The Court of Appeal For British Columbia
May 1, 2003

Court of Appeal for British Columbia
Citation:
Barbeau v. British Columbia (Attorney General),

2003 BCCA 251

Date: 20030501

Docket: CA029017; CA029048

Docket: CA029017

Between:

Dawn Barbeau and Elizabeth Barbeau

Peter Cook and Murray Warren,

Jane Hamilton and Joy Masuhara

Appellants

(Petitioners)

And

The Attorney General of British Columbia and

The Attorney General of Canada

Respondents

(Defendants)

- and -

Docket: CA029048

Between:

EGALE Canada Inc.,

David Shortt and Shane McCloskey,

Melinda Roy and Tanya Chambers,

Lloyd Thornhill and Robert Peacock,

Robin Roberts and Diana Denny,

Wendy Young and Mary Theresa Healy

Appellants

(Petitioners)

And

The Attorney General of Canada,

The Attorney General of British Columbia, and

The Director of Vital Statistics for British Columbia

Respondents

(Respondents)

Before:
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Low

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Place and Dates of Hearing:
Vancouver, British Columbia
February 10-12, 2003
Place and Date of Judgment:
Vancouver, British Columbia
May 1, 2003

Written Reasons by:
The Honourable Madam Justice Prowse
Concurring Reasons by:
The Honourable Mr. Justice Mackenzie (Page 84, para. 164)
Concurred in by:

The Honourable Mr. Justice Low

INDEX

Reasons for Judgment of the Honourable Madam Justice Prowse:

I. INTRODUCTION

[1] The primary issues addressed on these appeals are whether there is a common law bar to the marriage of same-sex couples, and, if so, whether that bar should be struck down as offending the Canadian Charter of Rights and Freedoms (the "Charter"), or Charter values.

[2] These issues have recently been canvassed by the Ontario Divisional Court in Halpern v. Canada (Attorney General), [2002] O.J. No. 2714, (2002) 215 D.L.R. (4th) 223. Similar issues were dealt with by the Superior Court of Quebec in Hendricks v. Québec (Attorney General), [2002] J.Q. No. 3816.

[3] In Halpern, the court held that there was a common law bar to marriage between same-sex couples; that the common law bar contravened s. 15 of the Charter; and that the contravention of s. 15 could not be saved under s. 1. This decision has been appealed to the Ontario Court of Appeal which has reserved its decision.

[4] In Hendricks, the court held that s. 5 of the Federal Law - Civil Law Harmonization Act No. 1, S.C. 2001, c. 4 (the "FCHA"), s. 1.1 of the Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (the "MBOA"), and part of para. 2 of Article 365, Civil Code of Québec, S.Q. 1991, c. 64, which operate as a bar to same-sex marriages, contravene s. 15 of the Charter and cannot be justified under s. 1. This judgment has also been appealed.

[5] In Halpern, the court declared the common law bar to same-sex marriage to be constitutionally invalid and inoperative and suspended the remedy for a period of 24 months. Mr. Justice LaForme would have granted immediate declaratory relief and reformulated the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others". The entered order provides that "in the event that Parliament does not act accordingly prior to the expiration of 24 months ...", the common law definition of marriage shall be reformulated as stated by Mr. Justice LaForme.

[6] In Hendricks, Madam Justice Lemelin declared the statutory bars to same-sex marriage to be of no force and effect and stayed that declaration for two years.

II. CONCLUSION

[7] For the reasons which follow, I conclude that there is a common law bar to same-sex marriage; that it contravenes s. 15 of the Charter; and that it cannot be justified under s. 1 of the Charter. I would grant the declaratory relief set forth at para. 158, infra, and reformulate the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others". I would suspend these remedies until July 12, 2004, solely to give the federal and provincial governments time to review and revise legislation to accord with this decision.

III. NATURE OF APPEALS

[8] These are appeals from the decision of a Supreme Court judge, rendered October 2, 2001, dismissing the petitions of the individual appellants, and of EGALE Canada Inc. ("EGALE"), for declarations, inter alia, that the issuer of marriage licences under s. 31 of the Marriage Act, R.S.B.C. 1996, c. 282, is permitted to issue marriage licences to couples of the same sex; that there is no legal bar to the marriage of two persons of the same sex; or, if there is such a bar, it is of no effect; and for orders of mandamus to compel the issuance of marriage licences to the individual appellants and to other same-sex couples who otherwise meet the requirements of the Act.

[9] The reasons for judgment of the trial judge are reported at (2001), 95 B.C.L.R. (3d) 122.

IV. ISSUES ON APPEALS

[10] The appellants submit that the learned trial judge erred in finding:

(1) that the Constitution of Canada bars recognition of same-sex marriages and that neither the federal nor provincial governments has the power to provide for same-sex marriages, except by way of a constitutional amendment;

(2) that there is a common law bar to same-sex marriage in Canada;

(3) in the alternative, that if there is a common law bar to same-sex marriage, that bar does not breach the individual appellants' rights under ss. 2, 6, 7 and 28 of the Charter;

(4) in the alternative, that if there is a common law bar to same-sex marriage, and assuming that the common law bar breaches the equality rights of the individual appellants under s. 15 of the Charter, that such breach is justifiable under s. 1 of the Charter.

[11] The respondents, the Attorney General of Canada ("AGC") and the Attorney General of British Columbia ("AGBC") agree with the appellants that the trial judge erred as set forth in the first ground of appeal, supra. The AGC also submits that the learned trial judge erred in finding that, to the extent there is a common law bar to same-sex marriages, that bar breaches the individual appellants' rights under s. 15 of the Charter.

[12] The AGBC takes no position with respect to the allegations of Charter breaches or the application of s. 1 of the Charter.

[13] There is also a significant issue as to the appropriate remedy in the event this court resolves the substantive issues in favour of the appellants.

V. THE PARTIES AND THE INTERVENORS

[14] Each of the individual appellants is living in a committed same-sex relationship and wishes to marry the person with whom he/she is living. These appellants are of different ages, ethnicities and religions. Some of them have cohabited for a relatively short time, while others have spent decades of their lives together. Some of them have raised children; others intend to do so in the future.

[15] The affidavits sworn by the individual appellants reveal that their reasons for wanting to marry are the same as for many heterosexual couples. Those reasons include: love, reinforcing family support, social recognition, ensuring legal protection, financial and emotional security, religious or spiritual fulfillment, providing a supportive environment for children, and strengthening their commitment to their relationship. They simply want what heterosexual couples have — the right to marry the person with whom they are living in a committed relationship.

[16] The appellant, EGALE ("Equality for Gays and Lesbians Everywhere"), is a national organization committed to the advancement of equality for lesbians, gays, bisexuals and transgendered people in Canada.

[17] The intervenor, the B.C. Coalition for Marriage and Family (the "B.C. Coalition"), is an umbrella group made up of three organizations: the Focus on the Family (Canada) Association, the Alliance for Social Justice, and Real Women of British Columbia.

[18] The intervenor, the Interfaith Coalition for Marriage (the "Interfaith Coalition"), is comprised of the Catholic Archdiocese of Vancouver, the Islamic Society of North America, the B.C. Muslim Association, the Evangelical Fellowship of Canada, the Catholic Civil Rights League and the B.C. Council of Sikhs.

[19] The intervenor, the Coalition of Canadian Liberal Rabbis for Same-Sex Marriage (the "Liberal Rabbis"), consists of a group of reform, reconstructionist and Jewish renewal rabbis.

[20] The B.C. Coalition and the Interfaith Coalition were granted intervenor status by order of Madam Justice Rowles, made June 6, 2002 (reasons released July 4, 2002). The Liberal Rabbis were granted intervenor status by order of Madam Justice Rowles pronounced June 21, 2002.

[21] The B.C. Coalition and the Interfaith Coalition support the position taken by the AGC, except that they also support the conclusion of the trial judge that the Constitution

of Canada bars same-sex marriages, and that neither the federal nor the provincial governments has the power to legislate with respect to same-sex marriages in the absence of a constitutional amendment.

[22] The Liberal Rabbis generally support the position of the appellants.

[23] The intervenors were granted status on the basis that they would neither seek nor be granted costs, and that any additional disbursements incurred by the parties as a result of their intervention would be borne by the intervenors.

VI. PROCEDURAL BACKGROUND

[24] Between December 1998 and October 2000, at least nine same-sex couples applied to the B.C. Director of Vital Statistics (the "Director") for marriage licences. In each case, the Director had denied the requests. The denial was based on a legal opinion the Director received from the Ministry of Attorney General advising that there was a common law bar to same-sex marriages, that the appellants, therefore, did not have the capacity to marry at law, and that only the federal government had the power to remove the common law bar by enacting legislation to redefine marriage or to change the rules concerning capacity to marry.

[25] On July 20, 2000, the AGBC filed a petition in the B.C. Supreme Court (No. L001944) seeking an order declaring that a person appointed an issuer of marriage licences pursuant to s. 31 of the Marriage Act is permitted to issue a marriage licence to persons of the same sex, and declaring that persons are not barred from marrying one another solely on the basis that they are of the same sex. (This petition was subsequently withdrawn on July 16, 2001, following a change in government.)

[26] On October 13, 2000, EGALE and five of the appellant couples filed a petition in the B.C. Supreme Court (No. L002698) challenging the Director's decision not to issue the couples marriage licences and seeking related relief.

[27] On November 7, 2000, three additional same-sex couples filed a petition in the B.C. Supreme Court (No. L003197) challenging the Director's decision not to issue the couples marriage licences and seeking additional relief.

[28] Chief Justice Brenner made an order on November 28, 2002 directing that the two petitions be heard at the same time. He also granted intervenor status to the B.C. Coalition and the Interfaith Coalition.

[29] The petitions were heard by the trial judge between July 23 and August 3, 2001. The reasons of the trial judge were delivered October 2, 2001 (followed by a corrigendum on October 4, 2001). On October 4, 2002, the trial judge issued his reasons for judgment with respect to costs.

[30] The petitioners appealed the decision of the trial judge and, by consent order dated December 7, 2001, the appeals were directed to be heard at the same time.

VII. DECISION OF THE TRIAL JUDGE

[31] The trial judge summarized his conclusions with respect to the issues before him in his "Summary of Opinion and Disposition" at paras. 8-12 of his reasons for judgment:

> Under Canadian law, marriage is a legal relationship between two persons of opposite sex. The legal relationship does not extend to same-sex couples.
>
> Marriage was defined by common, or judge-made law. Judges should only change the common law in incremental steps. A change to define marriage as the legal union of two individuals, regardless of sex, is not incremental. The change would have broad legal ramifications and would require, at the least, rules to govern the formation and dissolution of same-sex unions. Any permitted change to the common law of marriage must be made by legislation.
>
> Parliament may not enact legislation to change the legal meaning of marriage to include same-sex unions. Under s. 91(26) of the Constitution Act, 1867, Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship. By attempting to change the legal nature of marriage, Parliament would be self-defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to the power. Parliament would be attempting to amend the Constitution without recourse to the amendment process provided by the Constitution Act, 1982. Alternatively, Parliament would be attempting to enact legislation in respect of civil rights exclusively within the legislative authority of the province.
>
> "Marriage", as a federal head of power with legal meaning at confederation, is not amenable to Charter scrutiny. One part of the Constitution may not be used to amend another. Alternatively, if the legal relationship of "marriage" is subject to Charter scrutiny, its legal character does not infringe the petitioners' fundamental freedoms of expression or association, their mobility rights or their rights of liberty and security of the person, but does infringe their equality rights.
>
> The infringement of the petitioners' equality rights is a reasonable and demonstrably justified limit in a free and democratic society and is saved by s. 1 of the Charter.

