> We wish to have our marriage registered with the Registrar General for Ontario for many reasons. We believe that we have the freedom to choose whom to marry. We want to be recognized as a legally married couple.[20]
>
> We believe that we should have the right, as should any other Canadian citizen, to choose, from those options available, how to formalize our relationship. By excluding us from marriage, the government is sending a message that same sex couples are second class citizens as compared to opposite sex couples in Canada. We feel the impact of the government's violation of our human rights every day in our lives...
>
> We deeply hope that our nation, with its rights and protections, will prove to be a country that stands for all Canadians, and will provide full and equal rights to marriage regardless of sex or sexual orientation.[21]

21. Marriage for Christians is a manifestation of religious belief and a commitment before and to God. It is a spiritual celebration. Gays and lesbians have been marginalized in our society, including by religious bodies. It is important to note the key role of MCCT in the lesbian and gay community as a spiritual haven; a refuge for those who have been made to feel unwelcome in other faiths because of their sexual orientation.[22] Kevin and Joe said:

> For years, both of us were spiritually orphaned. We were both raised as Catholics and we both of us left the church as adolescents when we realized that, because of our sexual orientation, we were not welcome. Finding the Metropolitan Community Church of Toronto was an incredible experience, liberating us from the spiritual abuse and intolerance of the past

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[19] *Vriend* v. *Alberta,* [1998] 1 S.C.R. 493 at 580 [hereinafter *Vriend*]; and see generally K. Lahey, *Are We Persons Yet?* (Toronto: University of Toronto Press, 1999).

[20] *Vautour, supra* note 14 at 84, para. 13.

[21] *Affidavit of Kevin Bourassa and Joe Varnell, sworn January 24, 2001*, Application Record of the Applicant, MCCT, Vol. 1, Tab 4 at 79-81, paras. 8, 14 [hereinafter *Bourassa*];

[22] *Hawkes 1*, *supra* note 4 at 34, para. 13, 14; *Affidavit of Robert J. Hughes*, *sworn December 18, 2000*, Application Record of the Applicant, MCCT, Tab 8 at 122, para. 3 [hereinafter *Hughes*].

> … At the front of the church's sanctuary are the words, "My house shall be a house of prayer for all people."[23]

22. Marriage is a public affirmation of love before friends and family often with a religious congregation. It is a status with well-recognized social significance that, rightly or wrongly, is perceived by many to be the commitment of the highest order of one person to another. Kevin and Joe said:

> Many people use terms to describe our relationship that indicate that they consider our relationship to be inferior to that of heterosexual couples. Many people think they are being kind when they refer to, "your friend Kevin" or "your friend Joe". No one would dream of referring to the wife or husband in a heterosexual relationship as "your friend", but it is considered polite to do so in our case.[24]

Religious Debate About Homosexuality

23. MCCT is not alone in its view. Justice Blair acknowledged this debate in his reasons.[25] In support of its position in the Divisional Court, MCCT filed affidavits from a range of people of faith who supported the right of the Church to perform same sex marriages that are legally recognized by the state.

24. The record reveals that, in addition to UFMCC, many faiths no longer teach that homosexuality is a sin. These include Reform Judaism. As Rabbi Stevens notes, "virtually no Reform Jew would regard homosexual acts as sinful."[26] Some conservative Jews, such as prominent Rabbi Elliot Dorf, also share these views.

25. The United Church of Canada recently repealed its previous stance that homosexuality was a sin, and many congregations have declared themselves to

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[23] *Bourassa, supra* note 21 at 81, para. 14;

[24] *Bourassa, ibid.*, para. 12.

[25] *Halpern, supra* note 1, Blair J.

[26] *Affidavit of Rabbi Elliot Stevens sworn May 29, 2001*, Reply Record of the Applicant MCCT, Tab 5 at 131, 133, paras. 6, 13 [hereinafter *Stevens 2*]; see also *Affidavit of Rev. Donald Gillies, sworn December 15, 2000*, Application Record of the Applicant, MCCT, Vol. 1, Tab 10 at 149, para. 8 [hereinafter *Gillies*]; *Affidavit of Mark Morrison-Reed, sworn December 15, 2000,* Application Record of the Applicant, MCCT, Vol. 1, Tab 7 at 104, para. 3 [hereinafter *Morrison-Reed*]; *Hughes*, *supra* note 22 at 124-126, paras. 10, 11, 13, 14.

be "affirming" of lesbians and gays. The Canadian Unitarian Council has a long tradition of support for lesbians and gays, as does the Society of Friends (Quakers).[27]

26. Even within more conservative faiths and denominations, such as Islam, Orthodox Judaism, the Roman Catholic Church and the Anglican Church, there are those who disagree with the official dogma that teaches that homosexuality is sinful.[28] One of the most respected Anglicans in the world, Rt. Reverend Dr. Desmond Tutu, has been one of those who have spoken out for justice for gays and lesbians. Bishop Richard Holloway, the former Primus of Scotland, is another prominent Anglican who once thought of homosexuality as a sin but came to the view that,

> … the love of Jesus Christ that was extended by Him to social outcasts in His lifetime, should not be denied by the Church to gays and lesbians.[29]

27. Indeed, the legal recognition of same sex relationships has been paralleled by a religious debate about the blessing of same sex relationships and same sex marriage. There is a wide spectrum of religious opinion in Canada today revealed in the record. The dogma of some faiths, such as that of the Catholic Church, is hostile to same sex marriage. However, as Dr. Hunt notes, as with other Church teachings on sexuality, some Catholics do not support this teaching. Some faiths, such as the United Church, Reform Judaism and the Quakers, are not dogmatic, but leave the question of blessing same sex unions or even marriages to the individual congregation or clergy. Some such as Rabbi Greenberg would not offer same sex marriage within their own faith, but would

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[27] *Hughes*, *ibid.* at 124-126, paras. 10, 11, 13, 14; *Gillies*, *supra* note 26 at 149, para. 8; *Morrison-Reed*, *supra* note 26 at 104, para. 3.

[28] *Affidavit of Katherine Young, sworn March 14, 2001,* Record of the Respondent, The Attorney General of Canada, Vol. 2A, Tab F at 698, para. 25; *Affidavit of Rabbi Steven Greenberg, sworn May 31, 2001*, Reply Record of the Applicant MCCT, Tab 2 at 14-15, para. 15 [hereinafter *Greenberg Affidavit*]; *Exhibit "B" to the Affidavit of Mary Hunt, sworn December 18, 2000,* Application Record of the Applicant MCCT, Vol. 1, Tab 12 at 178 [hereinafter *Hunt 1*].

[29] *Affidavit of Bishop Richard Holloway*, *sworn December 12, 2000*, Application Record of the Applicant, MCCT, Vol. 1, Tab 11 at 170-171, 172, paras. 12,19 [hereinafter *Holloway*].

not deny it to others of a different faith. Some such as Bishop Holloway of the Anglican Church openly reject the dogma of their faith and advocate for the right to choose same sex marriage. Some would bless same sex relationships, but are uncertain about marriage. Some denominations, including the Canadian Unitarian Council and UFMCC, officially support same sex marriage as part of their dogma.

28. The evidence reveals that the majority of Canadians profess a religious faith, and that almost 50% profess the Catholic faith. However, it also appears that a large majority of Canadians support equality for gay and lesbian relationships. It is thus apparent that many Canadians of faith support equality for gays and lesbians, regardless of the "official" teachings of their faith.[30]

29. The portrait painted by the AGC, and of the interveners who support him, of the world's great religions as homogeneous, monolithic, uniform and universal in their condemnation of same sex marriage is contradicted by the evidence. The efforts of the Interfaith Coalition and the AGC to portray heterosexual marriage as a "near universal norm" flies in the face of this evidence. Moreover, since the decision below, the nation's largest Protestant denomination, the United Church of Canada, has joined a Coalition that has petitioned Parliament to extend legal recognition to same sex marriage and at least one of its clergy has also married a same sex couple using the publication of banns. While there are clerics or denominations that clearly hold a different view, the law should resist allowing the civil process of enforcing *Charter* rights to be distracted by such a debate. The law should not take sides in such a debate. It should support a reformulation that does not prefer one religious view to another, and permits those who decline to recognize same sex marriage to continue to do so.

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[30] *Affidavit of Suzanne Scorsone, sworn March 15, 2001,* Record of the Respondent the Attorney General of Canada, Vol. 2A, Tab E at 632-3, para. 20 [hereinafter *Scorsone*]*; Hawkes 1*, *supra* note 4 *at 48, para. 58; Affidavit of Reverend Doctor Brent Hawkes, sworn August 30, 2001*, Reply Record of the Applicant MCCT at 21, para. 8 [hereinafter *Hawkes 2*]; *Cere*, *supra* note 6 at 26, para. 65*; Hunt 1*, *supra* note 28 at 178*; Affidavit of Mary Hunt, sworn May 29, 2001,* Reply Record of the Applicant MCCT, Tab 4 at 80, 85, paras. 9, 23 [hereinafter *Hunt 2*]; *Affidavit of John Fisher, sworn January 10, 2001*, Application Record of the Intervener EGALE, Tab 1 at 28, paras. 79-80.

PART IV – ISSUES, ARGUMENT AND LAW

SECTION 2 (a) CHARTER VIOLATION

30. With respect to s. 2(a), the majority made no analysis of the issues, but concurred with the conclusions reached by Justice LaForme.

31. Justice LaForme made the following findings on s. 2(a):

a) that the government is not required to give recognition to all religious definitions of marriage. In this regard Justice LaForme found that the s. 2(a) claim of MCCT was analogous to the one in *Adler*;[31]

b) that there was no state action in this case; and,

c) that the definition of marriage does not protect one religion over another.[32]

32. Justice LaForme's analysis was incorrect for the following reasons.

a) Although there is no requirement that the law recognize any religious marriages, once the law chooses to recognize religious marriages, it cannot discriminate on the basis of dogma. *Adler* thus does not apply.

b) There was state action. From the perspective of MCCT the Registrar refused to accept the marriage documents for registration. More broadly, this constituted the state imposition of a particular definition of marriage on MCCT and its congregants.

c) Finally, the question is not so much whether the definition of marriage protects one religion over another, although it does; rather, it is whether the state is imposing a religious view *at all*,

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

[32] *Halpern, supra* note 1 at 379ff, LaForme J.

> a violation which is compounded when the result is to impede the religious practices of another group.

33. Where the law is challenged under s. 2(a) of the *Charter* on the basis that it constitutes state enforcement of a particular religious perspective, the Supreme Court of Canada in *R.* v. *Big M. Drug Mart* stated that the "historical underpinnings" of the law must be considered. If the Court finds that the law indeed has origins in efforts to bind the population to the religious perspective of the majority, the law cannot be saved unless it sheds its "sectarian robes" and rests upon some proper constitutional foundation.[33]

HISTORICAL UNDERPINNINGS OF THE LAW

Religious Roots of Marriage

34. Prior to the 13th century there was much controversy with respect to religious teachings regarding homosexuality. The Old Testament contains two principal passages that some scholars and theologians have relied on as evidence of a prohibition on homosexual acts.[34] This interpretation was the basis for the law of the Emperor Justinian prohibiting homosexual acts in 538.[35]

35. Christianity in the 13th century was preoccupied with issues of sexual purity. Christian concepts of marriage, like Christian doctrine on homosexuality, were influenced by negative medieval attitudes toward sexual pleasure in general.[36] As the Church moved to regulate sexuality, and as it continued to condemn homosexual acts, the Church also moved to regulate marriage.

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[33] *R*. v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 322-3 [hereinafter *Big M*].

[34] *The Bible*, *supra* note 6, Genesis: 19:1-29, Leviticus 20:13.

[35] J.M. Bailey, *Homosexuality and the Western Christian Tradition* (London: Longmans, Green and Co., 1955, reprinted in Hamden: Archon Books, 1975) at 73-79; *Affidavit of William N. Eskridge Jr., sworn November 14, 2000*, Application Record of the Applicant Couples, Vol. 3, Tab 1 at 11, para. 21 [hereinafter *Eskridge 1*].

[36] *Holloway, supra* note 29 at 170, para. 9 states: "Although the authors of the Bible apparently did not see sexual matters as a priority, it was a subject of concern to a number of later prominent Christian theologians, notably St. Augustine and St. Jerome. From their teachings emerged the notion that the holiest condition for a Christian was celibacy, and that marriage was a distant

36. In England, homosexual offences were under the jurisdiction of the ecclesiastical Courts. In 1533, as part of his drive to wrest power from the Church, Henry VIII passed the first civil penal statute dealing with "the abominable vice of buggery."[37] This statute was variously repealed and re-enacted in the period of religious upheaval that followed before being definitively re-enacted by Elizabeth I. Her Act noted that buggery was an offence "to Almighty God."[38]

37. The medieval Christian consensus on marriage that had taken a millennium to build began to unravel during the Reformation. Christians had always refused to recognize the marriages of Christians to "unbelievers." The Reformation rift in the Christian Church between Protestants and Catholics thus renewed debate about the Christian concept of marriage: the question arose as to the validity of marriages between Protestants and Catholics. In addition, many Protestants rejected the notion of marriage as a sacrament, and so some permitted divorce.[39]

38. Marriage remained under the exclusive jurisdiction of the ecclesiastical authorities in England until 1753 when the first statute regulating marriage was enacted, known as *Lord Hardwicke's Act*. This Act recognized the marriages of the Established Church, the Church of England, as valid marriages. All other religious marriages had no legal recognition and there was no concept of civil marriage outside of a religious ceremony. The Act recognized two exceptions to this religious monopoly of the Church of England, the marriages of Quakers and

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second best for good Christians. Even within marriage, according to their teaching sex was only to be for the purposes of procreation and sex for pleasure even between married persons was sinful. … I believe that these Medieval Christian teachings, teachings that are very negative about sex in general, still influence the thinking of many Christians today, including their attitudes toward homosexuality."

[37] The description of the crime as "abominable" echoed the language of Leviticus. The death penalty was specified for the guilty. *Bailey*, *supra* note 35 at 145-152, especially 147-150.

[38] *Bailey*, *ibid*. As noted in *Big M, supra* note 33. Elizabeth also enacted laws proscribing the practice of any Christian faith except that of the "Established Church."

[39] *Bailey, Ibid.* at 98, 99.

of Jews. In addition, the Act by its terms did not apply to the colonies beyond the seas.[40]

The First Nations and Homosexuality

39. In Canada, prior to the arrival of the French and English, the First Nations had no similar religious or other proscriptions of homosexual acts. Most First Nations had vastly different rules of marriage, permitting divorce, multiple spouses and same sex spouses (in Ojibwa, for example, "*ogokwe*").[41] Their nations did not believe that these *ogokwe* were immoral, but rather that "God made them that way." Thus, it may be fair to say that same sex unions are, or at least were, more "traditional" in our country than monogamous heterosexual marriages, because these forms of relationships pre-date the introduction of the Christian concept of marriage to this country by millenia.[42] With the arrival of the Europeans to North America, traditional Christian values were brought to this continent by missionaries who imposed their values on the First Nations in the name of "salvation" and "civilization."

Marriage in Ontario – from English Rule in 1763 to the Present

40. Following the Royal Proclamation of 1763, the rights and privileges of the Catholic Church were preserved in the Province of Quebec. These were later confirmed and expanded in the *Quebec Act* of 1774.[43] Although the Province,

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[40] *Lord Hardwicke's Act, supra* note 10.

[41] In Canada, the First Nations had no similar religious or other proscriptions of homosexual acts. Most First Nations recognized that some of their members were what we would call "gay" or "lesbian." First Nations believed that such persons were "two-spirited," that is that they had both a male and a female spirit, and that they were special or magical persons as a result. Many native cultures conceived of such persons as being of a third gender, and had a special name for them, such as the Lakota word *winkte*. Two-spirited persons often occupied a special place in their nations, and had relationships with others of the same sex.

[42] See *e.g.* W.L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture*, (Boston: Beacon Press, 1992) [hereinafter *Williams*]; Le Duigou, "A Historical Overview of Two Spirited People: a Context for Social Work and HIV/AIDS Services in the Aboriginal Community" (2000) 3:1 Native Social Work J. at 195-197 [hereinafter *LeDuigou*]; G. Kinsman, *The Regulation of Desire,* 2d ed. (Montreal: Black Rose Books, 1996) at 92-93 [hereinafter *Kinsman*].

[43] *Quebec Act of 1774*, (U.K.) 14 Geo. 3, c. 83 [hereinafter *Quebec Act*].

which included present day Ontario, was under the ecclesiastical authority of the Anglican Bishop of London, Governor Murray was given authority by the Crown to issue marriage licences.[44]

41. Aboriginal marriages received a unique treatment under English law. The Courts recognized that one could not travel three thousand miles by canoe and on foot to conform to the English rules of marriage, and that the native population was "for the most part unchristianized." Thus aboriginal forms of marriage were given legal recognition, but only to the extent that they did not offend British Christian conceptions of marriage.[45] This partial respect for traditional aboriginal marriage beliefs and practices led to the anomalous result that, while aboriginal customs would be recognized to the extent of creating a legally valid heterosexual marriage, a second such marriage, though equally valid in accordance with native custom, would justify a criminal conviction for bigamy. Male *ogokwe* relationships were also criminalized under English laws of buggery that until 1861 imposed the death penalty on offenders, and the *ogokwe* were persecuted by the church and state alike.[46]

42. The future Province of Ontario was founded by Loyalists in Upper Canada. Many Loyalists had supported the concept of an Established Church in the Revolutionary War. Ontario's first marriage law thus reflected the Loyalist commitment to attempting to "establish" the Church of England in Ontario. Upper Canada's marriage law was even less religiously tolerant than the English statute. Only Church of England marriages were given legal recognition, with no

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[44] J.J. Talman, "The Position of the Church of England in Upper Canada 1791-1840" (1934) Can. Historical R. 361, at 361-363 [hereinafter *Talman*]; *Scorsone*, *supra* note 30, Appendix B, at 653.

[45] Aboriginal spiritual and cultural marriage practices and beliefs that were morally offensive to the British were characterized as either *mala in se* or "incidental" to aboriginal custom, and therefore legally unenforceable.

[46] *Regina* v. *Bear's Shin Bone* (1899), 3 C.C.C. 329 (S.C. N.W.T.); *Regina* v. *Nan-E-Qui-A-Ka* (1889), 1 Terr. L.R. 211 (S.C.); *Connolly* v. *Woolrich* (1867), 17 R.J.R.Q. 25, 11 L.C. Jur. 1973 [aff'd] (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. Q.B.); *Le Duigou, supra* note 42 at 201-2; M. Walters, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711, at 716, 721, 724-726, 727-729, paras. 10, 17, 23, 25-26, 29-30; *Bailey*, *supra* note 35 at 151; *Williams supra* note 42 at 131-151, 180-181.

exception for Jews and Quakers. No other Christian marriages, let alone any non-Christian marriages, were recognized in law.[47]

43. The erosion and eventual demise of the notion of an "Established Church" or state religion in Ontario was reflected in the colony's changing marriage laws. The marriage statutes gradually extended legal recognition to the marriages of other Protestant denominations and eventually recognized all Christian marriages, finally including Catholic marriages in 1847. The civil marriage licence was introduced to accommodate other faiths that did not follow the Anglican practice of banns.[48]

44. Eventually, in 1857, legal recognition was extended to the marriages of all religious faiths in what is now Ontario. Criminal penalties were reserved for those posing as licensed clergy. Jewish marriages, legally valid for over a century in England, were finally given legal recognition in Ontario.[49] However, a religious ceremony of some kind continued to be necessary in order to be legally married in Ontario.

45. This brings us to the *Hyde* definition of 1866. *Hyde* defined legal marriage under the common law in expressly Christian terms: "I conceive that marriage, as understood i**n Christendom***,* may for this purpose be defined as the voluntary union **for life** of one man and one woman, to the exclusion of all others" (emphasis added).

46. The English common law thus based its understanding of marriage on the Christian concept of marriage as propounded by the Established Church, that is, the lawful union of one man and one woman to the exclusion of all others for life. As Justice Cory noted in *Re Hassan and Hassan,* the common law rule

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[47] *Talman, supra* note 44 at 373-374*; Ontario Marriage Act of 1793, supra* note 11.

[48] *Marriage Act of 1847, supra* note 12; *Talman*, *supra* note 44 at 361-375. It is probably no coincidence that Catholic marriages were recognized after Upper Canada had been "married" to Lower Canada in 1841. *Union Act, 1841,* 3 & 4 Vic. c.35.

[49] *An Act to Amend the Laws Relating to the Solemnization of Matrimony in Upper Canada,* 20 Vic., c. 66 [hereinafter *Ontario Marriage Act of 1857*].

articulated in *Hyde* is a "Christian" definition of marriage.[50] "Marriages" that did not conform to this sectarian Christian ideal were not legal marriages under the common law.

47. In 1950, marriage was finally permitted through a purely civil ceremony by a judge or other official. This ended the religious monopoly on marriage that had existed in Ontario since its foundation.[51]

48. The current prohibition is the last vestige of the religious discrimination that has deep roots in English law's enforcement of England's state religion.[52] The evidence makes clear that not only MCCT but other Churches and Synagogues would also offer marriage in this province but for the perceived legal impediment asserted by the federal and provincial governments.[53]

Twentieth Century Law in Ontario

49. With divorce reform in the late 1960's, a further substantial change was made in distancing marriage as a legal institution from its traditional Christian roots. Legal recognition of remarriage by divorced persons would have been unthinkable in Governor Simcoe's day, as would legal recognition of purely civil marriage, Catholic marriage or Jewish marriage.[54] While Anglican marriages, the only marriages that were legally recognized initially in Ontario, are still legally recognized, they are currently the minority of marriages in Ontario. None of the

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[50] *Re Hassan and Hassan* (1976), 12 O.R. (2d) 432 (H.C.J.).

[51] *Halpern, supra* note 1 at 391. Justice LaForme overstated this point when he said that purely civil marriage became available "in Canada" in 1950. As this is a matter exclusively within provincial jurisdiction, every Province made the change at different times. Quebec, for instance, did not permit purely civil marriage until 1970.

[52] See *e.g. Big M, supra* note 33.

[53] *Hawkes 2*, *supra* note 30 at 21, para. 11; *Hawkes 1*, *supra* note 4 at 45-49, paras. 50-60; *Morrison-Reed, supra* note 26 at 104-106, paras. 5, 6, 9, 10; *Affidavit of Rabbi Elliot L. Stevens*, *sworn December 14, 2000*, Application Record of the Applicant MCCT, Vol. 1, Tab 9 at 131, para. 18 [hereinafter *Stevens* 1].

[54] Another trace of the religious roots of marriage in Ontario law is the restriction on the availability of banns in the statute to those who have never been married. *Marriage Act, supra* note 7.

marriages of the Interfaith Coalition's constituents would have been valid legal marriages in Ontario at the time.

50. The 1960's were a turbulent time, when many traditional values were challenged. Racism, sexism, homophobia and the legal institutions that supported them were attacked. The Supreme Court of Canada's decision to confirm the indefinite incarceration of an "incurable homosexual" in *R.* v. *Klippert* provoked outrage.[55] Shortly thereafter, Justice Minister Pierre Elliott Trudeau famously remarked, "the state has no place in the bedrooms of the nation."[56]

51. Canada's marriage laws had never fully embraced all conservative Christian teaching on marriage. For example, Roman Catholic and Anglican Churches did and still do prohibit divorce. While divorce has been difficult to obtain in the past, it has always been permitted since Confederation. Moreover, Canada's divorce law by 1970 was secularized to permit divorce in a wide variety of circumstances contrary to conservative Christian teaching.[57]

52. In 1978, the *Family Law Reform Act* ("*FLRA*")[58] was introduced. The *FLRA* extended statutory recognition for the first time to heterosexual couples who had been "living in sin" or "without benefit of clergy". The Courts also began to expand unjust enrichment doctrine to protect those in such "common law" relationships. This was another important secular legal reform that was contrary

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[55] *R.* v. *Klippert*, [1967] S.C.R. 822.