[32] In his reasons on costs dated October 4, 2002, the trial judge ordered that the parties bear their own costs since "the basis of disposition [of the petitions] differed from grounds raised by either of them." ([2002] B.C.J. No. 2239, para. 8.) That remark is a reference to the fact that the primary constitutional basis upon which the trial judge dismissed the petitions was raised by the trial judge during the course of the hearing and resolved on the basis of oral and written submissions he solicited from the parties in that regard.

[33] I will elaborate on the trial judge's reasons for his conclusions as I address each of the individual grounds of appeal.

VIII. DISCUSSION OF THE ISSUES

A. The Evidence

[34] The evidence before the trial judge consisted of the affidavits of the individual appellants setting forth their personal history, the history of their relationships and their reasons for wanting to marry. Those affidavits are referred to by the trial judge at paras. 14-43 of his reasons. I will repeat here only his summary (at para. 45):

The difference between these [the appellant couples] and heterosexual couples is that the former choose and prefer a committed relationship and sexual relations with a person of the same, rather than opposite, sex. Because they are gay or lesbian, these couples have been told they cannot gain recognition as married persons.

[35] The parties and the intervenors also filed affidavits by individuals having expertise in various fields, including individual and comparative religions, history, anthropology, ethics and law, sociology, gender studies, linguistics, lesbian and gay studies, theology, education, economics, and philosophy. Those affidavits include opinions on such topics as the history of marriage; whether same-sex marriages have ever been recognized within societies; if so, whether same-sex marriages have ever represented a norm within those societies; the beliefs of various religious groups with respect to marriage in general and same-sex marriage in particular; the potential consequences within specific religions, and within society generally, if same-sex marriages are recognized at law, etc. While these affidavits were enlightening, several overstepped the boundary between opinion evidence on a matter in issue, and advocacy for a particular result.

[36] I note that the expert evidence in these cases was similar to the expert evidence before the courts in Halpern and Hendricks. Many of the same experts provided opinions, particularly in Halpern. Thus, the evidentiary foundation for the decisions in those cases paralleled, but was not identical to, the evidentiary foundation before the trial judge in these proceedings. It should be noted that the expert evidence was untested by cross-examination. Further, a degree of caution must be exercised in approaching the evidence of individuals purporting to speak on behalf of entire religious groups.

[37] In his reasons for judgment, under the heading "The Evolution of Parallelism", the trial judge discussed the relatively recent developments in Canadian statutory law which have extended economic and other benefits and obligations to same-sex couples which had previously been available only to married couples. These changes are set forth in some detail at paras. 47-70 of the trial judge's reasons. They include changes to statutes in relation to spousal support, guardianship, adoption, pension entitlement and medical decision-making. In British Columbia, many of these changes were accomplished by defining the word "spouse" in the relevant legislation to include same-sex partners.

[38] The trial judge noted that, unlike married couples, common-law and same-sex couples only acquire the rights and obligations available to married couples following a period of cohabitation, the length of which varies from province to province. He did not suggest, nor could it reasonably be suggested, that same-sex couples enjoy all of the rights of married couples, except the right to marry. What can be said is that there has been a movement over the last several years to provide same-sex couples with many benefits (and corresponding obligations) they had been denied under previous legislation because of their same-sex status.

[39] I note that the appellants rely on these changes in the law to argue that any further change to the common law to permit same-sex marriages could properly be termed "incremental". The AGC, B.C. Coalition, and Interfaith Coalition, on the other hand, rely on these changes to suggest that the goal of same-sex couples of achieving parity with opposite-sex couples has been substantially met, and that the law should not take the further step requested by the appellants. They say that the further changes sought by the appellants would so fundamentally alter the concept of marriage that marriage would become unrecognizable and unacceptable to those who oppose such a change, particularly those whose religious beliefs preclude them from accepting same-sex marriages.

C. Is there a Common Law Bar to Same-Sex Marriage?

[40] I preface this discussion by observing that (subject to the resolution of the first ground of appeal), it is common ground between the parties that the federal government has jurisdiction over marriage, including the capacity to marry, pursuant to s. 91(26) of the Constitution Act, 1867 under the heading: "Marriage and Divorce". The provinces, in turn, have jurisdiction to legislate with respect to the conditions governing the celebration of marriage under s. 92(12) of the Constitution Act, 1867 under the heading: "The Solemnization of Marriage in the Province", and to legislate with respect to "Property and Civil Rights in the Province" under s. 92(13).

[41] The parties agree that neither Parliament, nor the provincial legislature, has enacted legislation which prohibits same-sex marriages. >From a historical viewpoint, however, it must be remembered that same-sex conduct constituted a criminal offence in Canada until 1969. Thus, the prospect of same-sex marriages did not realistically arise in Canada until some time thereafter.

[42] The only federal statutes which directly touch on the question of same-sex marriage are s. 1.1 of the MBOA and s. 5 of the FCHA. Section 1.1 of the MBOA provides:

1.1. For greater certainty, the amendments made by the Act do not affect the meaning of the word "marriage" that is, the lawful union of one man and one woman to the exclusion of all others.

[43] The MBOA was an omnibus bill amending 68 federal statutes to extend benefits and obligations already available to married and common-law opposite-sex couples, to common-law same-sex couples, and to extend other benefits only available to married couples to all common-law couples. It was a legislative response to the Supreme Court of Canada's decision in M. v. H., [1999] 2 S.C.R. 3. In brief, M. v. H. declared that the definition of "spouse" in s. 29 of the Family Law Act, R.S.O. 1990, c. F.3, was of no force or effect as constituting an infringement of s. 15 of the Charter which was not saved by s. 1. Section 29 restricted the definition of "spouse" to married or common law opposite-sex couples, thereby excluding same-sex couples.

[44] It is not suggested by any of the parties that s. 1.1 of the MBOA does anything more than state Parliament's view as to what marriage is. It does not purport to be an exercise of Parliament's power to legislate in relation to marriage under s. 91(26) of the Constitution Act, 1867.

[45] Section 5 of the FCHA provides:

5. Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.

This Act came into effect on June 1, 2001. Its purpose was to harmonize the federal law with the civil law of the Province of Quebec.

[46] As earlier noted, both s. 1.1 of the MBOA and s. 5 of the FCHA were struck down by the court in Hendricks as unjustifiable violations of s. 15 of the Charter.

[47] There is no suggestion that the Marriage Act, or any other provincial statute, contains a bar to same-sex marriage. In fact, subject to the resolution of the first ground of appeal, any attempt by the province to create such a legislative bar would be viewed as exceeding the provincial government's legislative powers by intruding on the federal government's power to legislate with respect to capacity to marry.

[48] The Marriage Act makes no express reference to any requirement that marriage can only take place between opposite-sex couples. Sections 6 and 7(1) of the Marriage Act provide:

6 Subject to this Act and any Act of Canada in force in British Columbia, the law of England as it existed on November 19, 1858 prevails in all matters relating to the following:

(a) the mode of solemnizing marriages;

(b) the validity of marriages;

(c) the qualifications of parties about to marry;
(d) the consent of guardians or parents, or any person whose consent is necessary to the validity of a marriage.

7 (1) A religious representative registered under this Act as authorized to solemnize marriage has and may exercise authority to solemnize marriage in accordance with this Act between any 2 persons neither of whom is under a legal disqualification to contract marriage.

[Emphasis added.]

[49] It is the absence of any statutory prohibition of same-sex marriages which gives rise to the question of whether there is, nonetheless, a prohibition against same-sex marriage at common law.

[50] As earlier stated, the trial judge found that there was a common law bar to same-sex marriage; namely, the common law definition of marriage. In that regard, he relied on the oft-quoted passage from Hyde v. Hyde and Woodmansee (1866), L.R. 1 P. & D. 130 (H.L.), at p. 130. There, in deciding whether to recognize a polygamous marriage, the court described marriage as follows, at p. 133:

Marriage has been well said to be something more than a contract, either religious or civil — to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in 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.]

[51] This definition of marriage was referred to and adopted in Corbett v. Corbett, [1970] 2 All E.R. 33 (Probate, Divorce and Admiralty Div.), (where the court nullified a marriage involving a transgendered individual), and in Keddie v. Currie (1991), 60 B.C.L.R. (2d) 1 (C.A.), at p. 14 (where this Court expressly adopted the definition of marriage in Hyde, albeit in relation to a discussion of common law marriages).

[52] After considering the appellants' arguments that the definition of marriage in Hyde should not be treated as either binding or persuasive, or as an expression of the common law, and that the adoption of that definition in later cases constituted no more than obiter dicta, the trial judge made the following comments (at paras. 82-83):

I do not construe Hyde to create any new judicial characterization of the construct of marriage but to accurately state the law as it was before 1866 and, in the absence of any indication to the contrary, as it was at November 19, 1858.

Section 6 of the Marriage Act, R.S.B.C. 1996, c. 282 provides that the law of British Columbia with respect to the validity of marriage is the common law of England at November 19, 1858 until that law is changed by statute. Because no legislative body has attempted to change the common law of England as it was at the relevant date, "marriage" in British Columbia in 2001 is a relationship that may only subsist between one man and one woman.

[53] The Ontario Divisional Court in Halpern also found that marriage at common law meant the marriage between a man and a woman, agreeing in that respect with the majority in Layland v. Ontario (Minister of Consumer & Commercial Relations) (1993), 14 O.R. (3d) 658 (Ont. Div. Ct), which, in turn, adopted the definition of marriage set forth in Hyde, which was also adopted in North v. Matheson (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct).

[54] In Hendricks, Madam Justice Lemelin briefly discussed the issue of whether there was a common law bar to same-sex marriage, although she did so in the context of the legislative provisions which were at issue before her. In the result, she concluded as follows (at para. 94):

When the Constitution Act, 1867 was enacted, marriage was the union of a man and a woman, whether under the common law or under the Civil Code of Lower Canada. In any event, how could the situation have been otherwise when our law made homosexuality a criminal offence until 1969?

[55] In my view, the appellants' submission that there was no common law bar to same-sex marriage cannot be sustained. As Professor Lahey acknowledged in her factum, the issue of same-sex marriage was unlikely to have arisen in the face of the criminal sanctions in place in both England and Canada. The adoption by Canadian courts of the definition of marriage in Hyde and Corbett did not arise in the context of same-sex

marriages, but there is little doubt that the definition was in accord with the law in England and in Canada. The Keddie decision, in particular, discusses the history of marriage in England in some detail, and it is clear from that discussion that marriage was an opposite-sex institution and recognized by the courts as such.

[56] In the result, I am satisfied that the trial judge was correct in finding that there was a bar to same-sex marriage at common law by virtue of the common law definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others."

D. A Plain Reading of the Marriage Act

[57] The appellants submitted that, on a plain reading of the Marriage Act, and particularly s. 7 of that Act (quoted at para. 48, supra), it is apparent there is no prohibition to the issuance of marriage licences to same-sex couples. Section 7 refers to the solemnization of marriage "between any 2 persons neither of whom is under a legal disqualification to contract marriage."

[58] The full answer to that argument is that there is a common law bar to same-sex marriage which operates as a legal disqualification to contract marriage within the meaning of s. 7. In other words, by virtue of the common law definition of marriage, same-sex couples are "under a legal disqualification to contract marriage".

E. The Constitutional Issue

[59] Before addressing the appellants' arguments based on the Charter and Charter values, it is necessary to deal with the trial judge's critical finding that neither the provincial nor federal governments has the power to alter the common law definition of marriage, but that a constitutional amendment would be required. This finding underlies much of the trial judge's reasoning, and impacts directly on his Charter analysis, particularly his s. 1 analysis.