[56] *Eskridge 1, supra* note 35 at 31, para. 61; *Kinsman, supra* note 42 at 260-64.

[57] *Divorce Act,* S.C. 1967-68, c. 24, as rep. by R.S.C. 1970, c. D-8 [hereinafter *Divorce Act*]; *Report of the Special Joint Committee of the Senator and House of Commons on Divorce*, Ottawa: Information Canada; 1967, Record of the Respondent, the Attorney General of Canada, Vol. 7, Tab 12, at 2033 – 2040; W.H. McConnell, *Commentary on the British North America Act*, (Toronto: MacMillan, 1977), Record of the Respondent, The Attorney General of Canada, Vol. 6, Tab 0.1, at 1715 – 1718; *Answers to Written Interrogatories by The Interfaith Coalition on Marriage and Family* [hereinafter *Interfaith Answers*]; *Answers of Abdalla Idris Ali*, Tab 1, at 1-2, *Answers of Dr. Cere*, Tab 4, at 1-2, *Answers of Ernest Caparros,* Tab 5, at 1-2.

[58] S.O. 1978, c. 2 [hereinafter *FLRA*].

to conservative Christian teaching that viewed unmarried heterosexual relationships as immoral.[59]

53. Since 1978, the rights and responsibilities of common law couples in Canada have been expanded, notably by *Bill C-23, the Modernization of Benefits and Obligations Act,* where the rights and responsibilities of common law couples and married couples were largely equalized.[60] However, the Supreme Court recently confirmed in *Walsh* that the important legal distinctions that exist between married and unmarried cohabiting couples, referred to by Justice Blair, may be constitutionally valid.[61]

Secularization and the Legal Recognition of Same Sex Relationships

54. As Justice Lemelin noted in *Hendricks* v. *Québec*, no one can doubt the importance of religion in creating the framework for the institution of marriage. This does not mean that the law should be controlled by a particular religious view of marriage.[62]

55. The question of legal recognition of same sex marriage did not arise prior to 1969 in Canada, in part because for a man to concede that he was in a homosexual relationship prior to 1969 would be to admit committing a criminal offence and to risk indefinite incarceration. Although lesbians had never faced this legal risk, pervasive homophobia and misogyny had both erased their legal existence and ensured that public proclamation of their relationships would attract a high social penalty. In addition, Churches that taught that homosexuality was sinful would not have been willing to publish banns of

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[59] *FLRA, ibid.*; *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834*; Hawkes 2, supra* note 30*; Interfaith Answers, Answers of Dr. Cere, supra* note 57, Tab 4 at 6-7.

[60] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 [hereinafter *Bill C-23*]; *An Act to Amend Certain Statutes Because of the Supreme Court Decision in M. v. H,* S.O. 1999, c. 6 [hereinafter *Bill 5*].

[61] *Nova Scotia* v. *Walsh*, [2002] S.C.J. No. 84 [hereinafter *Walsh*].

[62] *Hendricks* v. *Québec*, [2002] J.Q. no 3816 (C.S.) [hereinafter *Hendricks*].

marriage prior to the re-examination of theology sparked by the Wolfenden Commission.[63]

56. In 1968, UFMCC began blessing "holy unions." In 1974, a Winnipeg couple consisting of two men were married in a Unitarian Church following the publication of banns. However, the Manitoba County Court ruled that the marriage was a nullity.[64]

57. The legal recognition of same sex relationships began in 1989 in Sweden (quickly followed by Denmark) where there were systems of registered domestic partnerships introduced. This type of system is now in place in many nations at the national level, such as the Netherlands and Belgium, as well as at the regional level in places such as Vermont and Nova Scotia.[65]

58. Unlike in Europe, legal recognition of same sex relationships in Canada began with the Courts in the *Charter* era, rather than in the legislatures. The first such case was *Veysey*,[66] and there were a series of cases leading up to two landmark Supreme Court decisions in *Egan* v. *Canada*[67] and *M.* v. *H*.[68] There were also a number of legislative initiatives largely spurred by these rulings.[69]

59. Only one of the *Charter* era cases had considered same sex marriage at all prior to the three current challenges. The Supreme Court in *M. v. H.* expressly

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[63] During the 1950's, Sir John Wolfenden was asked by the British government to study law reform around sexuality. His landmark report decried British laws prohibiting male homosexuality as "the Blackmailer's Charter." He urged decriminalization of male homosexual acts between consenting adults in private. However, it would take over ten years before Parliament would act on this recommendation in England. See Wolfenden, *Report of the Committee on Homosexual Offences and Prostitution* (London: Her Majesty's Stationary Office, 1957) [hereinafter *Wolfenden*]. See generally, *R.* v. *Klippert*, *supra* note 55.

[64] *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.) at 281, 285 [hereinafter *Re North*]*; Eskridge 1*, *supra* note 35 at 31-32, para. 62.

[65] *Eskridge 1, ibid.* at 33-34, paras. 64-67*; Law Reform (2000) Act,* S.N.S. 2000, c. 29.

[66] *Veysey* v.*Canada (Commissioner of the Correctional Services),* [1990] 1 F.C. 321 (T.D.) (aff'd on other grounds by the Court of Appeal on May 31, 1990, Court File A-557-89).

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

[68] *M.* v. *H.*, [1999] 2 S.C.R. 3 [hereinafter *M.* v *H.*]*; Eskridge 1, supra* note 35 at 34, para. 67

[69] *Bill 5* and *Bill C-23, supra* note 60.

and correctly excluded any comment on marriage, as marriage was not in issue in that case. The current state of the law following *M. v. H.* is that legal distinctions between common law heterosexual couples and same sex couples are constitutionally suspect.[70]

60. The Ontario Legislature passed Bill 5, *An Act to Amend Certain Statutes Because of the Supreme Court Decision in M. v. H.,* to address the issue of same sex couples. Unlike *Bill C-23*, no attempt was made to equalize the rights of married persons and common law heterosexual couples. Accordingly, Ontario not only denies access to marriage to same sex couples, it also imposes a less comprehensive regime of rights and responsibilities on common law couples. Ontario also went to the lengths of using separate nomenclature to label same sex couples as distinct and, it is submitted, inherently inferior to heterosexual couples.[71] As a result of *Walsh*, gays and lesbian may be confined to this less comprehensive regime if the relief sought is not granted.

61. In addition to the Ontario Legislature, a number of provincial legislatures have extended some of the rights and obligations of common law couples to same sex couples, but none have done so in the comprehensive fashion of the Federal Parliament in *Bill C-23*.[72]

62. The Netherlands was the first country to pass a law recognizing same sex marriages.[73] Recently, Belgium became the second.[74]

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[70] *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.) [hereinafter *Layland*]; *M.* v*. H.*, *supra* note 68, especially at 48-49.

[71] *Bill 5, supra* note 60.

[72] *See e.g. Bill C-23, supra* note 60*; Law Reform (2000) Act*, *supra* note 65.

[73] *Eskridge 1, supra* note 35 at 33, para. 65*; Affidavit of Dr. William N. Eskridge Jr., sworn August 2, 2001,* Reply Record of the Applicant Couples, Tab 4, at 170-171 [hereinafter *Eskridge 2*].

[74] *La loi "ouvrant le marriage à des personnes de même sex et modifiant certaines dispositions du Code civil"* (Belgium) 2003.

SECTION 2(a) LEGAL ANALYSIS

63. The Divisional Court erred in its finding that there was no infringement of MCCT's s. 2(a) freedom of religion on the facts. The Divisional Court also erred in holding that the principles in *Adler*[75] govern this case. In fact, that case was decided in a radically different legislative, historical and constitutional context, and its *ratio* has no application to this case.

64. MCCT accepts that there is a distinction between an infringement of freedom of religion under section 2(a) and religious discrimination under section 15(1), based on the Supreme Court's reasoning in *Delisle.*[76] However, it is the contention of MCCT that both of its rights are infringed on these facts.

65. Freedom of religion is a fundamental right of all Canadians. It is a right of great antiquity and enjoys widespread recognition internationally. The Courts recognized Canadians' freedom of religion even before the *Charter* as an "original freedom". In *Saumur* v. *City of Quebec*, Justice Rand said:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as the greatest constitutional significance throughout the Dominion is unquestionable.[77]

66. The legal protection of freedom of religion in Canada dates back to the *Quebec Act*[78] protections offered to the Catholic minority. Lord Dorchester was instructed by the Imperial Government in 1787 to "...permit Liberty of Conscience and the free Exercise of all such Modes of Religious Worship, as are not

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[75] *Adler* v. *Ontario*, *supra* note 31.

[76] *Delisle* v. *Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989 [hereinafter *Delisle*].

[77] *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299 at 327 [hereinafter *Saumur*].

[78] *Quebec Act of 1774*, *supra* note 43.

prohibited by Law."[79] Ontario has had a Religious Freedom Act in effect since before Confederation that espouses freedom of religion as a matter of public policy.[80]

67. Canada has a special history of freedom of religion because of the unique place of Quebec as a Catholic province within a Protestant Empire. However, the degree of religious toleration has always been imperfect. There have been attempts by both individuals and the state to impose discriminatory religious views on others who did not share their religious beliefs, and even attempts to privilege one denomination over others.[81]

68. Immediately following the Second World War, religious discrimination was recognized by the Courts as offensive to Canadian public policy. In thus advancing the common law, the Court quoted with approval the observation of Justice Cardozo that "... the law, like the traveler, must be ready for the morrow. It must have a principle of growth."[82]

69. Notwithstanding this stated public policy, a particularly dark episode in our history of religious intolerance unfolded in the 1940's and 1950's: the persecution of the Jehovah's Witnesses. Their scandalous pamphlets angered the Catholic Church and provoked legal retribution by the federal government and the Duplessis regime in Quebec through laws of ostensibly general application. However, the shameful intolerance of society and the state in Canada in this period is in marked contrast to the distinguished development of the law of

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[79] D.M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of *Charter* Rights" (2000) 33 U.B.C.L. Rev. 551; *Freedom of Religious Worship Act, 1852,* (U.K.) 14 & 15 Vict. c. 175.

[80] Brown, *ibid.; Talman*, *supra* note 44 at 365; *Religious Freedom Act*, R.S.O. 1990, C.R-22.

[81] See *e.g. Talman, supra* note 44 at 361.

[82] *Re Drummond Wren*, [1945] O.R. 778 at 780 (H.C.J.).

religious freedom in our Supreme Court in *Boucher* v. *Canada, Saumur* v. *City of Quebec, Chaput* v. *Romain et al.* and *Roncarelli* v. *Duplessis*.[83]

70. These cases established definitively that, even in the pre-*Charter* era, the state was not allowed to impose any particular religious doctrine on an unwilling minority. Justice Taschereau said:

> In our country there is no state religion. All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority might impose its religious views upon a minority…[84]

71. Freedom of religion was expressly recognized in the Canadian *Bill of Rights* (the "*Bill*").[85] However, in *Robertson and Rossetani* v. *The Queen*,[86] the Supreme Court found that the *Bill* only recognized freedom of religion to the extent it existed when the *Bill* was enacted, and that it did not exempt religious dissidents from laws of general application.

72. In 1982, Canada's laws became subject to the *Charter*. Freedom of religion was enshrined in Canada's Constitution by section 2(a) of the *Charter,* without entrenching the supremacy of any particular religious dogma. Chief Justice Dickson described freedom of religion in this way in *Big M*, the case which rejected the *Robertson* doctrine in the *Charter* era:

> Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or

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[83] *Boucher* v. *Canada*, [1951] S.C.R. 265; *Saumur, supra* note 77; *Chaput* v. *Romain*, [1955] S.C.R. 834 [hereinafter *Chaput*]; *Roncarelli* v. *Duplessis*, [1959] S.C.R.121; see also *Brown*, *supra* note 79 at 555-60.