[60] The appellants and both the AGC and the AGBC took the position before the trial judge that the issue of whether two individuals of the same sex could marry was an issue relating to the capacity to marry, and that issues relating to capacity fell within Parliament's jurisdiction to legislate concerning "Marriage and Divorce" under s. 91(26). It is apparent, however, that the trial judge did not see the issue that way, as evidenced by the following extract from his reasons for judgment (at paras. 100 and 101):

> In my opinion, a question that arises in the context of these petitions is whether same-sex relationships fall within the class of "Marriage and Divorce" so as to be subject to governance by Parliament, or within the class of Civil Rights so as to be subject to governance by the province. If such relationships are neither matters of marriage nor civil rights, they may be governed by Parliament for the peace, order and good government of Canada.

This answer to the question is important because the petitioners seek remedies that presuppose the meaning of "marriage" can be changed by Parliament. As I see it, the assumption around which the debate before me has been framed is that Parliament is empowered to enact legislation to define a head of power as opposed to enacting legislation under the authority of a head of power. This distinction is important.

[Emphasis added.]

[61] As earlier noted, the trial judge's resolution of the issue, as he reframed it, was summarized at paras. 10-11 of his reasons:

Parliament may not enact legislation to change the legal meaning of marriage to include same-sex unions. Under s. 91(26) of the Constitution Act, 1867, Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship. By attempting to change the legal nature of marriage, Parliament would be self-defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to that power. Parliament would be attempting to amend the Constitution without recourse to the amendment process provided by the Constitution Act, 1982. Alternatively, Parliament would be attempting to enact legislation in respect of civil rights exclusively within the legislative authority of the province.

"Marriage", as a federal head of power with legal meaning at confederation, is not amenable to Charter scrutiny. One part of the Constitution may not be used to amend another.

[62] In essence, what the trial judge found was that the meaning of "marriage" in s. 91(26), "Marriage and Divorce", was fixed for all time as of 1867, and that any attempt by Parliament to change the meaning of marriage to something other than what it meant in 1867 would constitute a unilateral amendment to the Constitution. Unlike its jurisdiction under other heads of power under s. 91, Parliament could not legislate to expand or otherwise change the definition of marriage, because to do so would render it something other than marriage in s. 91(26).

[63] The trial judge expressly rejected the submission of the parties that the question of whether same-sex couples can marry is a question dealing with capacity to marry. In so doing, he distinguished the decisions of North v. Matheson, supra, and Layland, supra, on the basis that the courts in those cases "assumed, without analysis, that the inability of persons of the same sex to marry was a question of capacity." The trial judge stated that those decisions were not binding on him and that he did not find them persuasive. He went on to state (at para. 119):

In my opinion, the fact that persons of the same sex may not legally marry is not a question of capacity. Rather the inability of same-sex couples to marry results from the fact that, by its legal nature, marriage is a relationship which only persons of opposite sex may formalize. The requirement that parties to a legal marriage be of opposite sex goes to the core of the relationship and has nothing to do with capacity.

[64] He also stated that it was open to the provincial government to recognize and formalize same-sex "relationships" (as opposed to same-sex "marriages") as a matter of civil rights within British Columbia.

[65] Finally, the trial judge concluded that the Charter could not be used to override the essential meaning of marriage in s. 91(26). The trial judge found support for this view in Reference Re Bill 30, An Act to Amend the Education Act (Ont.) [1987] 1 S.C.R. 1149, and Adler v. Ontario, [1996] 3 S.C.R. 609. I will discuss these cases later in these reasons in relation to the Charter issues.

[66] The trial judge's views of the immutability of the meaning of the word "marriage" in s. 91(26) were expressly rejected by the courts in both Halpern and Hendricks.

[67] In Halpern, Mr. Justice LaForme framed the constitutional issue which formed the foundation of the trial judge's decision in this case as follows (at paras. 99-101 of his reasons):

The submission of the Association [of Marriage and the Family] on this court's lack of jurisdiction is founded in the language of the Constitution Act, 1867. Specifically, it argues that sections 91(26) and 92(12) of the Constitution Act - when using the word "marriage" - contain within that word a clear, constitutionally enshrined meaning: "the union between a man and a woman". The argument then goes on to assert that, therefore any change to the meaning of the word "marriage" found in sections 91 and 92 requires a formal amendment to the Constitution Act.

Simply put, the Association argues that the meaning of the word "marriage" contained in the Constitution Act, expressly limits Parliament to legislating under that head of power to unions between one man and one woman. It goes on to say that the power granted to Parliament under that head of legislative authority does not authorize it to legislate with respect to unions between members of the same sex. Similarly, under s. 92(12), a province can only solemnize marriages between a man and a woman; a province does not possess the constitutional power to solemnize "marriages" between members of the same sex.

In sum, the Association submits that the impediment to the applicants' claim for the legal recognition of marriage between same-sex couples does not lie in federal or

provincial legislation - or in the common law - but in the language of the constitution itself. Respectfully, I disagree.

[68] The Associations' submission, summarized in these paragraphs, was essentially the view adopted by the trial judge here. The only participants who support that position on these appeals are the B.C. Coalition and the Interfaith Coalition.

[69] In Halpern, Mr. Justice LaForme observed that adopting the Association's view would freeze the meaning of the word "marriage" to the meaning it held for the framers of the Constitution in 1867. In rejecting this view, Mr. Justice LaForme stated, at para. 106 of his reasons:

> Given that "marriage" refers only to a topic or "class of subjects"39 of potential legislation, it cannot contain an internal frozen in time meaning that reflects the presumed framers' intent as it may have been in 1867. It must — as the authorities have proclaimed — be interpreted "as describing a subject for legislation, not a definite object." Canadian courts have repeatedly declared that the language of the B.N.A. Act "must be given a large and liberal interpretation" recognizing "the magnitude of the subject with which it purports to deal in very few words".40 [Footnotes omitted.]

[70] After providing examples to illustrate the extent of his disagreement with the views of the trial judge in this case, Mr. Justice LaForme concluded his analysis on this point at para. 123 of his reasons:

> In the end — and as a necessary preliminary matter — I find that the word "Marriage" used in the Constitution Act, 1982 does not of itself limit the ability of Parliament to legislate same-sex marriages under head s. 91(26). That is, it does not contain within it a definition that has the force of constitutional entrenchment, and thereby requires constitutional amendment to vary.

[71] I agree with Mr. Justice LaForme's analysis of this issue, which is consistent with, and elaborated upon, in the submissions of the appellants, the AGC and the AGBC. (I also note that Madam Justice Lemelin rejected the trial judge's views on this issue at paras. 109-122 of her reasons for judgment.)

[72] I will address the trial judge's related finding that the Charter cannot be used to "trump" or invalidate the constitutionalized meaning of the word "marriage" in s. 91(26) later in these reasons.

F. Charter Values

[73] Counsel for the appellants have urged this Court to analyze the common law bar to same-sex marriage based on Charter values. In so doing, they seek to avoid the full analysis required where legislation is under Charter scrutiny. They submit that where the common law (not legislation) is the subject of a Charter challenge, the court is entitled to base its analysis on Charter values, and to grant a remedy without engaging in a full s. 1

analysis. One of the authorities upon which the appellants rely in that regard is R. v. Swain, [1991] 1 S.C.R. 933. There, in considering a common law rule which was found to violate s. 7 of the Charter, Chief Justice Lamer stated, at p. 978:

Before turning to s. 1, however, I wish to point out that because this appeal involves a Charter challenge to a common law, judge-made rule, the Charter analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the Charter, it may not be strictly necessary to go on to consider the application of s. 1.... [I]t could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the Charter. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

[74] In the result, however, the court applied the formal s. 1 analysis set forth in R. v. Oakes, [1986] 1 S.C.R. 103. (See also R. v. Robinson, [1996] 1 S.C.R. 683, where the court also engaged in a full s. 1 analysis in relation to a common law rule which was found to have breached the Charter.)

[75] The AGC and AGBC submit that when state action is engaged, as here, by the refusal of a Ministry official to issue marriage licences to same-sex couples, the court should engage in a full Charter analysis. They also submit that when state action is challenged, deference should be accorded to the state, both in the nature of the analysis undertaken, and, more particularly, in determining the appropriate remedy in the event of a breach of the Charter or Charter values. The respondents say this is so whether the state action is founded on legislation or, as here, on the common law.

[76] This issue was also raised in Halpern, where the court was presented with similar arguments to those presented here. Mr. Justice LaForme agreed with the appellants that it was open to the court to consider the challenge to the common law bar to same-sex marriage by applying Charter values, rather than by a full Charter analysis, including the application of the s. 1 Oakes test. In the result, however, he adopted the more conservative route of engaging in a full Charter analysis. Even applying this more stringent test, he found that the common law bar to same-sex marriage breached s. 15 of

the Charter and was not saved under s. 1. Mr. Justice Blair and Associate Chief Justice Smith (now Chief Justice Smith) agreed with his approach in that regard.

[77] I agree with the appellants and with the court in Halpern that this Court has a choice as to whether it will engage in a full Charter analysis where the challenge is to the common law rather than to a legislative provision. In my view, however, the more conservative approach chosen by the trial judge in this case and by the court in Halpern is the more appropriate approach. My conclusion in that regard turns on the fact that, like the trial judge, I do not view the appellants' request for relief in these appeals as a request for a "mere" incremental change in the law.

[78] I agree with Mr. Justice Blair in Halpern that the relief requested, if granted, would constitute a profound change to the meaning of marriage, and would be viewed as such by a significant portion of the Canadian public, whether or not it supported the change. It would certainly be viewed as a profound change by those who hold religious beliefs which are incompatible with an acceptance of same-sex marriages. While an informed member of the public would be aware of the significant changes that have taken place over the last several years in expanding the rights and obligations of same-sex couples, many members of the public have regarded those changes, in themselves, as highly controversial. On the other hand, many others have viewed them as simply a long-overdue recognition of the need to provide equality to those for whom equality has, in the past, been denied.

[79] Whatever one's point of view, the fact that previous legislative changes and changes to the common law have expanded the rights of same-sex couples does not make the further expansion of those rights any less significant to those who, by reason of religious beliefs, or otherwise, view these changes as momentous. Applying the rigour of a full Charter analysis to a challenge to the law in these circumstances recognizes the importance of the rights at stake and the significance of those rights not only to the appellants, but to other members of society who have an interest in this issue.

[80] I will say more about the question of deference to Parliament when I address the issue of remedies later in these reasons.

G. Section 15 of the Charter

[81] Section 15 of the Charter provides:

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that

are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[82] The trial judge dealt with the Charter issues in the alternative, in the event he was in error in finding that Parliament did not have the power to legislate with respect to same-sex marriages. In finding that the common law bar to same-sex marriage breached s. 15 of the Charter, he applied the analysis set forth in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497. He concluded, first, that the common law bar to same-sex marriage subjected the appellants to differential treatment, in that same-sex couples do not have the choice to marry which is available to opposite-sex couples. Secondly, he concluded that the differential treatment was based on an analogous ground; namely, sexual orientation. (That is not disputed by the respondents.) Thirdly, he concluded that the differential treatment discriminated against the appellants in a substantive sense. In arriving at that conclusion, the trial judge stated, in part (at paras. 174-78):

In terms of the factors identified in Law, Canadian courts accept the fact that gays and lesbians have been disadvantaged by stereotyping and prejudice. There is a need in the gay and lesbian community to have society acknowledge the value and reality of same-sex unions. The distinction between opposite-sex and same-sex relationships in the marriage context excludes the latter from a social and legal institution of considerable importance and tends to perpetuate the stereotypical and frequently critical community view of gays and lesbians.

The Attorney General of Canada says that across cultures, opposite-sex marriage is intended to "complement nature with culture for the sake of reproduction and the intergenerational cycle". She says "the universal norm of marriage has been a culturally approved opposite-sex relationship intended to encourage the birth (and rearing) of children". The Attorney General says legal marriage does not discriminate in a substantive sense because gays and lesbians cannot achieve the ends for which marriage exists.