[84] *Chaput*, *ibid.*, quoted with approval in *Big M, supra* note 33 at 325.

[85] *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(c).

[86] *Robertson and Rossetani* v. *Canada*, [1963] S.C.R. 651[hereinafter *Robertson*].

> reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.[87]

73. The *Charter*'s underlying theory was of liberty, freedom of choice and respect for the dignity of all human beings. As Madam Justice Wilson said in *Morgentaler:*

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
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> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.[88]

74. There can be no doubt that marriage is a ceremony and a status with deep religious significance to many Canadians. It is a ceremony of such religious significance that it is the only Canadian religious ceremony, aside from the Coronation, that also confers legal status.

75. The *Hyde* definition will violate freedom of religion if it has an unconstitutional purpose or an unconstitutional effect.[89] As can be seen from the history of marriage in Ontario, the *Hyde* definition has the unconstitutional

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[87] *Big M*, *supra* note 33 at 336.

[88] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

[89] *Big M, supra* note 33.

purpose of enforcing a traditional Christian definition of marriage in the secular legal setting.

76. The evidence also makes clear that the common law prohibition on same sex marriage has an unconstitutional effect: it infringes the religious beliefs of MCCT in a fundamental manner.[90] MCCT has propounded as a core teaching that same sex relationships and Christianity can be reconciled, and has provided a safe harbour to those fleeing denominations with dogmas inconsistent with this core teaching. In the case of marriage, that escape is incomplete. The state, by its refusal to recognize marriages that conform to the doctrine of MCCT, 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. At the same time, the state honours and endorses doctrine of traditional churches through state recognition of their marriages. This relegates the same sex marriages performed at MCCT to the same status as the "infidel" marriages described by the Court in *Hyde*, or to the second class status to which Jewish and Catholic weddings were relegated in pre-Confederation Ontario.

77. For historical reasons and owing to our commitment to religious freedom, the state in our system largely leaves the matter of who may marry and what constitutes a valid marriage to the practices of the religious body performing the marriage. Legal recognition of a church's marriage ritual thus provides endorsement of the state to the legitimate status of that church legally and socially. The denial of legal recognition sends a message that MCCT (a) is not a "real" church; (b) that it has beliefs that are "illegitimate"; and, (c) that MCCT is engaging in socially unacceptable activities. This message generally marginalizes and devalues MCCT compared to more traditional churches. The state is coercing MCCT into denying a religious ceremony to its members and enforcing a restriction that is repugnant to its theology in order to conform to the state's view of acceptable religious belief.

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[90] See *e.g. Hawkes 1, supra* note 4.

78. The Divisional Court erred in finding there was an absence of government action or constraint in this case. As Chief Justice Dickson said in *Big M*:

> Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.[91]

79. The state prevents MCCT from offering marriages to same sex couples, and forces it to offer something less than marriage (holy unions). In its submissions the AGC uses language to attempt to strip even this lesser union of its holiness by calling it a "same-sex union ceremony". The fact that these ceremonies are refused recognition as marriages by the AGC amounts to coercion within the meaning of the word outlined above.

80. The Divisional Court found that there was no government action in this context. However, the refusal of both levels of government to recognize these marriages as marriages was government action. The refusal of the Ontario government to register the documents was clearly government action. It is also implicit in the AGC's request to have the case heard in the Divisional Court that there was a statutory power of decision being exercised.[92] Justice LaForme would have corrected this state action with an order in the nature of mandamus.

81. Moreover, the infringement is more sweeping than just its impact on MCCT, for it is apparent that there is at least one other religious denomination whose official doctrine supports recognition of all same sex marriages, namely the Canadian Unitarian Council. Further, there are other faiths such as the Quakers and the Reform Jews who would permit individual rabbis or congregations to offer same sex marriages in the absence of legal impediment. The current situation in the United Church is somewhat more ambiguous. Even

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[91] *Big M, supra* note 33 at 336.

[92] In his reasons, Justice LaForme incorrectly comments that the Applicants wished to have the matter heard in the Divisional Court. It was in that Court due to the insistence of the appellant AGC. *Halpern, supra* note 1.

in denominations where the majority or prevailing view appears to be hostile to same sex marriage, such as Orthodox Judaism, Islam, Anglicanism and Roman Catholicism, the evidence reveals that there are those within those faiths who would either offer same sex marriage within their faith, or recognize the validity of a same sex marriage offered by another faith.[93] As Chief Justice Dickson said in the context of the ban on Sunday shopping in *Big M*, the theological content of this alleged legal restriction:

> …remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.[94]

82. The Divisional Court erred in suggesting that because other same sex couples in other denominations will face the same problem, that there is no infringement of the freedom of MCCT. Rather than excuse the infringement, this simply highlights the fact that the infringement is not trivial since it impacts on many Canadians, just as the Sunday shopping ban affected not only Jews but Seventh Day Adventists, among others.

83. The Divisional Court erred in finding that MCCT was advancing the proposition that the state must recognize all forms of religious marriage. In particular, the Court erred in applying *Adler*. That case dealt with the unique situation where Ontario required all children to be educated in secular schools and provided financial support only to Catholic schools and not to other religious schools. The situation did not engage section 2(a) because it was immune from *Charter* scrutiny. The reason that this situation was immune from *Charter* scrutiny was because the rights of separate schools in Ontario were expressly protected in the *Constitution Act, 1867*.[95] There is no equivalent section in this

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[93] *Morrison-Reed*, *supra* note 26 at 104-105, paras. 3-6; *Stevens 1*, *supra* note 53 at 131, para. 18; *Gillies, supra* note 26 at 149-150, paras. 6-9; *Affidavit of Lynda Clarke, sworn May 29, 2001*, Reply Record of the Applicant MCCT, Tab 1, at 3 paras. 7-9; *Hunt 2*, *supra* note 30 at 84-86, paras. 21-26; *Holloway*, *supra* note 29 at 170-171, 173 paras. 12, 26.

[94] *Big M, supra* note 33 at 337.

[95] *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c.3 [hereinafter *Constitution Act, 1867*]. Section 93(1) provides that "no law may prejudicially affect any right or privilege with respect to

case. The present case does not involve a funding issue, whereas in *Adler* the excluded schools were seeking funding.

84. An example of a hypothetical fact situation that might engage *Adler* in the marriage context would be: if there had been a decision in 1867 to refuse legal recognition to all religious marriages, with a constitutionally enshrined exception for legal recognition only of Catholic marriages. This is not the case. Instead, the state has chosen to recognize all religious marriages, except those that do not reflect the teaching of traditional Christian churches that marriage is reserved to heterosexual unions. As Lord Penzance did, the law effectively engages in the exercise of approving as valid those marriages that are akin to traditional Christian marriages and rejecting those that are not.

85. There is no obligation on the law to recognize religious marriage as a legal institution. However, once it decides to do so (as it has done), it cannot withhold recognition to any religious marriage except in a constitutionally lawful manner.

86. The applicable case is not *Adler*, but *Trinity Western.* In that case, *mandamus* was ordered where a government agency had refused to recognize teaching graduates of a university because of objections to its religious dogma.[96]

87. The legal context is that the state has decided to legally recognize religious marriages. It has declined to recognize the MCCT marriages solely because the couples are of the same sex. In doing so, the state imposes traditional Christian dogma about marriage as an exclusively heterosexual institution on an unwilling Church. This situation offends the *Charter,* for as Justice Lemelin noted in *Hendricks,* quoting *Big M* with approval:

> What may appear good and true to a majoritarian religious group, or the state acting at their behest, may not, for religious

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denominational schools which any class of persons had at the time of Union." *See e.g. Adler, supra* note 31. Even these special rights do not always negate the equality rights of gays and lesbians. See *Hall* v. *Durham,* [2002] O.J. No. 1803 (S.C.).

[96] *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772 [hereinafter *Trinity Western*].

> reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority.[97]

88. There can be no doubt that there are many evangelical Protestants, Muslims, Orthodox Jews, Catholics and others for whom the concept of same sex marriage, particularly religious same sex marriage, is anathema.[98]

89. By its support for an exclusion of same sex marriage, the state chooses a particular religious view in what should be an extra-legal religious debate. Moreover, it does so by coercing one group to accept the religious practice of the other by forcing them to exclude same sex couples from marriage. This intrusion into the religious sphere is without parallel in any other aspect of Canadian life. It is far more intrusive and direct interference with religious practice than the interference with commercial pursuits imposed by the Sabbath enforcement legislation in issue in *Big M.*

90. Whether or not the views of MCCT represent the majority view in Canadian society is beside the point. The Jehovah's Witnesses have never represented the majority view in Quebec either.

91. The Divisional Court erred in finding that the common law definition did not "protect one religion over another." In fact, as the Quebec Superior Court alluded to in *Hendricks,* the Interfaith Coalition has intervened in this case to maintain a status quo and to control a legal definition of marriage that conforms to their religious concept of marriage, at the expense of other views.

92. The religious roots of this legal definition cannot be denied. It has not "shed its sectarian robes." In upholding this particular religious view of marriage, the state imposes these religious views of marriage on an unwilling minority. The fact that all religions are treated identically does not insulate this restriction from *Charter* scrutiny. As Chief Justice Dickson said in *Big M:*

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[97] *Big M, supra* note 33 at 337; *Hendricks, supra* note 62.

[98] See generally *Cere*, *supra* note 6.

> The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.[99]

93. As the Supreme Court articulated in *Edwards Books*, the Court must ascertain first whether there is a burden imposed by the law, and second whether the burden is trivial.[100] In determining whether there is a burden on a religious minority, the assessment must be done from the standpoint of members of those religious minorities.[101] It is clear that from the standpoint of a reasonable church in the position of MCCT that the refusal to recognize same-sex marriage is a burden on its religious belief. Given the centrality to the theology of MCCT of its core doctrine that homosexuality is not contrary to Christianity, and given the historic importance of marriage to all Christians, it cannot be said that the effects of this alleged restriction on MCCT and its congregants are "trivial or insubstantial."[102]

94. Like all other freedoms, freedom of religion is not absolute. As Chief Justice Dickson observed in *Big M,* it is subject to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[103] Examples of reasons to limit freedom of religion are the desire to create a common day of rest, the need to provide life-saving medical treatment to children or the need to ensure minimal educational standards in schooling.[104]

95. Limits for the purposes of "protecting the fundamental rights and freedoms of others" does not mean that the state may compel observance of a particular

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[99] *Big M, supra* note 33 at 347.

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

[101] *Zylberberg* v. *Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.) at 654; *Canadian Civil Liberties Association* v. *Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.).

[102] *Trinity Western, supra* note 96 at 814-5; *R. B.* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Edwards Books, supra* note 100.

[103] *Big M, supra* note 33 at 337.

[104] See *e.g. Jones* v. *Canada*, [1986] 2 S.C.R. 284 at 298; *Brown*, *supra* note 79 at 565; *Canada (Minister of Justice)* v. *Borowski*, [1981] 2 S.C.R. 575.

religious doctrine on a minority because of the importance of those religious beliefs to the majority. On the contrary, as Chief Justice Dickson said in *Big M:*

> In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.[105]

96. The Court may endorse the limitation as constitutional if it protects others from injury. For example, in *Young* v. *Young* the Court found that conduct that poses risk of harm to a child would not be protected.[106]

97. One of the reasons for limiting freedom of religion is in order not to interfere with the freedom of religion of others. It is clear that the position taken by the governments in this case (apart from the City of Toronto) infringes the freedom of religion of MCCT and others. Despite the allegations made in the record, as was noted by both the Divisional Court and the Quebec Superior Court, it cannot be fairly said that the absence of such a prohibition would unduly interfere with the religious beliefs of others.[107]

98. MCCT recognizes that the religious doctrine of some faiths is hostile to same sex marriage. This is generally based on the view that homosexuality is sinful, and in at least some cases on the view that only sexual activity within marriage, or perhaps only procreative sex within marriage, is moral. Those religious views should be respected, and indeed enjoy constitutional protections

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[105] *Big M, supra* note 33 at 350.

[106] *Young* v. *Young*, [1993] 4 S.C.R. 3.

[107] *Halpern, supra* note 1 at 374 and 446; *Hendricks, supra* note 62.

in the sphere of private activity. However, respect for religious faith should not be confused with a right to state enforcement of religious beliefs.[108]

99. Persons holding conservative religious beliefs may be offended by same sex marriage. However, in truth it is the homosexual act itself that violates their teachings. Moreover, some adherents of the Catholic faith believe that unmarried heterosexual unions are also sinful and unworthy of legal protection.[109]

100. In its attempts to define marriage, Canadian law has never fully conformed to traditional Christian dogma, nor to the definition in *Hyde*. For example, divorce has been legally permitted since 1867. Unmarried relationships, both heterosexual and homosexual, also now enjoy considerable legal recognition under Canadian law.

101. Those who hold conservative religious beliefs must already accommodate themselves to a Canadian society that does not enforce all of their religious beliefs. Muslims must live with the sale of alcohol, and observant Jews and Hindus with the sale of pork and beef in our grocery stores. Catholics must accept the fact that divorce is not prohibited, as they have since 1867, and fundamentalist Protestants must accept that unmarried heterosexual relationships are recognized in law. Even those who condemn homosexual acts as sinful recognize the right of the state to refrain from criminalizing such behaviour.[110]

102. MCCT does not seek to compel anyone to marry same sex couples. MCCT seeks recognition of the marriages that it has performed in conformity with its own religious teachings. Rabbi Novak, Imam Ali, Dr. Gay and others are free

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[108] *Trinity Western, supra* note 96 at 814-15; *Big M, supra* note 33 at 336-337, 346-347, 350; see generally, *Chamberlain* v. *Surrey School District No. 36* (2000), 80 B.C.L.R. (3d) 181 (C.A.); *Hendricks, supra* note 62.

[109] *Interfaith Answers*, Tab 1, Q. 3(a), 8(a); Tab 4, Q. 8(a); Tab 5, Q. 8(a); Tab 3, Q. 8(a).

[110] *Hawkes 2*, *supra* note 30, para. 17; *Greenberg Affidavit*, *supra* note 28 at 15-16, paras. 16-17; *Interfaith Answers*, Tab 1, Q. 2(a), Tab 3, Q. 2(a), Tab 4, Q. 2(a).

to refuse to recognize them as "real" marriages because of their religious beliefs. However, the government of Canada may not refuse to recognize them as legal marriages.

103. As Justice Lemelin noted in *Hendricks*, section 2(a) will protect clergy who refuse to marry people on religious grounds if the common law rule is reformulated.[111]

104. The Supreme Court has established in *Trinity Western University* v. *British Columbia College of Teachers* that those who hold the belief that homosexuality is sinful are entitled to that belief. However, they must accept constraints on religious beliefs when they enter the public realm. In this context, the public realm includes the legal recognition of marriage, as opposed to the private realm of churches which, as Justice Lemelin noted in *Hendricks,* are free to make their own rules in accordance with their teachings.[112]

FREEDOM TO MARRY

105. The AGC asserts that Canadians have no freedom to marry under Canadian law. MCCT disagrees.

106. That Canadians have and should have the freedom to marry is supported by at least five important sources:

a) common law;[113]

b) international treaties to which Canada is a signatory;[114]

c) the values underlying section 2 (a) of the *Charter*;

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[111] *Hendricks, supra* note 62.

[112] *Hendricks, ibid.*

[113] *Loving* v. *Virginia,* 388 U.S. 1 (1967) at 12, quoted in *Morgentaler*, *supra* note 88 at 169.

[114] *Universal Declaration of Human Rights,* 10 December 1948, G.A. Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810, Art. 16, para. 1; *International Covenant on Civil and Political Rights,* 16 December 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A-6316 (1966); *American Convention on Human Rights,* 18 July 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

d) the values underlying section 2 (d) of the *Charter*; and

e) the values underlying section 7 of the *Charter*;

107. The Supreme Court of Canada in *Morgentaler* quoted with approval the following statement about the freedom to marry from the decision of the United States Supreme Court in *Loving* v. *Virginia*:

> The freedom to marry has long been recognized as one of the 'vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival … [The] freedom to marry … resides with the individual …"[115]

108. The Supreme Court of Canada in *Walsh* held, at paragraph 63:

> Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life: *R.* v. *Big M Drug Mart Ltd*., [1985] 1 S.C.R, 295, at p. 336; *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46, at paras. 117. Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

109. The United Nations Human Rights Committee (UNHRC) has found that discrimination against gays and lesbians violates international equality rights guarantees.[116] The law of Canada, including the common law, is to be interpreted in a manner consistent with international law. Although the recent decision of the UNHRC states that there is no requirement under international law to recognize a right to same sex marriage, there is nothing in that decision that limits Canada's ability to do so.[117]

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[115] *Loving* v. *Virginia, supra* note 113.

[116] *Toonen* v. *Australia,* United Nations Human Rights Committee, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) [hereinafter *Toonen*].

[117] *Joslin v. New Zealand,* United Nations Human Rights Committee, Communication No 902/1999. Avail. at http://www.bayefsky.com/pdf/newzealand_t5_iccpr_902_1999.pdf.

110. Section 2(a) of the *Charter* guarantees "freedom of religion and conscience." As long ago as 1893, the Ontario Courts recognized marriage as a manifestation of religious belief protected by freedom of religion. The state continues to permit churches, synagogues, mosques and temples to set their own criteria for marriage and to determine how persons achieve the status of married persons.[118]

111. Section 2(d) of the *Charter* guarantees "freedom of association," one of the most fundamental rights in a free society. The values underlying freedom of association are particularly important to the exercise of other fundamental freedoms, such as freedom of religion. It is difficult to conceive of a chosen human association more intimate and more significant than marriage.

> Man, as Aristotle observed, is a 'social animal, formed by nature for living with others,' associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes.[119]

112. The Supreme Court of Canada has held that the institution of marriage might well be protected by freedom of association in combination with other rights and freedoms, although freedom of association would have no bearing on the legal consequences of marriage, such as control or ownership of matrimonial property.[120]

113. Section 7 of the *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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[118] See *e.g. Lord Hardwicke's Act*, *supra* note 10, s. 7*; Eskridge 2, supra* note 73 at 173-174, para. 11*; R. v. Dickout* (1893), 24 O.R. 250 (Q.B.).

[119] L.J. MacFarlane, *The Theory and Practice of Human Rights,* (1985) at 82, cited with approval in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 395, McIntyre J., concurring [hereinafter *Reference Re Public Service*].

[120] *Reference Re Public Service, ibid.*; *Black* v. *Law Society of Alberta,* [1986] 3 W.W.R. 590 (Alta. C.A.), Kerans J.A.

114. Interpreting the values underlying s. 7 as supportive of a freedom to marry accords with international law. It also accords with persuasive dicta from the Supreme Court of Canada. Justice Wilson, in *Singh* v. *Minister of Employment and Immigration*, cited with approval the liberal approach of the United States Supreme Court in *Board of Regents of State College* v. *Roth* to liberty, where the Court said:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, **to marry**, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390 at 399. In a constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. (emphasis added)[121]

SECTION 15(1) CHARTER VIOLATION

General Principles

115. In addition to the violation of section 2(a), the conduct of the governments clearly violates section 15(1). The test for a violation of section 15(1) was recently set out by the Supreme Court of Canada in *Law* v. *Canada*.[122]

116. The proper approach to analyzing a claim under section 15(1) of the *Charter* requires a court to make three broad inquiries, according to *Law*:

> Whether the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics;

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[121] *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 205; see *e.g. Bolling* v. *Sharpe,* 347 U.S. 497 (1952), at 499-500; *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Board of Regents of State College* v. *Roth*, 404 U.S. 909 (1971) at 572.

[122] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*].

> Whether the claimant was subject to differential treatment on the basis of one or more of the enumerated and analogous grounds; and,
>
> Whether the differential treatment discriminates in the substantive sense, bringing into play the purpose of s. 15(1).[123]

117. The Attorney General asserts that the s. 15(1) test was applied incorrectly.[124] The assertion that LaForme J. applied a *prima facie* test to find a violation of s. 15(1) is rejected by Justice LaForme's own words at para. 162 and by his application of the test in *Law* at paras. 175 et seq. For his part, Justice Blair recites the *Law* test for good measure at para. 36 of his decision, explicitly referring to the "purposive and contextual" requirements of the analysis.[125]

118. The Attorney General also finds error in what it calls a conflation of the s. 15(1) analysis with other *Charter* guarantees.[126] The values which underlie and inform the *Charter* are part of the context to be considered in the analysis. There is no "undue" conflation leading to any error.

119. The Supreme Court has held that the purpose of s. 15(1) of the *Charter* is to:

> prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally deserving of concern, respect and consideration.[127]

120. A court is required to engage in a comparative analysis taking into account the surrounding circumstances of the claim and the claimant. The appropriate

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[123] *Law, ibid* at 524.

[124] *Factum of the Attorney General of Canada* at 19, para. 52(b).

[125] Upon elaboration at para. 177 of his decision, Justice LaForme makes clear that his s. 15 analysis is faithful to *Law*. That LaForme J. was acutely aware of the objective requirement in the subjective objective test is made clear in his own words at paragraph 177 of his judgment and is reflected in the earlier paragraphs 156 and 157. *Halpern, supra* note 1 at 419-25, LaForme J.

[126] *Factum of the Attorney General of Canada* at 26, para. 74.

[127] *Law, supra* note 122 at 518.

comparator must be evaluated from the perspective of the claimant. In *Egan*, Justice L'Heureux-Dubé stated that the analysis must be both subjective and objective.[128]

121. The contextual factors to be considered include: whether there is a pre-existing disadvantage, the relationship between the ground upon which the claim is based and the nature of the differential treatment, the ameliorative purpose or effects of the impugned legislation, and the nature of the interest affected. With regard to the last factor, Justice L'Heureux-Dubé stated in *Egan* that:

> it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society[129]

Religious Discrimination

122. The Divisional Court erred in failing to analyse the religious discrimination claim at all.

123. The historical and social context for the religious discrimination analysis is the same as that of the religious freedom analysis. However, the analysis proceeds in a different manner. As the Supreme Court of Canada noted in *Delisle,* section 2 generally imposes a negative obligation on the government while section 15 may impose a positive obligation of protection, inclusion or assistance.[130]

124. As outlined above, the current common law distinction is the imposition of a state religion that amounts to coercion. However, it is also a failure to include the religious marriages of MCCT because of a common law rule based on traditional Christian teaching. To the extent that the Divisional Court's s. 2(a) analysis rested on a government omission to extend recognition, this omission

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[128] *Law, ibid.* at 532; *Egan, supra* note 67 at 552.

[129] *Law, ibid.* at 540; *Egan, ibid.* at 556.

[130] *Delisle, supra* note 76.

clearly amounts to a failure to include MCCT's marriages within the legal concept of marriage based on religious precepts in violation of section 15(1). This is similar to the Alberta Government's neglect or refusal to include sexual orientation in its human rights law.[131]

125. For the reasons set out in the discussion of freedom of religion it is clear that the alleged prohibition on same sex marriages is an infringement of MCCT's right to be free from religious discrimination under section 15(1). Canada's marriage law has its roots in Christianity. The prohibition is a clear remnant of this discriminatory origin of marriage as defined by the Anglican tradition that originally preserved to itself the only legally recognized religious marriages in Ontario. The evidence reveals that even some Anglicans no longer support continuing the restriction in issue, but whether or not the definition is currently favoured by a majority within the Anglican Church or elsewhere is irrelevant. It is not a view held by all sincere Canadians of religious faith and discriminates against some of them on religious grounds.