As I appreciate their position, the petitioners say that marriage in Canadian society can no longer be said to exist for a purpose that is uniquely heterosexual. Rather it is a means of acknowledging a committed personal relationship and the sex of the partners is not material.

The legislative changes in British Columbia, many other provinces, and Parliament that have removed many of the historic legal, economic and social differences between married, unmarried opposite-sex, and same-sex couples while leaving the legal nature of

marriage intact, have sharpened the focus on the fact that marriage is a relationship reserved for partners of opposite sex. Social changes have diminished the importance of marriage to some extent. Advances in alternative means of conception have decreased reliance upon marriage as an opposite-sex relationship required for the purpose of procreation. Children are conceived by, born to, and raised by opposite-sex, unmarried couples. They are also adopted and raised by same-sex couples.

Viewed in the context of legislative change and social and cultural evolution, and notwithstanding the material distinction between opposite-sex and same-sex couples with respect to reproductive capacity, the omission to provide some form of legal status for same-sex couples enhances, rather than diminishes, the stereotypical view that same-sex relationships are less important or valuable than opposite-sex relationships. There is now sufficient practical similarity between the economic and social consequences of opposite-sex and same-sex relationships that affording one but not the other the opportunity to acquire a legal and formal status discriminates in the substantive sense of the word.

[83] The respondents, supported by the B.C. Coalition and the Interfaith Coalition, submit that the trial judge erred in his s. 15 analysis.

[84] Like the trial judge in this case, the court in Halpern found that the common law definition of marriage breached s. 15 of the Charter. While I agree with the trial judge's summary of the s. 15 analysis just quoted, I prefer the more extensive analysis in Halpern. Since Halpern addresses the s. 15 issues raised in this appeal, I will refer to it at some length.

[85] In his s. 15 analysis, Mr. Justice Blair provided an overview of the nature of marriage, both historically, and in its present-day civil context. His review was based, in part, on the affidavits filed in that case, most of which are also found in the materials filed in this case. I would adopt Mr. Justice Blair's historical review of marriage set out at paras. 39-84 of his reasons. In so doing, I recognize that his review cannot be comprehensive, given the breadth of the subject, and the limited materials available to the court. Rather than repeat Mr. Justice Blair's analysis, I will simply highlight certain aspects of it.

[86] In the course of his discussion, Mr. Justice Blair noted that the anthropological, sociological and historical materials filed revealed that "marriage" has almost universally been viewed as a monogamous union between a man and a woman in which procreation was emphasized. There were exceptions to this in some societies at certain points in time, but those exceptions never became the norm. Mr. Justice Blair also noted, however, that the evidence indicated that "marriage is not a static institution within any society" but "evolves as society changes" (para. 49). At para. 56 of his reasons, Mr. Justice Blair referred to the evidence of some of these changes, particularly in the twentieth century:

That there has been a sea-change in laws and attitudes relating to marriage and the family in the past century is recognized by Professor Witte at the conclusion of his evidence regarding what he refers to as the Enlightenment Contractarian model of marriage. He states (at paras. 60-61):

In the early part of the twentieth century, sweeping new laws were passed to govern marriage formalities, divorce, alimony, marital property, wife abuse, child custody, adoption, child support, child abuse, juvenile delinquency, education of minors, among other subjects. Such sweeping legal changes had several consequences. Marriages became easier to contract and easier to dissolve. Wives received greater independence in their relationships outside the family. Children received greater protection from the abuses, and neglect of their parents, and greater access to benefit rights. And the state eclipsed the church as the principal external authority governing marriage and family life. The Catholic sacramental concept of the family governed principally by the church and the Protestant concepts of the family governed by the church and broader Christian community began to give way to a new privatist concept of the family whereby the wills of the marital parties became primary. Neither the church, nor the local community, nor the paterfamilias could override the reasonable expressions of will of the marital parties themselves.

In the past three decades, the Enlightenment call for the privatization of marriage and the family has come to greater institutional expression. Prenuptial contracts, determining in advance the respective rights and duties of the parties during and after marriage, have gained prominence. No-fault unilateral divorce statutes are in place in virtually every state. Legal requirements of parental consent and witnesses to marriage have become largely dead letters. The functional distinction between the rights of the married and the unmarried has been narrowed by a growing constitutional law of sexual autonomy and privacy. Homosexual, bisexual, and other intimate associations have gained increasing acceptance at large, and at law. [Emphasis of Blair R.S.J.]

[87] After briefly reviewing the historical basis of marriage, Mr. Justice Blair turned to a view of what marriage is today. He linked the relevance of that discussion to a s. 15 analysis at paras. 60-61 of his reasons:

If the courts are to examine the common law definition of marriage through the prism of Charter rights and values, it seems to me they must recognize and appreciate the changes that have occurred over the centuries, and more rapidly in recent years, in the attitudes of society towards the family, marriage and relationships, as outlined above. To do otherwise is to abandon the purpose of s. 15 — which is to promote equality and prevent discrimination arising from such ills as stereotyping, prejudice and historical wrongs — and to fail to consider the common law principle under review in a contextual fashion. As noted already, the Courts are mandated to take a purposive and contextual

approach to the analysis and interpretation of s. 15 equality rights: Law v. Ontario (Minister of Employment and Immigration), supra.

Given this background and dramatically shifting attitudes towards marriage and the family, I have a great deal of difficulty accepting that heterosexual procreation is such a compelling and central aspect of marriage in 21st century post-Charter Canadian society that it — and it alone — gives marriage its defining characteristic and justifies the exclusion of same-sex couples from that institution. It is, of course, the only characteristic with which such couples are unable to conform (and even that inability is changing).

[88] It is apparent from the trial judge's reasons in this case, that here, as in Halpern, the AGC, B.C. Coalition and Interfaith Coalition emphasized their view that the most fundamental and essential defining characteristic of marriage is heterosexual procreation, and, to a lesser extent, heterosexual child-rearing. (Several of the experts' affidavits use the word "procreation" to include child-rearing.) As Professor Lahey noted in her submissions, there has been some "shift" in the position of these participants on appeal, but only to the extent of clarifying that they do not rely on heterosexual procreation as the only significant aspect of marriage. They recognize that marriage fulfills other societal needs, including mutual care and support, companionship, and economic interdependency.

[89] On this appeal, counsel for the B.C. Coalition (supported by the Interfaith Coalition) stated that his clients' position with respect to the applicability of s. 15 of the Charter was concisely stated by Mr. Justice Blair at para. 80 of his reasons, and then erroneously rejected at paras. 81-84 inclusive. Paragraph 80 states:

Whether one approaches "marriage" from the classical perspective based upon the narrow basis that heterosexual procreation is its fundamental underpinning and what makes it "unique in its essence, that is, its opposite sex nature", or whether one approaches it from a different perspective, is pivotal to the s. 15 analysis, however. If one accepts the former view as the starting premise, there is little debate, it seems to me. The institution of marriage is inherently and uniquely heterosexual in nature. Therefore, same-sex couples are not excluded from it on the basis of a personal characteristic giving rise to differential treatment founded upon a stereotypical difference. Same-sex couples are simply incapable of marriage because they cannot procreate through heterosexual intercourse. Thus it is a distinction created by the nature of the institution itself which precludes homosexuals from access to marriage, not a personal characteristic or stereotypic prejudice. The equality provisions of s. 15 are not violated, and even if they were, the same analysis would justify the law in preserving the institution for heterosexual couples and therefore save the classic definition of "marriage" on a s. 1 analysis.

[90] Paragraphs 81-84 contain Mr. Justice Blair's response to this argument:

On the other hand, once it is accepted that same-sex unions can feature the same conjugal and other incidents of marriage, except for heterosexual intercourse, and if heterosexual procreation is no longer viewed as the central characteristic of marriage, giving it its inherently heterosexual uniqueness, the s. 15 argument must succeed. If heterosexual procreation is not essential to the nature of the institution, then the same-sex couples' sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage. For all of the reasons articulated by Mr. Justice LaForme, this differentiation is discriminatory of the same-sex couples' equality rights as set out in s. 15 of the Charter and cannot stand.

First, the common law definition of marriage draws a formal distinction between the Applicant Couples and the couples "married" by the MCCT [Metropolitan Community Church of Toronto], on the one hand, and heterosexual couples, on the other hand, on the basis of their personal characteristics, i.e., their sexual orientation. Secondly, the claimants are subject to differential treatment on the basis of a ground of discrimination which has been held to be a ground analogous to those enumerated in s. 15, namely, sexual orientation. Finally, the differential treatment of the claimants discriminates against them in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping and historical disadvantage: see, Law v. Canada (Minister of Employment and Immigration), supra, per Iacobucci J. at p. 524 [S.C.R.], adopted by Cory J. and Iacobucci J. in M. v. H., supra, at pp. 46-47 [S.C.R.].

The evidence supports a conclusion that "marriage" represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core.

The equality provisions of s. 15(1) of the Charter are therefore violated.

[91] Mr. Justice Blair's analysis of s. 15, summarized in these passages, builds upon Mr. Justice LaForme's s. 15 analysis which, in turn, was accepted by Associate Chief Justice Smith in her concurring reasons. Their reasons with respect to the s. 15 analysis are also consistent with those of Madam Justice Lemelin, with necessary modifications arising from the fact that she was dealing with legislative barriers to marriage, rather than a barrier created by the common law definition of marriage. I do not find it useful to repeat their analyses in my reasons.

[92] As earlier stated, I prefer the more extensive and contextual analysis of the s. 15 issue engaged in by the courts in Halpern and Hendricks to the more limited analysis of

the trial judge in this case. I agree with the trial judge's conclusion under s. 15, and with his overall application of the principles set forth in Law, summarized at para. 82, supra. I note however, that while the trial judge's s. 15 analysis does not appear to accept the emphasis placed by the AGC, B.C. Coalition and Interfaith Coalition on the procreational significance of marriage, he relies almost entirely on the procreational function of marriage in his s. 1 Oakes analysis. As will become apparent, I do not find his s. 1 analysis persuasive.

[93] Before leaving the s. 15 issue, I will comment on one extract from the authorities upon which significant reliance was placed by AGC, the B.C. Coalition and the Interfaith Coalition. That reference is to the remarks of Mr. Justice La Forest in Egan v. Canada, [1995] 2 S.C.R. 513 at paras. 21 and 25 of that decision:

> My colleague Gonthier J. in Miron v. Trudel [[1995] 2 S.C.R. 418] has been at pains to discuss the fundamental importance of marriage as a social institution, and I need not repeat his analysis at length or refer to the authorities he cites. Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.
>
> * * *
>
> It is the social unit that uniquely has the capacity to procreate children and generally care for their upbringing . . . .

[94] There were five sets of reasons in Egan. In the passage quoted above, Mr. Justice La Forest spoke for a minority. The case concerned the claim of a same-sex partner for spousal benefits under the Old Age Security Act, R.S.C. 1985, c. O-9. By a 5:4 majority, the court held that the limitation in the definition of "spouse" in that Act to a person of the opposite sex was constitutional. Mr. Justice Iacobucci, (speaking for himself and Mr. Justice Cory, in dissent), made a point of stating that the case was not to be taken as constituting a challenge to the traditional common law or statutory concept of marriage. Further, the passage from Mr. Justice La Forest's reasons, although emphasizing the aspects of procreation and child-rearing relied on by the AGC and two of the intervenors, does not purport to limit the ability of Parliament to change the definition of what La Forest J. referred to as "the traditional marriage". It is not disputed that heterosexual marriages represent the tradition; the question is whether that tradition must be re-evaluated and altered in light of the Charter. For the reasons contained in this judgment, I have joined with other jurists in concluding that the answer to that question is "yes".