126. The prohibition, based as it is on historic Christian dogma, also reflects the hostility to homosexuality that was the prevailing view in the Christian faith since the Middle Ages. While many Christians now take a different view of homosexuality, many maintain the historic dogma, a dogma shared with some other faiths. The sincerity of their religious views does not change the fact that the exclusion operates to discriminate against MCCT, which is denied the fundamental right to choose to offer same sex "marriage" in accordance with its teaching.

127. Any prohibition against same sex marriage sends an implicit message that the state considers gay and lesbian relationships to be less worthy than heterosexual relationships by withholding recognition of the religious marriages of MCCT while extending recognition to all manner of religions that embrace a contrary dogma regarding homosexuality. This is made manifest in the material

[131] *Vriend, supra* note 19.

filed by the Coalition and the Association, which allege that heterosexual marriage will be injured in that it will be devalued by extending the availability of marriage to same sex relationships. These materials make it clear that, for conservative people of faith, marriage is a valuable institution that is superior to other situations, and heterosexual unions are inherently superior to homosexual unions. This symbolic message of heterosexual and religious superiority, endorsed by the state, is what is really threatened by the removal of any prohibition to same sex marriage.[132]

Sexual Orientation

128. It has been recognized by the Supreme Court of Canada in *Egan* and in *M.* v. *H.* that discrimination against same sex couples infringes section 15 (1) of the *Charter*.[133] While those cases did not concern themselves with marriage, it is apparent that this exclusion does discriminate against same sex couples. Apart from the immediate acquisition of benefits that accrue over time under *Bill C-23*, there are important rights and obligations that are only available to married persons under the laws of Ontario. Moreover, for gay and lesbian Christians, anything other than marriage does not allow them the dignity of their religious beliefs about their sexuality.

129. The pervasive and insidious nature of discrimination against gays and lesbians has been the subject of repeated comment in the Supreme Court. In *Vriend*, Justice Cory characterized such discrimination as "cruel and unfortunate."[134]

130. *Layland*, a case which pre-dates *M.* v. *H.*, should not be followed on that ground alone.[135] Moreover, the *Layland* court held that as homosexuals were free to marry persons of the opposite sex, the impediment resulted from their

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[132] *Interfaith Answers*, Tab 1, Q. 8(a); Tab 3, Q. 1(b), 8(a); Tab 4, Q. 7(a), 8(a).

[133] *Egan, supra* note 67*; M.* v. *H.*, *supra* note 68.

[134] *Vriend, supra* note 19.

[135] *Layland, supra* note 70.

sexual preference and not any legal requirement. This type of analysis was subsequently rejected by the Supreme Court in *Vriend*, where the majority noted that the allegation that the distinction between heterosexuals and homosexuals was created by nature and not by the law was the same analysis rejected by the Court in respect of pregnant women in *Brooks* v. *Canada Safeway* and in respect of the hearing impaired in *Eldridge*. The British Columbia Court in *EGALE* v. *Canada* declined to follow *Layland* on this point, as did the Quebec Court in *Hendricks.* Both agreed with our Divisional Court in finding a violation of section 15 (1) on the grounds of sexual orientation.[136]

131. The prohibition also violates section 15(1) and section 28 on the grounds of sex. As has been held in *Baehr* v. *Miike* and *Baker* v. *Vermont*, the law draws a distinction on the basis of the gender of the partner, much as anti-miscegenation laws drew distinctions based on the race of the partner. This interpretation is also consistent with international law that treats sexual orientation discrimination as sex discrimination.[137]

132. As Justice Greer noted in her dissent in *Layland*, it is:

> a basic theory in our society that the state will respect choices made by individuals and the state will avoid subordinating these choices to any one conception.[138]

133. To deny same sex couples the option of marriage conveys a message that they are somehow undeserving of membership in that institution. Justice LaForme said:

> The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied

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[136] *Vriend*, *supra* note 19 at 539-44; *Brooks* v. *Canada Safeway*, [1989] 1 S.C.R. 1219; *Eldridge* v. *B.C. (A.G.)*, [1997] 3 S.C.R. 624 [hereinafter *Eldridge*]; *EGALE* v. *Canada (A.G.)* (2001), B.C.S.C. 1365 (S.C.) [hereinafter *EGALE*]; *Hendricks, supra* note 62.

[137] *Baehr* v. *Miike*, *1996 WL 694235* (Hawaii Cir. Ct., Dec. 3, 1996)*; Baker* v. *Vermont,* 744 A.2d 864 (Verm. 1999)*; Toonen, supra* note 116.

[138] *Layland, supra* note 70 at 672.

> the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage.[139]

The Common Law Must Conform to the Charter

134. As this involves a common law restriction only, at best, there can be no need for legislative deference. It is judges who have fashioned this rule and judges can modify it.[140] Although this change is significant and important, both for its substantive and symbolic content, given the context of increasing recognition of same sex relationships through legislation and judicial rulings in this and other democracies, it must be seen as an incremental change. MCCT agrees with Justice LaForme, and disagrees with Justice Blair, that a change can be both profound and incremental.

135. While the opponents of the recognition of same sex marriage mount the usual *in terrorem* arguments about unforeseen consequences in urging caution, these can be disregarded. Adverse consequences have been predicted and failed to materialize over every important advance in gay and lesbian equality, from adoption to ending the ban on gays and lesbians serving openly in the military. As Justice Iacobucci noted in *Trinity Western*, the Court should not give regard to speculative evidence about the possibility of future harm.[141] There are predictable consequences, however, namely Canada's advancement toward the "magnificent goal of equal dignity for all", and "a sense of dignity and worthiness

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[139] *Halpern, supra* note 1 at 445, LaForme. Recently, the Supreme Court of Canada in *Sauvé* commented on the validity of a statute prohibiting federal inmates from voting: …the government is making a decision that some people, whatever their abilities, are not morally worthy to vote - that they do not "deserve" to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers' decision to make. The Charter makes this decision for us... The Charter emphatically says that prisoners are protected citizens, and short of a constitutional amendment, lawmakers cannot change this. … Denial of the right… on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter. *Sauvé* v. *Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66 [hereinafter *Sauvé*].

[140] *R.* v. *Salituro,* [1991] 3 S.C.R. 654 at 664-65 [hereinafter *Salituro*].

[141] *Trinity Western, supra* note 96.

for every Canadian and the greatest possible pride and appreciation in being part of a great nation."[142]

136. It is apparent from the foregoing analysis that the objective or effect of any prohibition is to maintain the last vestige of an historic Christian definition of marriage, a definition that is no longer shared even by all Christians. This is the enforcement of religious dogma by the state in violation of section 2(a), and no section 1 analysis is required. The enforcement of religious dogma by the state can never be justified under section 1. The Supreme Court of Canada in *Quebec* v. *Quebec Association of Protestant School Boards* said:

> An Act of Parliament or of legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guaranteed freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s.1[143]

137. In the alternative, if the existing restriction is imposed by the common law, given that it infringes *Charter* rights, the correct approach is to amend it without conducting a section 1 analysis.[144] This was the finding of Justice LaForme. Justice Blair was not inclined to agree, and Justice Smith appears to have concluded that a section 1 analysis was necessary without commenting on the point. If the position of MCCT outlined in the preceding paragraph is not accepted, MCCT agrees that it was open to the Court to conduct a section 1 analysis but submits that it was not necessary to do so.

138. The correct approach when faced with a violation of a common law rule is for the Court to attempt to reformulate the rule to bring it into line with the *Charter*. If it can do so, then it should do so, and no section 1 analysis is necessary. As Justice LaForme noted, from *Hyde* through to the present case, the Courts have not hesitated to pronounce on what constitutes a valid marriage

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[142] *Vriend, supra* note 19 at 535, Cory J., *Stevens 2*, *supra* note 26 at 134, para. 16.

[143] *Quebec (A.G.)* v. *Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66.

[144] *Salituro, supra* note 140; *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 978.

and what does not. In fact, a Quebec Court recognized a marriage within days of Confederation that clearly did not conform to the definition in *Hyde* in the absence of the *Charter.*[145] As the Court found, Parliament has not acted to define marriage so the normal process of the state justifying a piece of legislation is inapplicable.

NO SECTION 1 JUSTIFICATION FOR INFRINGEMENT OF S. 2(a) OR S. 15(1)

139. In the further alternative, if a section 1 analysis is required, the burden to demonstrate the justification for the infringement is on the state, and it is a heavy one.[146]

140. The first step of the analysis is to examine the objectives that the "limit on a *Charter* right or freedom are designed to serve" (emphasis added) per Dickson C.J. in *Oakes*, quoted with approval by Iacobucci J. in *Vriend*. The AGC must demonstrate, not that the objective of marriage is pressing and substantial, but that the objective of the infringement of *Charter* rights or freedoms by withholding state recognition from the religious same sex marriages of MCCT is pressing and substantial. The British Columbia Court erred in *EGALE* v. *Canada* by focusing on the undoubted importance of heterosexual marriage, rather than focusing on the real question of whether it were important to exclude same sex couples from marriage.[147]

141. If the purpose of the limitation is to exclude same sex couples, the purpose is discriminatory and cannot be justified under section 1. If the purpose of state recognition of religious marriage is to respect both the traditional role of churches in performing marriages while respecting religious diversity in Canadian society, imposing this limitation is the antithesis of this goal. It does not respect religious diversity but constitutes state enforcement of historic Christian dogma against those with differing views to the discredit of all people of faith. If the

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[145] *Connolly* v. *Woolrich, supra* note 46.

[146] *Sauvé, supra* note 138.

[147] *Vriend supra* note 19 at 555; *EGALE*, *supra* note 136 at 82.

purpose of state recognition of marriage is to foster loving, committed and mutually supportive relationships, that purpose is undermined by limiting legal recognition to heterosexual relationships only. If the purpose of marriage is to benefit children, this limit both deprives the children of gay and lesbian parents of the benefits of legal marriage and denies the gay and lesbian children of all parents the hope and dream of marriage.[148]

142. In *EGALE*, Justice Pitfield articulated the section 1 justification as procreation. In doing so, he quotes from the section 15 analysis of Justice LaForest in *Egan*, an analysis supported by only 4 of 9 Justices. Moreover, this biological, essentialist or procreation justification has subsequently been expressly rejected by an overwhelming majority of the Supreme Court in *M.* v. *H*. Justice Iacobucci noted that, given that some heterosexual couples do not procreate and some homosexual couples do, the exclusion is "simultaneously underinclusive and overinclusive" and lacking any rational connection with the alleged objective. In fact, Justice Pitfield's analysis in this regard is virtually identical to that of Justice Gonthier in *M.* v. *H.*, where that learned Justice was a minority of one. Justice Pitfield failed to articulate how a section 1 justification that was expressly rejected by an overwhelming majority of the Supreme Court in the context of common law relationships was nonetheless justified in the context of marriage. Therefore, as the Divisional Court concluded, procreation must be rejected as a s.1 defence.[149] The Divisional Court, in distilling the AGC's s.1 defence to procreation, addressed the reliance of the AGC on St. Augustine's three "goods" of marriage.

143. There is no clash of rights here that would require a s.1 balancing of interests. As in *Trinity Western,* properly delineating the rights avoids any clash. The extension of recognition to same sex relationships will not imperil the

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[148] *Layland, supra* note 70 at 677, Greer J., dissenting; see also *Bourassa, supra* note 21.

[149] *EGALE*, *supra* note 136 at 71-85; *M*. v. *H.*, *supra* note 68; see also *Hendricks, supra* note 62 and *Halpern, supra* note 1, Blair J.

recognition of opposite sex marriages of any other faith. As Justice Greer said in dissent in *Layland*:

> "…heterosexuals will not be circumscribed or in any way limited by extending to gays and lesbians the right to marry."[150]

144. There has been an attempt in this case to create the illusion of conflict between the equality rights of gays and lesbians and the religious freedom of those who view same sex relationships as sinful. In reality, the Court is never forced to choose between these interests. As Justice L'Heureux-Dubé (dissenting) said in *Mossop*, which was quoted with approval by the majority in *Miron*:

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.[151]

145. And as Justice Greer (dissenting) said in *Layland*, quoting with approval from the *Leshner* decision,

> …marriage and the "traditional family" are sustaining institutions of society, but that they should not be used as a means to impose discrimination and disadvantage on others. Support for the traditional family or for the institution of marriage should not entail the exclusion and disadvantaging of other family forms.[152]

146. Moreover, the same arguments advanced now about same sex marriage trenching on religious freedom have been unsuccessfully advanced in respect of other measures aimed at improving gay and lesbian equality in other cases, notably in the case of human rights protection in *Vriend*. The Supreme Court in *Vriend* ruled that the religious beliefs of some, even the majority, may not be

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[150] *Layland, supra* note 70 at 677.

[151] *Canada (A.G.)* v. *Mossop*, [1993] 1 S.C.R. 554 at 634.

[152] *Layland, supra* note 70 at 675.

relied upon by government to justify infringing the equality rights of gays and lesbians.[153]

FROZEN RIGHTS

147. The Association takes the position that Parliament cannot change the referred nature since it was "frozen" in 1867. MCCT disagrees.

148. There are at least seven reasons why the definition of marriage cannot be said to have been frozen in 1867.

149. First, a significant element of the religious compromise resulting in Confederation centred around marriage and its differences in Upper and Lower Canada.[154] To ascribe any one definition of marriage at 1867 to the Constitution is to attempt to add something to the Constitution that was deliberately excluded from it.[155]

150. Second, Confederation had, as one of its purposes, an attainment of autonomy from the United Kingdom that would not be reflected were the definition of marriage frozen in 1867. The English parliament has had full power since 1867 to change the definition of marriage.[156] To assert that Canada adopted the then English definition of marriage, yet at the same time lost its ability to change the definition of marriage in 1867, is to assert that Confederation had the effect of making Canada less autonomous and not more autonomous.

151. Third, the definition of marriage being advanced by the proponents of the frozen definition does not contain all of the elements as set out in *Hyde*.[157]

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[153] See generally *Vriend, supra* note 19; See also *Big M, supra* note 33 at 353.

[154] *Reference Re: Marriage Act (Canada)* (1912), 46 S.C.R. 132 [hereinafter *Marriage Reference*].

[155] *Morgentaler, supra* note 88 at 166.

[156] *Brook* v. *Brook* (1861), 9 H.L. Cas. 193 at 709, 710, 711, 712, 713.

[157] *Hyde*, *supra* note 2.

152. Fourth, the proposition that the meaning of marriage was frozen in 1867 contravenes the principle that "the *B.N.A. Act* planted in Canada a living tree capable of growth and expansion within its natural limits."[158]

153. Fifth, section 91 of the *Constitution Act, 1867,* grants Parliament exclusive jurisdiction "to make laws" over a list of matters or class subjects.[159] It does not define what marriage means.[160] The classes are of subjects, not objects, and their magnitude in relation to the few words used to describe them mandates a large and liberal interpretation of them.[161]

154. Sixth, without the ability to interpret the meaning of words used in the Constitution, there would be no need for the "venerable principle" of constitutional interpretation of "not entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." This a further indication that a court is required to enter into the delicate field of constitutional interpretation.[162]

155. Seventh, changes in the definitions have actually occurred. From time to time since Confederation the Courts have found it necessary to redefine words

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[158] *Edwards* v. *Canada (A.G.)*, [1930] A.C. 123 (P.C.) at 136, as cited in *Halpern, supra* note 1 at 406, LaForme J.; See also P. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87 at pp. 97-98, as cited with approval in *Ontario Hydro* v. *Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327 (Iacobucci J. writing for Cory and Sopinka JJ., dissenting on other grounds) at 409; See also, *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437; *Monk Corp*. v. *Island Fertilizers*, [1991] 1 S.C.R. 779; *Q.N.S. Paper* v. *Chartwell Shipping*, [1989] 2 S.C.R. 683; *British Columbia* (*A.G.*) v. *Ontario (A.G.)*, [1994] 2 S.C.R. 41; *ITO—International Terminal Operators* v. *Miida Electronics*, [1986] 1 S.C.R. 752; See also P. Cote, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Que: Yvon Blais, 1991) at 354-67.

[159] *Constitution Act, 1867, supra* note 95; *Halpern, supra* note 1 at 407, LaForme J.

[160] By way of anecdotal evidence of this, see *Parliamentary Debates*, 3rd sess., 8th Parl., At 1-6, 15, 175-177, 189-193, 266-269, 333-336, 342-345, 384-390, 408-411, 502-506, 577-581, 690-692, 701-702, 775-787, 825-835, 845-850, 856-860, 876-878, 906-912 (Volume 6, O 4 at p.1821 as cited in the factum of the Attorney General of Canada in the court below, at paragraph 41.

[161] *Reference Re Alberta Bill of Rights Act*, [1946] 3 W.W.R. 772 at 778, cited in *Halpern, supra* note 1 at 407, LaForme J.

[162] *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at 109, as cited with approval in *Canada (A.G.)* v. *Canadian National Transportation*, [1983] 2 S.C.R. 206.

used in the *Constitution Act*, *1867*, including marriage,[163] and such as "maritime", "admiralty" and "Indian".[164] The legislature has also redefined marriage.[165]

156. In *Reference Re: Marriage Act*,[166] Idington J. held the following with respect to the definition of marriage in s. 91 of the Constitution:

> The word "marriage" is not, as I conceive its use in this Act, to be interpreted as only such form of marriage as the laws of England had deemed marriage, or part of this country at the time of Confederation had deemed such.
>
> It is to be taken for the measuring of the *power*, in the widest sense that the word can have a meaning in any civilized country, including, for example, the widest sense in which any one of the court engaged in resolving the case of *The Queen* v. *Millis*, 10 Cl. & F. 534, would have held it to mean; or, for example, in the sense that so long prevailed over Western Europe and up to recent years in Scotland; in short, *consensual marriage of any kind***.**

157. For all of the reasons above, the definition of marriage is not frozen and was never intended to be frozen by the framers of the Constitution or the Courts and legislatures which followed.

REMEDY

158. The effect of the Divisional Court Order is that the change in the common law definition is suspended for two years, and reformulated automatically on July 12, 2004 unless Parliament acts in the interim.

159. MCCT respectfully submits that, apart from the declaration sought regarding infringement of religious freedom and religious discrimination, the remedy proposed by Justice LaForme in the Divisional Court is the appropriate

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[163] *Connolly* v. *Woolrich*, *supra* note 46; *Re Hassan, supra* note 50.

[164] *Monk Corp.* v. *Island Fertilizers*, *supra* note 158; *Re British North America Act, 1867* (U.K.), s. 91 [hereinafter *Re Eskimo*].

[165] *An Act Concerning Marriage with a Deceased Wife's Sister*, S.C. 1882, c. 42; *Divorce Act*, *supra* note 57; *Marriage Act*, *supra* note 7.

[166] *Marriage Reference, supra* note 154.

remedy. The marriages performed at MCCT may not have any legal recognition unless this is the remedy granted.

160. There are no partial remedies in a case like this. For MCCT it is marriage or nothing. A suspended remedy will cast into limbo the marriages of Joe and Kevin and Elaine and Anne.

161. Parliament has never acted to define marriage, let alone to prohibit same sex marriage. As Justice LaForme noted, in millennia of regulating marriage under the common law by the Courts, the Courts have never hesitated to act rather than waiting for Parliament to speak. Lord Penzance did not shrink from creating the very definition in issue out of concern for Parliament's views. It is appropriate for the Courts to refer a defective statute back to the legislative branch for repair. It is inappropriate for the judiciary not to repair outmoded common law principles that the judiciary has itself created.

162. A declaration of invalidity coupled with a suspension is a usual remedy when confronted with a statutory provision that violates the *Charter*, especially where, as in *M.* v *H.,* there are related statutory provisions that may also require attention.[167] This is the first instance of a declaration of invalidity of a common law principle coupled with a suspension. Moreover, the length of the suspension exceeds any granted in any other constitutional case.

163. MCCT submits that this is a case like *Vriend*, where the solution is clear but the legislature is unwilling to act.[168] In such circumstances, as the guardian of the *Charter* rights of minorities, the judiciary must act to preserve those rights.

164. *Schachter* demands that the proposed remedy be precise.[169] Reformulating the common law definition by exchanging the words "two persons" for the words "one man and one woman" is a clear, simple and precise solution.

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[167] *M.* v. *H., supra* note 68.

[168] *Vriend, supra* note 19.

[169] *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 at 718.

Moreover, with due respect to the view of the Divisional Court that there might be a constitutional alternative, it is the only solution that meets the requirements of the *Charter*. The suggested legislative alternatives do not respect the *Charter* rights of MCCT and its congregants. Even Justice Blair conceded that amending the common law as proposed is "a leading alternative for consideration in bringing the law into line with *Charter* values."[170] Moreover, the majority of the Divisional Court did not find that there were any constitutionally valid alternatives, but merely posited that Parliament should be given an opportunity to explore alternatives.

165. In part, Justice Blair appeared to be concerned with process; the change proposed was sufficiently controversial that it was better dealt with in Parliament through its inquisitorial process. With great respect, Justice Blair was in error as to process. First, a judge made rule should ordinarily be corrected by other judges. Second, there is no evidence that the views of those opposed to this change have not been heard; in fact, groups representing those views have appeared in the Courts three provinces, in addition to their current deputations to Parliament and those made in connection with *Bill C-23*. Their views do not need to be discovered, they are well known. Third, as in *Vriend*, it is precisely because Parliament appears to be responding to the moral views of a particular sector in society rather than acting in accordance with *Charter* principles that the Courts must act to defend the rights of a minority whose rights have been neglected time and again by Parliament.

166. Further, MCCT submits that, as was done by the Court of Appeal in *Haig* and *Birch* v. *Canada* and as was done by the Supreme Court of Canada in *Vriend*, this Honourable Court must consider the alternatives and not simply refer the matter to Parliament in the hope that a constitutional alternative might be discovered as suggested by Justice Smith.[171] The Court must judge the

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[170] *Halpern, supra* note 1 at 374, Blair J.

[171] *Haig* v. *Canada* (1992), 9 O.R. (3d) 495, 10 C.R.R. (2d) 287, 94 D.L.R. (4th) 1, 92 C.L.L.C. 17,034 sub nom. *Birch* v. *Canada* (C.A.); *Vriend, supra* note 19.

constitutional validity and adequacy of potential remedies suggested by the AGC. If there are no constitutionally valid alternatives, there can be no grounds for abdicating the responsibility to grant the remedy to Parliament merely because the question is controversial. It is a feature of our system that the judiciary makes decisions based on reasons and principles of law, whereas politicians must respond to a variety of pressures.

167. In his reasons, Justice Blair discussed three possible alternatives to changing the common law definition: a parallel "registered domestic partnership" regime; the replacement of religious marriage by a "legal civil union" regime; and opening marriage to same-sex couples with certain restrictions.

168. MCCT submits that the alternative remedies suggested by Justice Blair would not be constitutionally valid and would not solve the problem of the province's refusal to register the religious marriages of MCCT and other congregations. For MCCT, civil unions would not be religious marriages. There is no sacrament of registered domestic partnership. The *Law Commission of Canada* also rejected these alternatives in its report.[172]

169. Moreover, the proposed remedies would not be available under the current constitutional framework and would require a constitutional amendment. These alternatives will be discussed in turn below.

Registered Domestic Partnership

170. Justice Blair indicated that he had "some concerns about the adequacy of the registered domestic partnership regime to meet the requirements of the *Charter*." The Quebec Court found the Quebec civil union to be an inadequate

[172] *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, Report, Law Commission of Canada (Ottawa, December 21, 2001), c. 4, avail. at http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pdf.

alternative. Like all of the proposed alternatives, this option is currently constitutionally impossible, and would require a constitutional amendment.[173]

171. The proposed legislation would have to be created at the provincial level, or by federal statute in the federal sphere alone. This raises division of powers issues that cannot be ignored. The provinces do not have the jurisdiction to legislate with respect to "marriage and divorce." At the same time, only the provinces have the jurisdiction to legislate with respect to "property and civil rights in the province."[174]

172. Even if the provinces have the constitutional jurisdiction to legislate in this area, different legislation respecting registered domestic partnerships across Canada would result in a legal patchwork of relationships incapable of recognition from one jurisdiction to another. Currently, for example, the same sex couples "civilly united" in Nova Scotia are not afforded any status in Ontario. In the United States, for instance, the Appellate Court of Connecticut ruled that it had no jurisdiction over dissolving the civil union of Glen Rosengarten and Peter Downes, a same sex couple that was "civilly united" in Vermont in 2000 under the Vermont civil union legislation.[175]

173. The resulting institution would not be a binding, portable relationship comparable to marriage, which is required under the Constitution.