[95] In summary, I agree with the trial judge that the appellants have established that the common law definition of marriage (which operates as a common law bar to same-sex marriage) breaches their right to equality under s. 15 of the Charter.

[96] Before turning to a s. 1 analysis, I will refer briefly to the other Charter breaches upon which the appellants rely.

H. Other Alleged Charter Breaches

[97] The appellants allege that the common law bar to same-sex marriage also breaches their rights under s. 2 (freedom of conscience and religion, freedom of expression and freedom of association); s. 6 (mobility rights); s. 7 (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); and s. 28 (rights guaranteed equally to both sexes).

[98] The trial judge found that the appellants had not established a breach of their rights under any of these provisions.

[99] None of the parties addressed these alleged breaches of the Charter in their oral arguments. Rather, they were content to rely upon the submissions set forth in their factums. The trial judge spent little time on these issues.

[100] Since I have found a breach of the appellants' rights under s. 15 of the Charter and since, for the reasons I am about to give, I have concluded that this breach is not justifiable under s. 1 of the Charter, I do not find it necessary to deal with the other alleged breaches. My failure to comment on those issues should not be taken as either an acceptance or a rejection of the appellants' submissions in that regard.

I. Section 1 of the Charter

[101] Section 1 of the Charter provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[102] The trial judge found that the breach of the appellants' s. 15 equality rights could be justified under s. 1 of the Charter. He approached his analysis of this issue from two perspectives. First, he referred back to his original constitutional analysis whereby he concluded that "marriage" in s. 91(26) could only mean a marriage between a man and a woman since that was its meaning both prior to and at the time of Confederation. He then relied on that analysis, supported by his interpretation of the Bill 30 and Adler decisions, to justify his ultimate conclusion that the common law definition of marriage was a reasonable limit on the appellants' s. 15 Charter rights. His views with respect to this aspect of his s. 1 analysis are reflected in the following passages at paras. 199-200 of his decision:

Quite apart from the kind of analysis approved by the Supreme Court of Canada in Oakes [supra] and Thomson [infra], the limitation [of the appellants' s. 15 equality rights] is justified by the Constitution itself. There is no doubt that its framers and the Parliament of England knew and comprehended the nature of marriage in 1867. As opposed to the general subject of family, it was marriage and divorce that were considered matters of such national importance that exclusive jurisdiction over them should be assigned to the federal Parliament. The Constitution, itself, expressed an intention that marriage was an issue of pressing and substantial national importance and differentiation and discrimination inherent in the fact that marriage was then, and still is, an opposite-sex relationship would be permitted.

Section 52(1) of the Constitution Act, 1867 provides that the Constitution is the supreme law of Canada. Under s. 91(26), Parliament was given plenary power in relation to marriage, a construct that is, by its nature, not inclusive of everyone. Failure to rely on s. 1 to save the core nature of legal marriage would result in one aspect of the Constitution being used to limit a plenary power in respect of which qualification was not intended. I do not understand the law to be that the Charter can be used to alter the head of power under s. 91(26) so as to make marriage something it was not when the various fields of legislative authority were divided between Parliament and the provinces.

[103] The trial judge noted that, in Bill 30, the Supreme Court of Canada found that s. 15 of the Charter could not be applied to invalidate s. 93 of the Constitution Act, 1867. The trial judge concluded (at para. 202) that:

By analogy, the Charter cannot be used in an attempt to eliminate the differences or distinctions that must inevitably result as a consequence of Parliament relying on the "Marriage and Divorce" head of power under s. 91(26) to define some relationships, but not others, as marriage.

[104] The trial judge then went on to apply a more traditional Oakes analysis to reach the same conclusion. In that analysis, he emphasized: the opposite-sex nature of marriage as the norm within and across societies; the biological reality that opposite-sex couples may "as between themselves" propagate the species, whereas same-sex couples cannot; that marriage is the primary means by which humankind perpetuates itself in Canadian society; and the passage from Mr. Justice La Forest's reasons in Egan, quoted in part at para. 93, supra.

[105] Ultimately, the trial judge concluded that the salutary effects of retaining the common law definition of marriage far outweighed the deleterious effects of changing that definition, particularly since, in his view, the effect of recent legislative change had narrowed or minimized the differences between same-sex and opposite-sex relationships.

[106] As earlier stated, I do not accept the trial judge's conclusion that the definition of marriage under s. 91(26) of the Constitution Act, 1867 was fixed at that time, and for all time, to mean marriage between a man and a woman, subject only to constitutional

amendment. For that reason, it may not be strictly necessary for me to deal with his finding that s. 15 of the Charter could not be used to invalidate what he found to be the one and only meaning of marriage under s. 91(26). Because the trial judge viewed the Bill 30 and Adler cases as strong support for his analysis, however, I will deal with them here. In so doing, I note that the B.C. Coalition took the position at trial, and on appeal, that these two cases were a "full answer" to the claims of the appellants.

[107] Bill 30 was a reference regarding the constitutionality of legislation in Ontario designed to extend provincial funding to senior grades of Roman Catholic High Schools. The Ontario government took the position that the Bill was immune from Charter scrutiny (and, in particular, immune from a s. 15 analysis) because it represented an exercise by the province of its legislative powers under s. 93(1) of the Constitution Act, 1867 with respect to denominational schools and, therefore, was protected by s. 29 of the Charter. Those provisions state:

93. In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

. . .

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.

* * *

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

[108] In the result, Madam Justice Wilson, speaking for the majority, accepted the government's position and held that s. 93(1) was immune from Charter scrutiny. She further found that s. 93(1) was protected from Charter scrutiny even without recourse to s. 29 of the Charter. The B.C. Coalition places particular emphasis on the following passage (at pp. 1197-99) of Madam Justice Wilson's reasons as applying, by analogy, to a Charter attack on what the trial judge found to be the inherent meaning of "marriage" in s. 91(26):

I have indicated that the rights or privileges protected by s. 93(1) are immune from Charter review under s. 29 of the Charter. I think this is clear. What is less clear is whether s. 29 of the Charter was required in order to achieve that result. In my view, it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the Charter only for greater certainty, at least in so far as the Province of Ontario is concerned.

To put it another way, s. 29 is there to render immune from Charter review rights or privileges which would otherwise, i.e., but for s. 29 be subject to such review. The question then becomes: does s. 29 protect rights or privileges conferred by legislation passed under the province's plenary power in relation to education under the opening words of s. 93? In my view, it does, although again I do not believe it is required for this purpose. The Confederation compromise in relation to education is found in the whole of s. 93, not in its individual parts. The section 93(3) rights and privileges are not guaranteed in the sense that the s. 93(1) rights and privileges are guaranteed, i.e., in the sense that the legislature which gave them cannot later pass laws which prejudicially affect them. But they are insulated from Charter attack as legislation enacted pursuant to the plenary power in relation to education granted to the provincial legislatures as part of the Confederation compromise. Their protection from Charter review lies not in the guaranteed nature of the rights and privileges conferred by the legislation but in the guaranteed nature of the province's plenary power to enact that legislation. What the province gives pursuant to this plenary power the province can take away, subject only to the right of appeal to the Governor General in Council. But the province is master of its own house when it legislates under its plenary power in relation to denominational, separate or dissentient schools. This was the agreement at Confederation and, in my view, it was not displaced by the enactment of the Constitution Act, 1982. As the majority of the [Ontario] Court of Appeal concluded at pp. 575-76:

These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the Charter into the Constitution Act, 1982, does not change the original Confederation bargain. A specific constitutional amendment would be required to accomplish that.

I would conclude, therefore, that even if Bill 30 is supportable only under the province's plenary power and s. 93(3) it is insulated from Charter review.

[Emphasis added.]

[109] What is apparent from these passages, and from the judgment of Wilson J. as a whole, is that the reason s. 93 was immune from Charter review was because of a pre-confederation compromise ("bargain") designed to protect the Roman Catholic minority in Ontario and the Protestant minority in Quebec. This compromise, which carried with it certain built-in rights (and inequalities), was entrenched in the Constitution Act, 1867. Section 29 of the Charter did not grant the right to immunity from Charter review under s. 15 or otherwise; it simply recognized and preserved the rights conferred by s. 93 in their historical context.

[110] In my view, there is no valid analogy between s. 93 and s. 91(26) in that regard. It is true that there were constitutional bargains made in the division of powers between the federal and provincial governments which were eventually reflected in the power over "Marriage and Divorce" being given to the federal government under s. 91(26), and the power over "The Solemnization of Marriage in the Province" being given to the provinces under s. 92(12). However, these bargains had nothing to do with the meaning of marriage or the capacity to marry. They certainly did not have anything to do with guaranteeing the opposite-sex nature of marriage, remembering that same-sex conduct at that time constituted a criminal offence. It was accepted that the federal government would control capacity to marry. There was no suggestion that the capacity to marry in 1867 was then, and always would be, dictated by the status quo with respect to capacity to marry as it existed in 1867. By contrast, s. 93 expressly provided for a compromise which necessarily discriminated on the basis of religion, and effectively resulted in entrenched inequality insofar as that provision was concerned. Unlike s. 91(26), s. 93 did not simply confer the power to make laws in relation to the subject-matter of the section (education), it also conferred rights which were not subject to the Charter.

[111] I am not persuaded that the reasoning in Bill 30 can be extended to apply to the definition of marriage in s. 91(26) as suggested by the B.C. Coalition and the Interfaith Coalition.

[112] In my view, the Adler decision, which also involved a Charter challenge to s. 93, and which explicitly applied the Bill 30 analysis, adds nothing of significance to this discussion.

[113] In the result, therefore, I am satisfied that the Bill 30 and Adler decisions do not support the trial judge's constitutional analysis or his s. 1 analysis. In particular, I find that these cases do not support the trial judge's conclusion that s. 15 of the Charter cannot apply to alter the meaning of marriage at common law, or that the effect of such a decision would be an illegitimate use of one provision of the Constitution (s. 15) to invalidate another provision of the Constitution (s. 91(26)).

[114] I turn, then, to an analysis of the trial judge's application of the Oakes test as his alternative basis for justifying the limitation of the appellants' rights under s. 15.

[115] It is common ground that in applying a s. 1 analysis, the onus is on the party seeking to uphold the limitation of a constitutional right. The burden of proof, on a preponderance of probability, must be applied rigorously. The party bearing the burden of proof must show that the limitation of the Charter right is "demonstrably justified". As Madam Justice McLachlin stated in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at para. 128: "The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration." Here, the onus and the burden of proof rested on the AGC.

[116] The nature of a s. 1 analysis has been set forth, with minor variations, in numerous authorities. In essence, the government must establish that the impugned provision (the common law definition of marriage which precludes marriage between same-sex couples) is a reasonable limit on the appellants' s. 15 equality rights which is justifiable in a free and democratic society. In order to do so, the government must show that the objective of the impugned provision is "pressing and substantial". The means chosen to achieve the objective must also pass a three-part proportionality test; namely that: (1) the means are rationally connected to the objective; (2) the impugned provision impairs the constitutionally protected right no more than is necessary to achieve the objective; and (3) the deleterious effects of the impugned provision are proportional both to their salutary effects and to the importance of the objective which has been identified as pressing and substantial. These criteria will be applied in a contextual manner and with varying degrees of rigour depending on the context of the appeal. (See, for example, the majority decision of Mr. Justice Bastarache in Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877.)

[117] It is apparent in his analysis under s. 1, that the trial judge accepted the arguments of AGC, the B.C. Coalition and the Interfaith Coalition that the principal, albeit not the sole, purpose or objective of marriage is procreation and the perpetuation of mankind; that this objective is pressing and substantial; that retaining the opposite-sex definition of marriage is proportional and necessary to obtaining this objective; and that the salutary effects of retaining this definition more than offset the resultant denial of the appellants' equality rights under s. 15 of the Charter.

[118] After referring to evidence that opposite-sex marriage had been the norm in societies similar to Canada, and that marriage had been an historically important institution, the trial judge emphasized what he viewed as the biological and procreative core of marriage in the following passages from his s. 1 analysis (at paras. 205-207 and 210-211):

> While, in the recent past, same-sex couples have been accorded many of the rights and obligations previously reserved for married couples, the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot.

I accept the petitioners' submission that same-sex couples create family units and discharge child-rearing responsibilities much as opposite-sex couples do. Perhaps the best evidence of that is the fact that adoption laws in this and other provinces have been amended to recognize the needs and capabilities of same-sex couples. I also accept the fact that numerous alternatives to heterosexual intercourse have evolved and continue to evolve in Canadian society to facilitate procreation.

At the same time, whatever views one holds of its other aspects, it cannot be denied that marriage remains the primary means by which humankind perpetuates itself in our society. I reject the petitioners' submissions that this is a recent rationalization of the origin and essential importance of marriage. The state has a demonstrably genuine justification in affording recognition, preference, and precedence to the nature and character of the core social and legal arrangement by which society endures.

* * *

Other than the desire for public recognition and acceptance of gay and lesbian relationships, there is nothing that should compel the equation of a same-sex relationship to an opposite-sex relationship when the biological reality is that the two relationships can never be the same. That essential distinction will remain no matter how close the similarities are by virtue of social acceptance and legislative action.

I concur in the submission of the Attorney General of Canada that the core distinction between same-sex and opposite-sex relationships is so material in the Canadian context that no means exist by which to equate same-sex relationships to marriage while at the same time preserving the fundamental importance of marriage to the community.

[Emphasis added.]

[119] As earlier noted, the AGC acknowledged that there are other aspects of marriage which are important, beyond what the trial judge referred to as the "core" function of marriage; namely, procreation. The trial judge emphasized, however, that it is the procreative potential of the partners to an opposite-sex marriage which truly distinguishes their relationships from those of same-sex couples. For him, that was the crucial factor which justified the application of s. 1 to override the appellants' equality rights.

[120] The view that procreation is the over-riding pressing and substantial concern governing all stages of the s. 1 analysis was discussed, and rejected, by the courts in Hendricks and Halpern.

[121] In Hendricks, Madam Justice Lemelin found that the potential for procreation was not a precondition for the civil matrimonial bond. She noted that the definition of families had changed significantly over time; that some married couples opt not to have children; some couples cannot have children; proof of fertility is not a prerequisite to marriage; and that homosexual couples may now have children by means of medically-assisted procreation and through adoption. While these remarks were made in the context of her s. 15 analysis, they are also valid in relation to s. 1. At para. 149 of her decision, Lemelin J. stated:

Marriage is no longer necessarily defined by the children born of the union. Marriage is an exclusive, intimate and lasting relationship of two persons who agree to live together and to support each other. Marriage is celebrated publicly and with a certain solemnity. More than a contract, it is an institution that one may not leave without observing certain specific conditions and without obtaining the judgment of a court. Changes in society and the general context of the family and technological developments may indicate a greater flexibility in the institution in better meeting the needs of homosexual couples.

[122] It is interesting to note that while the trial judge emphasized many of the same factors as Madam Justice Lemelin in his s. 15 analysis, he then significantly diminished the significance of those factors in his s. 1 analysis.

[123] In Halpern, Mr. Justice LaForme found that the AGC had not met the onus upon it to demonstrate that procreation was the essential objective of marriage. In coming to that conclusion, he referred to earlier court decisions regarding the validity of marriage and capacity, and concluded that those decisions had not been founded on the view that procreation was the main purpose of marriage. Rather, he accepted the applicants' position that the emphasis on procreation as the justification for marriage arose once same-sex couples began asserting their claims for equal recognition of their relationships.

[124] I take a somewhat different approach to this part of the s. 1 analysis than did Mr. Justice LaForme. While it may be that the authorities referred to by counsel do not demonstrate that procreation has been the essential object of marriage, there is a body of evidence before the court which indicates that, historically and across cultures, procreation was viewed as such an essential objective. The evidence also shows, however, that the emphasis on procreation as being at the core of marriage has been displaced to a considerable degree by the evolving view of marriage and its role in society referred to by Mr. Justice Blair and Madam Justice Lemelin in their reasons for judgment. It is on that basis that I find that procreation (including the rearing of children) resulting from sexual intercourse between a husband and a wife, can no longer be regarded as a sufficiently pressing and substantial objective that it satisfies the first stage of the s. 1 analysis. Or, to view the first-stage issue from a somewhat different perspective, I am not satisfied that denying same-sex couples the right to marry because of their inability to procreate "as between themselves" is a sufficiently pressing and substantial objective to satisfy the first stage of the s. 1 analysis.

[125] Even if procreation is a sufficiently pressing and substantial objective of marriage to pass the first stage of the Oakes analysis, however, I agree with Mr. Justice LaForme that it is not sufficiently compelling to justify the breach of the appellants' s. 15 rights under the balance of the s. 1 analysis.

[126] LaForme J. found that there was no rational connection between the importance of procreation (and child-rearing) and the restriction of same-sex marriage. He stated (at para. 248 of his reasons) that:

There simply is no evidentiary basis to support the proposition that granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the quality of care with which heterosexual couples raise their children.

[127] I agree. In this case, it is not clear on what basis the trial judge assumed that permitting same-sex couples to marry would diminish the procreative potential for marriage (unless he was responding to a perceived threat that if same-sex couples were permitted to marry, significant numbers of opposite-sex couples would no longer do so). It is also unclear why he downplayed the very real fact that same-sex couples can "have" and raise children, given technological developments and changes in the law permitting adoption. It is apparent, however, that the trial judge was of the view that permitting same-sex marriages represented a significant threat to the institution of marriage. In that regard, I agree with the comments of Mr. Justice Iacobucci at para. 211 of Egan, supra, (albeit in relation to the question of providing economic benefits to same-sex couples) where he said he failed to see "how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions."

[128] Mr. Justice LaForme also found (at para. 250 of his reasons) that the restriction on same-sex marriage failed the rational connection test because it was both:

· overinclusive in that it allows non-procreative heterosexuals to marry; and

· underinclusive because it denies same-sex parents and intended parents the legal right to marry.

[129] Mr. Justice LaForme further found that the common law bar to same-sex marriage did not constitute a minimal impairment of the equality rights of same-sex couples. Rather, he found that the law excluded them entirely from the institution of marriage based upon a protected personal characteristic.

[130] Finally, Mr. Justice LaForme rejected the AGC's submission, which was accepted by the trial judge in this case, that the salutary effects of retaining the opposite-sex requirement of marriage outweighed the deleterious effects to same-sex couples. He

repeated his earlier statements that the appellants' quest for the right to marry was not "merely" a quest for social recognition or social status, but a quest for equality itself. He expanded on this view at paras. 261-264 of his reasons:

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 the autonomy to choose whether they wish to marry. This in turn conveys the ominous message that they are unworthy of marriage. For those same-sex couples who do wish to marry, the impugned restriction represents a rejection of their personal aspirations and the denial of their dreams.

There is no meaningful evidence that points to any legitimate benefit to the rights denial. In this case, an absolute common law bar on the freedom of same-sex couples to marry does not constitute the "least intrusive" means by which the state could achieve the purported goal of providing institutional support to couples who have and raise children. On the contrary, this goal could easily be advanced without denying same-sex couples the freedom to marry.

Further, I find that there is no merit to the argument that the rights and interests of heterosexuals would be affected by granting same-sex couples the freedom to marry. Contrary to the assertion of Interfaith Coalition — I cannot conclude that freedom of religion would be threatened or jeopardized by legally sanctioning same-sex marriage. No religious body would be compelled to solemnize a same-sex marriage against its wishes and all religious people — of any faith — would continue to enjoy the freedom to hold and espouse their beliefs. Thus, there is no need for any infringement of the equality rights of lesbians and gays that arises because of the restrictions against same-sex marriage.

In this case, I am satisfied that, even if the exclusion of same-sex couples from marriage recognition were otherwise appropriate, the harms of exclusion are so severe that the violation of their rights and freedoms could not be justified. Given the serious violation of fundamental rights and freedoms, and the evidence of numerous and damaging effects on an already disadvantaged segment of society, I can find no benefit whatsoever to the exclusion.

[131] Subject to the further comments I will make with respect to deference to Parliament and my comments concerning the historical importance attributed to procreation in marriage, I am in substantial agreement with Mr. Justice LaForme's analysis under s. 1 to which I have just referred.

[132] In the context of her s. 1 analysis, Madam Justice Lemelin also dealt with the interest of various religious groups in the institution of marriage and their objections to same-sex marriage based on their religious beliefs. In that regard, Madam Justice Lemelin made the following comments, at paras. 164-166 of her reasons, with which I agree:

No one would dispute that religions have played a major role in marriage since their beliefs and rites have governed the development of the institution's framework. The secularization of marriage has forced our legislatures to take into account the fact that the institution is civil and cannot be defined solely in religious terms. We are no longer living in the homogenous community of the last century. Multiculturalism, various religious beliefs, the secularization of several institutions testify to the openness of Canadian society. The State must ensure compliance by each individual but no single group can impose its values or define a civil institution.

The Honourable Justice Dickson stated the following in Big M Drug Mart [[1985] 1 S.C.R. 295 at 337] in his analysis of the Lord's Day Act:

What may appear good and true to a majoritarian religious group, or to the state acting at its behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "tyranny of the majority".

The Court cannot conclude that this is the situation in the instant case although the Churches are firmly and sometimes tenaciously opposed to granting homosexual couples access to marriage, as the expert opinions of the Ligue and the Alliance explain. Despite this caveat, the statements of Justice Dickson can be transposed to any question where the courts are asked to consider a situation in which religious values come up against social concerns, since believers alone may not define marriage or require the maintenance of the status quo.

[133] It is interesting to note that in Quebec, Article 367 of the Civil Code provides that no minister of religion may be forced to celebrate a marriage that his or her religion and the rules of his or her religious society do not recognize. A concern was raised in this appeal by the Interfaith Coalition that, absent such a provision, religions whose beliefs preclude the recognition of same-sex marriage could find themselves required to participate in such marriages, or be discriminated against because of their beliefs. As noted by Lemelin J. in Hendricks, there is no hierarchical list of rights in the Charter, and freedom of religion and conscience must live together with s. 15 equality rights. One cannot trump the other. In her view, shared by the court in Halpern, the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs. Similarly, the rights

of religious groups to freely practise their religion cannot oust the rights of same-sex couples seeking equality, by insisting on maintaining the barriers in the way of that equality. While it is always possible for an individual to attempt to challenge the practices of a religious group as being contrary to Charter values, the possibility of such a challenge cannot justify the maintenance of the common law barrier to same-sex marriage.

[134] As was stated by the intervenor, the Liberal Rabbis, in its factum:

For a number of years there has been a growing debate in religious communities about same-sex marriage. Different religious groups have adopted various positions on this issue. There is obviously no uniform religious perspective on same-sex marriage. If the Court supports a continuation of the exclusion of same-sex marriage, it will be choosing sides in this religious debate. By allowing same-sex marriage, either through a civil ceremony generally available to all or a religious ceremony from a religious group [which] chooses to offer it, the courts still respect the freedom of conscience and religion of those religious groups who choose not to perform same-sex marriage. By not allowing same-sex marriage, the court forces some religious groups to accept the religious practices of others by forcing them to exclude same-sex couples from marriage.

[135] In the result, I agree with the courts in Halpern and Hendricks that the common law bar to same-sex marriage cannot be justified under s. 1 of the Charter.