174. Moreover, there would be no possibility of international comity. Whereas same-sex marriages would have the possibility of being recognized abroad (currently they certainly would be recognized in countries such as the Netherlands and Belgium), a registered domestic partnership would be a creature of statute exclusive to the jurisdiction in which it was created.

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[173] *Halpern, supra* note 1 at 330, Blair J.; *Hendricks, supra* note 62.

[174] *Constitution Act, 1867, supra* note 95.

[175] *Rosengarten* v. *Downes*, 71 Conn. App. 372 (2002).

175. In the European Union, some of the members (France, Germany and some Scandinavian countries) recognize same-sex civil union while others like Italy, Spain, Greece, Ireland, Luxembourg, and Austria do not recognize any form of gay civil union. In order to assist in developing comity, the European Parliament has recently issued a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[176]

176. Moreover, in this case, a registered domestic partnership scheme separate from marriage would continue to violate MCCT's s.15(1) and s.2(a) rights under the *Charter*, as a form of segregation, relegating the marriages performed at MCCT to a second class status. It would allow traditional faiths to have their forms of marriage granted legal recognition, while MCCT would be performing legally meaningless same-sex union ceremonies. The Courts in *Hendricks* and *Walsh* have taken judicial notice of the inferior status such a scheme would create.[177]

Abolition of Religious Marriage

177. The second option, the abolition of religious marriage in favour of a "legal civil union" regime fails for similar reasons. However, if such a scheme were created at the federal level, it would remove the problem of relegating same-sex marriage to second class status, and would also remove the religious discrimination issue because all religious marriages would be abolished.

178. However, this option would still require a constitutional amendment, would not be a binding, portable relationship and would not be valid in other countries. The comity problem would become even more significant, in that no Canadian

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[176] (COM(2001) 257 - C5-0336/2001 - 2001/0111(COD)) (European Parliament Resolution), 2003 avail. at http://www3.europarl.eu.int/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=p0030211EN.pdf&LANGUE=EN, pp. 13-51.

[177] *Hendricks, supra* note 62; *Walsh, supra* note 61.

union, whether between members of the same or opposite sex, would be recognized abroad.

179. On its face, this option suggests the French or Continental model, where there is no legal recognition of religious marriage. However, civil marriage in France is still called "marriage." This form of continental civil marriage is currently available to same sex couples in the Netherlands and Belgium. While France has a legal civil union available to same sex couples (PACS), it is a regime separate from marriage, and it is not recognized elsewhere, including in other European Union countries.[178]

180. Canada would be capable of embracing the end of legal recognition of religious marriage, and to require purely civil marriage ceremonies, but only at the provincial level. This would avoid rather than address the question of capacity that is in issue in this case. The question of capacity would remain, as it is a purely federal issue.

181. The abolition of religious marriage is a heavy-handed response unworthy of our system. It is reminiscent of the response of officials in Montgomery, Alabama, when they were forced by the Courts in 1958 to end racial segregation in the city parks: the parks were closed.[179]

Restrictions on Marriage

182. The third option, opening marriage to same sex couples with certain restrictions, is similarly inadequate and impossible under our constitutional framework. This system was initially adopted in the Netherlands. The Dutch have since eliminated the distinctions between same sex and opposite sex

[178] *See supra* note 176 and accompanying text. It is important to note that the same complaints were heard from social conservatives in France about the PaCS that are heard now about marriage. See Daniel Burrillo, "Fantasmes des jurists vs Ratio juris" in D. Burrillo, E. Fassin eds., *Au-delà du PaCS* at 162.

[179] This was a common response by officials in various states when faced with the prospect of racial integration. See *Palmer* v. *Thompson*, 419 F.2d 1222 (5th Cir. Miss. 1969); *Gilmore* v. *Montgomery*, 337 F Supp. 22 (M.D. Ala. 1972).

marriages. This option could not be advanced by the federal Parliament since issues such as filiation are matters of provincial law. The federal government has no jurisdiction to legislate in this area.

183. Moreover, the proposed restrictions have been universally found in cases that have considered them under provincial law to violate the *Charter*. For example, in *Re K.*, restrictions on adoptions by same-sex couples were found to be unconstitutional.[180]

184. Conclusion

185. For the foregoing reasons, these "alternatives" to marriage are mythical and illusory. They are not available under our division of powers and are not constitutionally valid. Where no constitutionally valid legal alternative exists, there is no reason for the Court to defer to Parliament. Rather, the Court is under a positive obligation to amend the common law rule to conform to the *Charter*. None of the alternatives suggested would be constitutionally permissible in the circumstances, and only the precise remedy proposed by MCCT is available.

186. With the exception of the abolition of marriage, the various options proposed all result in a "separate but equal" regime. As Justice LaForme stated in the Divisional Court:

> …I would have to embrace the concept that same-sex couples are entitled to be married; they just cannot appropriate the word marriage because that belongs exclusively to heterosexual couples. That would be a wrong concept for this court to embrace.[181]
>
> It should be recalled that at one time African-Americans were entitled to sit on the same bus as "whites" and in seats that were equally comfortable to other seats. They just could not sit at the front of the bus because those equal seats were reserved for "white people." As well, African-Americans were entitled to drink water and

[180] *Re K* (1995), 23 O.R. (3d) 679 (Prov. Div.).

[181] *Halpern, supra* note 1 at 429.

> to use toilet facilities that were in all other respects equal to those used by white people. Once again, they could not do so from the same fountain or use the same toilet as whites. Each of those were – although once seemingly credible concepts – discredited and rejected by courts in the United States.[182]

187. At the Federal Court of Appeal in *Egan*, Justice Linden, in dissent, stated (which was quoted with approval by LaForme J.):

> In this country, the separate but equal doctrine was rejected by the Supreme Court in *Andrews*… as a loathsome artifact of the similarly situated approach. One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada forty decades after its much-heralded death in the United States.[183]

188. Although the change in the law may be perceived by some to be profound, it is nonetheless an incremental change and the logical next step in the evolution of marriage and on the road to equality for the lesbian and gay community. There is no evidence before the Court that the proposed change to the common law definition of marriage will cause harm to Canadians. MCCT should not be subjected by Parliament to an inquisitorial process in search of harm when the Court found none existed.

189. Parliament has left this issue to be decided by the Courts. It is the duty of the Courts to act. As was quoted by Justice LaForme in the Divisional Court, quoting Rev. Martin Luther King Jr., "[w]e must use time creatively, in the knowledge that the time is always ripe to do right. … Now is the time to lift our

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[182] See *Brown* v. *Board of Education,* 349 U.S. 294 (1955); *Bolling* v. *Sharpe,* 347 U.S. 497 (1994). Canadians have little right to feel superior to their American cousins on this point. Racial segregation was a fact of Canadian life that was sanctioned by the Canadian Supreme Court in *Christie* v*. York Corp*, [1940] S.C.R. 139. Of course, a very different conclusion would be reached today on the basis of the *Charter*.

[183] *Egan,* [1993] 3 F.C. 401 at p. 442, 103 D.L.R. (4th) 336 (C.A.) rev'd [1995] 2 S.C.R. 513 (*supra* note 67), quoted with approval in *Halpern, supra* note 1 at, 430, LaForme J.

national policy from the quicksand of injustice to the solid rock of human dignity."[184]

PART V – ORDER REQUESTED

190. MCCT therefore asks that the judgment below be varied as follows:

a) by declaring that the common law rule that marriage be between "one man and one woman to the exclusion of all others", so found, be reformulated to read "two persons to the exclusion of all others", regardless of the sex of those persons;

b) by declaring that there be no suspension of the remedy and that the reformulation of the common law rule requested by MCCT take effect immediately;

c) by declaring that the marriages of Kevin Bourassa and Joe Varnell and of Elaine Vautour and Anne Vautour are valid legal marriages and ordering that the Registrar General accept registration of the documents evidencing these two marriages;

d) by declaring that the common law prohibition of same sex marriages infringes MCCT's freedom of religion under s. 2(a) of the *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 (the "*Charter*"), and that such infringement is not justified under section 1 of the *Charter*; and,

e) by declaring that the common law prohibition of same sex marriages is an infringement of MCCT's right to be free from religious discrimination under section 15(1) of the *Charter* and that such infringement is not justified under section 1 of the *Charter*.

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[184] *Halpern*, *supra* note 1 at 455, LaForme J.

191. MCCT asks that the AGC appeal be dismissed with costs to MCCT, and that the cross-appeal be allowed with costs against the AGC. As no appeal was taken from the costs awarded below, that costs award should not be altered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2003.

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Douglas Elliott

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R. Trent Morris

_____

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CERTIFICATE

An Order under subrule 61.09(2) has been obtained further to a motion for directions, signed December 17, 2002

Counsel estimates that 4 hours is required in response to the appeal and for oral argument on the cross-appeal, excluding reply.

SCHEDULE A

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

Baker v. *Canada*, [1999] 2 S.C.R. 817

Black v. *Law Society of Alberta,* [1986] 3 W.W.R. 590 (Alta. C.A.)

Boucher v. *Canada*, [1951] S.C.R. 265

Brook v. *Brook*, (1861) 9 H.L. Cas. 193

Brooks v. *Canada Safeway,* [1989] 1 S.C.R. 1219

Canada (A.G.) v. *Mossop*, [1993] 1 S.C.R. 554

Canada (A.G.) v. *Canadian National Transportation*, [1983] 2 S.C.R. 206

Canada (Minister of Justice) v. *Borowski,* [1981] 2 S.C.R. 575

Canadian Civil Liberties Association v. *Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.)

Chamberlain v. *Surrey School District No. 36* (2000), 80 B.C.L.R. (3d) 181 (C.A.)

Chaput v. *Romain*, [1955] S.C.R. 834

Christie v. *York Corp*, [1940] S.C.R. 139

Citizens Insurance Company of Canada v. *Parsons* (1881), 7 App. Cas. 96

Connolly v. *Woolrich* (1867), 17 R.J.R.Q. 25, 11 L.C. Jur. 1973 [aff'd] (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. Q.B.)

Delisle v. *Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989

Edwards v. *Canada (A.G.)*, [1930] A.C. 123 (P.C.)

EGALE Canada v. *Canada (A.G.)* (2001), B.C.S.C. 1365 (S.C.)

Egan v. *Canada*, [1995] 2 S.C.R. 513 rev'g [1993] 3 F.C. 401, 103 D.L.R. (4th) 336 (C.A.)

Eldridge v. *B.C. (A.G.),* [1997] 3 S.C.R. 624

Haig v. *Canada* (1992), 9 O.R. (3d) 495 (C.A.)

Hall v. *Durham,* [2002] O.J. No. 1803 (Sup. Ct.)

Halpern and MCCT v. *Canada (A.G.)*, [2002] 60 O.R. (3d) 321 (Div. Ct.)

Hendricks v. *Québec*, [2002] J.Q. no 3816 (C.S.)

Jones v. *Canada*, [1986] 2 S.C.R. 284

Law v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497

Layland v. *Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.)

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

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

Monk Corp. v. *Island Fertilizers*, [1991] 1 S.C.R. 779

Nova Scotia v. *Walsh*, [2002] S.C.J. No. 84

Ontario Hydro v. *Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327

Pettkus v. *Becker*, [1980] 2 S.C.R. 834

Quebec (A.G.) v. *Quebec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66.

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

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