J. Remedy

[136] In their factums, the relief sought by the appellants included:

(a) a declaration pursuant to s. 52 of the Constitution Act, 1867 that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the Charter and does not constitute a reasonable and demonstrably justifiable limit on those rights within the meaning of s. 1 of the Charter; and

(b) an order in the nature of mandamus requiring the issuer of marriage licences in British Columbia to issue marriage licences to the Appellant couples and to any other same-sex couples who otherwise meet the legal requirements for capacity to marry; and

(c) an order in the nature of prohibition, preventing the issuer of marriage licences from refusing to issue licenses to the Appellant couples or to other same-sex couples, solely because the applicants for the marriage licence are of the same sex; and

(d) an order that the Appellants be granted increased costs in this Court and in the Court below.

[137] In their oral submissions, the appellants also sought an order in accordance with that made by Mr. Justice LaForme in Halpern, reformulating the common law definition of marriage to provide that marriage is "the lawful union of two persons to the exclusion of all others".

[138] The appellants seek immediate relief. They say that if the court finds a breach of their constitutional rights which is not justified under s. 1, the only just result is to provide the remedies they are seeking, without restriction or delay. In the alternative, the appellants submit that, if the court deems it appropriate to grant a suspension of any remedy, that suspension should be short (between three to six months) and should be granted solely to permit the federal and provincial governments time to amend their legislation to give effect to this Court's ruling. The appellants submit it would be wholly inappropriate for this Court to defer the question of remedy to Parliament, since there is no legislation in issue and the only remedy which will achieve equality for the appellants is the remedy they request.

[139] In support of their submission, the appellants referred the court to a federal discussion paper: "Marriage and Legal Recognition of Same-sex Unions", (the "Discussion Paper") dated November 2002, and, in particular, to p. 24 of that paper which, in their view, is an acknowledgment by the drafters that only a change in the law to permit same-sex marriage "would fully address equality concerns." The appellants submit that the other alternatives to same-sex marriage addressed in the Discussion Paper would not fully address equality concerns. Rather, those alternatives are limited to addressing same-sex relationships short of marriage. The appellants submit that any "parallel" remedy short of marriage would continue to relegate same-sex couples to a status of second-class citizens who have not achieved full personhood. They point to the anomaly arising from the fact that the children they raise in same-sex relationships can marry (as long as they marry opposite-sex partners), while the appellants cannot.

[140] The AGC submits that, in the event the court finds that the common law definition of marriage is unconstitutional, it should declare the definition to be of no force and effect, but suspend the declaration of invalidity for a lengthy period of time, "until Parliament and the provincial legislatures have had an opportunity to create their own remedial provisions." The AGC rejects the submission that the only appropriate remedy is the relief sought by the appellants. The AGC submits that this is an instance in which the court should defer to Parliament on the question of remedy, particularly since Parliament has taken some steps through its Discussion Paper and attendant committee hearings to determine the best method of dealing with this thorny issue.

[141] As earlier stated, in Hendricks Madam Justice Lemelin declared the provisions of the various statutes which she found offended s. 15 of the Charter to be of no force and effect and stayed the declarations of invalidity for a period of two years.

[142] In Halpern, the judges had differing views of the appropriate remedy. Mr. Justice LaForme would have reformulated the common law definition of marriage to permit marriage between "two persons to the exclusion of all others". He would have granted immediate relief in that regard. In his view, some of the alternatives to marriage suggested by the AGC were dubious solutions, based on a theory of equality which bore more than a passing resemblance to the long-discarded "separate but equal" concept of equality.

[143] Mr. Justice Blair would have given Parliament 24 months to provide a constitutional remedy, failing which the reformulated common law definition of marriage proposed by Mr. Justice LaForme would take effect.

[144] Associate Chief Justice Smith would have given Parliament 24 months in which to provide a constitutional remedy, failing which the parties could apply to the court for further directions.

[145] The trial judge here did not discuss the issue of remedy because he found that the breach of s. 15 of the Charter was saved under s. 1.

[146] In my view, the question of whether the court should defer to Parliament in these circumstances is troubling. In Halpern, both Associate Chief Justice Smith and Mr. Justice Blair preferred the deferential approach, whereby the matter of remedy would be left to Parliament. In that respect, Associate Chief Justice Smith adopted the view of Madam Justice McLachlin set forth in the following passage from Watkins v. Olafson, [1989] 2 S.C.R. 750 (at pp. 760-61):

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

[147] I note that Olafson was not a Charter case, but, rather, a case involving the issue of whether the courts should impose structured settlements on future payments for successful plaintiffs in personal injury actions, and, if so, what form those structured settlements should take. There were many possible alternatives in that regard, and the court did not feel it was in the best position to choose the ideal alternative from amongst them. The appellants submit that the situation in this case is entirely different since the only solution which would achieve "true equality" for gays and lesbians who wish to

marry is to permit them to do so. Other options falling short of marriage would fail to meet the equality concerns raised by the appellants and accepted as legitimate by this Court. In the appellants' view, seeking to equate "same-sex relationships" with "same-sex marriage" is fundamentally flawed.

[148] Mr. Justice Blair was also of the view that the court should be reluctant to determine the appropriate remedy, even though the proposed remedy suggested by the appellants "seems simple and straightforward on its face." In his view, expressed at para. 97 of his reasons:

. . . the consequences and potential reverberations flowing from such a transformation in the concept of marriage, it seems to me, are extremely complex. They will touch the core of many people's belief and value systems, and their resolution is laden with social, political, cultural, emotional and legal ramifications. They require a response to a myriad of consequential issues relating to such things as inheritance and property rights, filiation, alternative biogenetic and artificial birth technologies, adoption, and other marriage-status driven matters. The Courts are not the best equipped to conduct such a balancing exercise, in my opinion.

[149] Mr. Justice Blair's reasons for concluding that it was not appropriate to grant immediate relief to the appellants, but, rather, to leave the question of the appropriate relief to the federal and provincial governments, at least for 24 months, are well-articulated at paras. 91-143 of his reasons.

[150] Mr. Justice LaForme noted that, since many of the economic disparities between opposite-sex and same-sex couples had been dealt with by the federal and provincial governments following the M. v. H. decision, much of the need for caution with respect to the impact of changing the definition of marriage to accommodate same-sex marriages had dissipated. He was satisfied that it was for the courts, not Parliament, to make the change in the common law, particularly where Parliament had chosen not to legislate. In the result, he concluded that the appellants were entitled to the relief they sought, and that they should not be forced to wait for two years to see if Parliament would grant them a remedy, and, if so, the nature of that remedy.

[151] In support of his position, Mr. Justice LaForme referred (at para. 306 of his reasons) to the following extract from Mr. Justice Iacobucci's reasons in Vriend v. Alberta, [1998] 1 S.C.R. 493 (which represented the view of the majority on this point):

In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words. [para. 122]

[152] In analyzing the question of whether it is appropriate for this Court to grant the appellants redress for the breach of their equality rights, or defer that decision to Parliament and/or the provincial Legislatures, I find it noteworthy that the Law Commission of Canada (the "Commission") addressed the issue of same-sex marriage in 2001 in its report entitled: Beyond Conjugality, Recognizing and supporting close personal adult relationships. This report was broad-ranging and discussed a variety of adult committed relationships. At chapter four of the report, the Commission discussed "The Legal Organization of Personal Relationships" with a view to addressing the nature of the state's role and interest in assigning rights and responsibilities within committed relationships, including marriage. Amongst other things, it addressed the concept of Registered Domestic Partnerships ("RDP's") which are raised as an option in the federal Discussion Paper. The Commission described RDP's as an alternative way for the state to recognize and support close personal relationships and as a regime which is designed to be a "parallel to marriage". It is noteworthy that the Commission stated that the ability of Parliament to implement such a scheme was limited, since its jurisdiction under s. 91(26) was not sufficiently broad to empower it to regulate entry into and exit from "this new civil arrangement". The Commission did not view RDP's as a viable reform option to marriage "at this time".

[153] Some of the views on same-sex marriage which were considered by the Commission are referred to at pp. 129-130 of its Report:

> There are diverse views on same-sex marriage, with strong feelings on each side of the issue. For those same-sex couples who wish to marry, the prohibition on same-sex marriage represents a rejection of their personal aspirations and the non-recognition of their personhood. They feel that without equal access to the institution of marriage, their ability to celebrate their love and their lives on equal terms is undermined. They feel that they are denied a fundamental personal choice.
>
> On the other side are those who argue, equally passionately, that marriage has always been defined as, and should remain limited to, the union of a man and a woman. For the opponents of same-sex marriage, it is a matter of preserving a time-tested and even sacred institution. Although a number of religious institutions are now celebrating same-sex commitment ceremonies, some of the opposition to expanding the entitlement to marry to include same-sex couples stems from religious beliefs. Many feel that Parliament should not redefine a concept that they consider inseparable from its societal and religious meanings and origins. Others point to the universality of the heterosexual aspects of marriage and find it difficult to accept that marriage be extended to same-sex couples. [Footnotes omitted.]

[154] The Commission noted that it received many submissions both for and against same-sex marriage and that public polls indicated that Canadians were increasingly accepting of the idea of same-sex marriage, although there was still strong opposition in some quarters. The Commission also stated that registration schemes should not be

viewed as a policy alternative to same-sex marriage since to do so would maintain the stigma of same-sex couples as second-class citizens. Ultimately, the Commission concluded that the argument that marriage should be reserved to opposite-sex couples could no longer be sustained where the state's objectives underlying contemporary state regulation of marriage "were essentially contractual ones, relating to the facilitation of private ordering." As it stated at p. 130 of its report:

The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. The current law does not reflect the social facts: as the Supreme Court of Canada has recognized, the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation. Furthermore, whether or not denial of same-sex marriage infringes the Charter, adherence to the fundamental values of equality, choice and freedom of conscience and religion, requires that restrictions on same-sex marriage be removed; the status quo reinforces the stigmatization felt by same-sex couples. If governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion. [Footnote omitted.]

[155] The Commission went on to emphasize that the civil recognition of same-sex marriage did not alter the rights of religious denominations to solemnize marriage without state interference in accordance with their religious beliefs.

[156] Given the extensive consultation engaged in by the Commission, of which the federal and provincial governments are aware, it cannot be said that the subject of same-sex marriage has not been well-canvassed and the input of the public invited. Further consultation will not change the fact that there are those in favour of same-sex marriage and those against it. If same-sex marriage is recognized as being a contravention of the equality rights of same-sex couples which cannot be saved under s. 1 of the Charter, the obvious remedy is that chosen by Mr. Justice LaForme in Halpern — the redefinition of marriage to include same-sex couples. In my view, this is the only road to true equality for same-sex couples. Any other form of recognition of same-sex relationships, including the parallel institution of RDP's, falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples "almost equal", or to leave it to governments to choose amongst less-than-equal solutions.

[157] If Parliament concludes that this result is unacceptable, it continues to have options available to it. It could, for example, abolish marriage altogether. This solution has not been advocated by any of the parties or the intervenors and is referred to by counsel for the appellants as "equality with a vengeance" in that it punishes both opposite-sex and same-sex couples equally, by denying marriage to both. In the alternative, it is open to the government to use its override power under s. 33 of the Charter.

[158] In the result, I would allow the appeal. I would grant the declaration sought by the appellants, namely:

(a) a declaration pursuant to s. 52 of the Constitution Act, 1867 that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the Charter and does not constitute a reasonable and demonstrably justified limit on those rights and freedoms within the meaning of s. 1 of the Charter.

[159] I would also reformulate the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others".

[160] I would not grant the relief requested in the nature of mandamus and prohibition on the basis that it is unnecessary to do so.

[161] I would suspend the relief referred to in paras. 158 and 159 until July 12, 2004, solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision. This period of suspension coincides with the expiration of the 24-month suspension of remedy in Halpern, and is necessary, in my view, to avoid confusion and uncertainty in the application of the law to same-sex marriages. The appellants acknowledge that there will be consequential amendments required to both federal and provincial legislation to give effect to this decision.

IX. RESULT

[162] I would allow the appeal, set aside the order of the trial judge and make the orders set forth at paras. 158, 159 and 161, supra.

[163] If the parties are unable to agree to an order with respect to costs, they may file written submissions in that regard. The intervenors shall bear their own costs.

“The Honourable Madam Justice Prowse”

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[164] I have had the privilege of reading in draft the reasons of Madam Justice Prowse. I agree with my colleague that the appeal should be allowed and with the remedy to be ordered. However, I do not find it necessary to address the wider context of the issues that has been extensively canvassed in the companion cases of Halpern v. Canada (Attorney General), [2002] O.J. No. 2714 (Div. Ct), and Hendricks v. Canada, [2002] J.Q. No. 3816 (S.C.), as did Madam Justice Prowse.

[165] The judgment under appeal turns on the proposition that the heterosexual dimension of marriage is so central to the institution of marriage as constitutionally expressed in s. 91(26) of the Constitution Act, 1867 that any purported extension of civil marriage to include same-sex couples, either by Parliament or application of the Charter, would violate an essential element of the institution with the result that it would cease to be "marriage". In my respectful view, that proposition cannot be supported for the reasons that follow.

[166] I agree with the trial judge, Mr. Justice Pitfield, that the common law definition of marriage excludes same-sex unions, for the reasons given by my colleague at paras. 40 to 56 of her reasons. That definition may be stated as the voluntary union for life of one man and one woman, to the exclusion of all others. It is common ground that the common law definition, in the aspects with which we are concerned, has not been modified by statute.

[167] The question is whether the heterosexual element of the common law definition is immutable. Mr. Justice Pitfield concluded that it was. His opinion is succinctly stated in the summary of his reasons as follows (at paras. 10-11):

> Parliament may not enact legislation to change the legal meaning of marriage to include same-sex unions. Under s. 91(26) of the Constitution Act, 1867, Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship. By attempting to change the legal nature of marriage, Parliament would be self-defining a legislative power conferred upon it by the Constitution rather than enacting legislation pursuant to the power. Parliament would be attempting to amend the Constitution without recourse to the amendment process provided by the Constitution Act, 1982. Alternatively, Parliament would be attempting to enact legislation in respect of civil rights exclusively within the legislative authority of the province.
>
> "Marriage", as a federal head of power with legal meaning at confederation, is not amenable to Charter scrutiny. One part of the Constitution may not be used to amend another.

[168] The argument before us in support of this position was advanced by Mr. Cowper on behalf of the B.C. Coalition for Marriage and Family and adopted by Mr. Benson on behalf of the Interfaith Coalition for Marriage. Mr. Cowper developed the supporting argument with reference to the following passage from the reasons for judgment of Mr. Justice Blair in Halpern, (at paras. 80-81):

> Whether one approaches "marriage" from the classical perspective based upon the narrow basis that heterosexual procreation is its fundamental underpinning and what makes it "unique in its essence, that is, its opposite sex nature", or whether one approaches it from a different perspective, is pivotal to the s. 15 analysis, however. If one accepts the former view as the starting premise, there is little debate, it seems to me. The institution of marriage is inherently and uniquely heterosexual in nature. Therefore,

same-sex couples are not excluded from it on the basis of a personal characteristic giving rise to differential treatment founded upon a stereotypical difference. Same-sex couples are simply incapable of marriage because they cannot procreate through heterosexual intercourse. Thus it is a distinction created by the nature of the institution itself which precludes homosexuals from access to marriage, not a personal characteristic or stereotypic prejudice. The equality provisions of s. 15 are not violated, and even if they were, the same analysis would justify the law in preserving the institution for heterosexual couples and therefore save the classic definition of marriage on a s. 1 analysis.

On the other hand, once it is accepted that same-sex unions can feature the same conjugal and other incidents of marriage, except for heterosexual intercourse, and if heterosexual procreation is no longer viewed as the central characteristic of marriage, giving it its inherently heterosexual uniqueness, the s. 15 argument must succeed. If heterosexual procreation is not essential to the nature of the institution, then the same-sex couples' sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage. For all of the reasons articulated by Justice LaForme, this differentiation is discriminatory of the same-sex couples' equality rights as set out in s. 15 of the Charter and cannot stand.

[169] Mr. Cowper submitted that Blair R.S.J. correctly stated the proposition in the first paragraph quoted that marriage "is inherently and uniquely heterosexual" and that this distinction is not "a personal characteristic or stereotypic prejudice" that could engage s. 15 of the Charter. Mr. Cowper submitted that Blair R.S.J., having stated the proposition correctly, erred in failing to apply it in the second paragraph just quoted, and that he should have concluded that the heterosexual dimension is an essential feature of marriage beyond the reach of s. 15.

[170] Pitfield J. extended this analysis to the conclusion that the heterosexual dimension of marriage was beyond legislative alteration by Parliament. While Mr. Cowper supported that extension, he noted that it was not necessary to take the proposition that far to support the judgment, as Parliament has not tried to legislate an extension to same-sex couples. However, the trial judge's conclusion that the matter is beyond alteration by Parliament would follow logically from the essentialist character of the position.

[171] This conclusion was opposed by the submissions of both Attorneys General as well as the appellants. The Federal position is the jurisdiction of Parliament under s. 91(26) does allow an extension of the capacity to marry to same-sex couples but that jurisdiction has not been exercised. The Attorney General of British Columbia takes the same position.

[172] Mr. Cowper relied on Reference Re Bill 30, An Act to Amend the Education Act, [1987] 1 S.C.R. 1148, and Adler v. Ontario, [1996] 3 S.C.R. 609, for the proposition

that it was never intended that the Charter could be used to invalidate other provisions of the Constitution, referring to a passage from the reasons of Wilson J. in Bill 30, at p. 1197 and quoted at para. 108 of my colleague's reasons. Both Bill 30 and Adler involved Charter challenges to the public funding of Catholic separate schools in Ontario under s. 93 of the Constitution Act, 1867. Bill 30 was a reference by Ontario for an opinion on the constitutional validity of legislation for public funding of Catholic separate schools in Ontario. Adler challenged constitutionally the non-funding of Jewish and independent Christian schools in Ontario in contrast to the funding of Catholic schools.

[173] The constitutionality of Bill 30 was upheld and the Adler challenge failed. The majority of the Supreme Court in Adler, following the reasoning in Bill 30, concluded that s. 93 was the product of a historic compromise crucial to Confederation and formed a comprehensive code with respect to denominational school rights that cannot be enlarged through the Charter. The difference in treatment in Ontario between Catholic schools and other denominational schools was integral to the s. 93 Confederation compromise and was immune to Charter scrutiny.

[174] In my respectful view, there is no similarity between the comprehensive code defining the powers of the provinces with respect to separate schools in s. 93 and the s. 91(26) power with respect to marriage. Section 93 embodies a delicate constitutional balance struck at Confederation which retains its importance in Canadian polity. Section 91(26) does not have comparable significance and it is not a comprehensive code of marriage.

[175] Mr. Cowper found support for his position in observations by La Forest J. in Egan v. Canada, [1995] 2 S.C.R. 513, para. 21, that marriage "is by nature heterosexual", in the sense that heterosexual couples have a unique ability to procreate. The passage in Egan relied on by Mr. Cowper is quoted at para. 93 of my colleague's reasons. I agree with her conclusion that La Forest J. was speaking for a minority of the court on this point and the observations were not directed to the issue of Parliament's authority to alter the definition of marriage. I think that any such implication would be contrary to the clear trend of the Supreme Court's jurisprudence on homosexual rights: see for example Vriend v. Alberta, [1998] 1 S.C.R. 493.

[176] Mr. Cowper also suggested an analogy between marriage in s. 91(26) and the jurisdiction conferred on Parliament under s. 91(24) with respect to "Indians, and land reserved for the Indians" and exercised through the Indian Act, R.S.C. 1985, c. I-5. Unquestionably, he submitted, Parliament could not assert a jurisdiction over non-aboriginal persons under the Indian Act by the expedient of revising the definition of "Indian" in the Act to include non-aboriginal persons. The jurisdiction with respect to Indians is in its essential character limited to aboriginal persons. Similarly, it is argued that the heterosexual dimension of marriage is so fundamental to the institution of marriage that an extension of the capacity to marry to same-sex couples would result in the institution ceasing to be marriage as constitutionally envisioned, against the historical background of its recognition only for heterosexual couples from time immemorial in common law, civil law and canon law.

[177] In my view, Mr. Cowper's hypothetical Indian Act analogy is not persuasive. In contemporary Canadian society, I do not think that heterosexuality has the same essential quality for marriage as an aboriginal heritage has to jurisdiction related to Indians. The Indian analogy also breaks down at another point. Jurisdiction over non-aboriginal property and civil rights, vested in Parliament with respect to aboriginals, rests with the provinces under s. 92 and can be exercised by provincial legislatures. However, the essentialist position with respect to the heterosexual requirement for capacity to marry is that while it remains federal jurisdiction, it is beyond alteration by either Parliament or the provincial legislatures. In other words, while the constitutional definition of "Indians and Property reserved for Indians" is a division of powers question with the power to legislate residing either in Parliament or the legislatures, the essentialist position is that extending capacity to marry to same-sex couples would be beyond both federal or provincial legislative powers and constitutionally frozen as such, short of constitutional amendment. I agree with the submission of the Attorney General of Canada that there is a fundamental constitutional premise that legislative power is plenary and that every matter, existing now or in the future can be found within the legislative competence of one or the other level of government. There are a few exceptions, as Professor Hogg notes (P. Hogg, Constitutional Law of Canada, loose-leaf ed. (1997), pp. 15-42/43), but marriage would not come within them apart from Charter scrutiny. In my view, the conclusion that this aspect of the capacity to marry exists in a legislative vacuum is not tenable.

[178] In my respectful view, the trial judge's reasons fail to give adequate weight to the evolution of societal views with respect to homosexuality. Until relatively recently, homosexual relations were subject to criminal sanctions and the idea of same-sex marriage was not a possibility that could be seriously considered. Since the de-criminalization of homosexual relationships in Canada in 1969, there has been a steady expansion of the rights of gay, lesbian and bi-sexual persons reflected in human rights legislation and Charter jurisprudence. These developments have substantial public support, although the matter remains controversial. In my view, this evolution cannot be ignored. Civil marriage should adapt to contemporary notions of marriage as an institution in a society which recognizes the rights of homosexual persons to non-discriminatory treatment. In that context, I do not think it can be said that extending the capacity to marry to same-sex couples is so fundamental a change as to exceed Parliament's jurisdiction over marriage under s. 91(26).

[179] In short, I do not think that the judgment under appeal can be supported on the ground that marriage under s. 91(26) is so essentially heterosexual as to be constitutionally incapable of extension to same-sex couples and in that respect immune from Charter scrutiny.

[180] I agree with the conclusion of my colleague that the common law definition of marriage contravenes s. 15 of the Charter and that it cannot be justified in contemporary Canadian society under s. 1. The Charter issues have been extensively canvassed by my

colleague and the several opinions in Halpern and Hendricks and I do not think that there is anything I can usefully add to the Charter analysis in those opinions.

[181] I wish to emphasize, as did my colleague, at paras. 133 and 134 of her reasons, that the issue before us concerns civil marriage only and the conclusion does not displace the rights of religious groups to refuse to solemnize same-sex marriages that do not accord with their religious beliefs. Freedom of religion under the Charter requires respect for the pluralism of religious beliefs on this question.

[182] For these reasons I would allow the appeal and grant the remedy directed by Madam Justice Prowse.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Mr. Justice Low"
