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COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., MACPHERSON and GILLESE JJ.A.
BETWEEN:

HEDY HALPERN and COLLEEN ROGERS, MICHAEL LESHNER and MICHAEL STARK, ALOYSIUS PITTMAN and THOMAS ALLWORTH, DAWN ONISHENKO and JULIE ERBLAND, CAROLYN ROWE and CAROLYN MOFFATT, BARBARA MCDOWALL and GAIL DONNELLY, ALISON KEMPER and JOYCE BARNETT
Applicants
(Respondents, Appellants by way of cross-appeal)

- and -

ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, and NOVINA WONG, THE CLERK OF THE CITY OF TORONTO *Respondents*
(Appellant, Respondent by way of cross-appeal)

- and -

EGALE CANADA INC., METROPOLITAN COMMUNITY CHURCH OF TORONTO, THE INTERFAITH COALITION ON MARRIAGE AND FAMILY, THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO, CANADIAN COALITION OF LIBERAL RABBIS FOR SAME-SEX

MARRIAGE, and CANADIAN HUMAN RIGHTS COMMISSION *Intervenors*

A N D BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO
Applicant
(Respondent, Appellant by way of cross-appeal)

ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF ONTARIO *Respondents*
(Appellant, Respondent by way of cross-appeal)

- and -

HEDY HALPERN and COLLEEN ROGERS, MICHAEL LESHNER and MICHAEL STARK, ALOYSIUS PITTMAN and THOMAS ALLWORTH, DAWN ONISHENKO and JULIE ERBLAND, CAROLYN ROWE and CAROLYN MOFFATT, BARBARA MCDOWALL and GAIL DONNELLY, ALISON KEMPER and JOYCE BARNETT, EGALE CANADA INC., THE INTERFAITH COALITION ON MARRIAGE AND FAMILY,THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO, CANADIAN COALITION OF LIBERAL RABBIS FOR SAME-SEX MARRIAGE, and CANADIAN HUMAN RIGHTS COMMISSION *Intervenors*

Roslyn J. Levine, Q.C., Gail Sinclair and Michael H. Morris for the Attorney General of Canada, appellant, respondent by way of cross-appeals

Martha A. McCarthy and Joanna L. Radbord for the applicant couples, respondents, appellants by way of cross-appeal
R. Douglas Elliott, R. Trent Morris and Victoria Paris for the Metropolitan Community Church of Toronto, respondent, appellant by way of cross-appeal
Lisa J. Solmon for the Attorney General of Ontario, respondent
Leslie Mendelson and Roberto E. Zuech for the Clerk of the City of Toronto, respondent
Cynthia Petersen and Vanessa Payne for Egale Canada Inc., intervenor
Peter R. Jervis and Bradley W. Miller for The Interfaith Coalition on Marriage and Family, intervenor
Ed Morgan for the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage, intervenor
Leslie A. Reaume, Andrea Wright and Elizabeth Kikuchi for the Canadian Human Rights Commission, intervenor

Heard: April 22 to April 25, 2003

On appeal from a judgment of the Divisional Court (Heather F. Smith, A.C.J.S.C., Robert A. Blair R.S.J., and Harry LaForme J.) dated July 12, 2002, reported at 60 O.R. (3d) 321.

BY THE COURT:

A. INTRODUCTION

[1] The definition of marriage in Canada, for all of the nation's 136 years, has been based on the classic

formulation of Lord Penzance in *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 at 133: “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.” The central question in this appeal is whether the exclusion of same-sex couples from this common law definition of marriage breaches ss. 2(a) or 15(1) of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) in a manner that is not justified in a free and democratic society under s. 1 of the *Charter*.

[2] This appeal raises significant constitutional issues that require serious legal analysis. That said, this case is ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada.

[3] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 530, Iacobucci J., writing for a unanimous court, described the importance of human dignity:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[4] The Ontario *Human Rights Code,* R.S.O. 1990, c. H.19, also recognizes the importance of protecting the dignity of all persons. The preamble affirms that “the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. It states:

[I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

[5] Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.

[6] The ability to marry, and to thereby participate in this fundamental societal institution, is something that most Canadians take for granted. Same-sex couples do not; they are denied access to this institution simply on the basis of their sexual orientation.

[7] Sexual orientation is an analogous ground that comes under the umbrella of protection in s. 15(1) of the *Charter*: see *Egan v. Canada,* [1995] 2 S.C.R. 513, and *M. v. H.*, [1999] 2 S.C.R. 3. As explained by Cory J. in *M. v. H.* at 52-53:

In *Egan*...this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). In addition, a majority of this Court explicitly recognized that gays, lesbians and bisexuals, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (para. 175, *per* Cory J.; see also para. 89, *per* L'Heureux-Dubé J.).

[8] Historically, same-sex equality litigation has focused on achieving equality in some of the most basic elements of civic life, such as bereavement leave, health care benefits, pensions benefits, spousal support, name changes and adoption. The question at the heart of this appeal is whether excluding same-sex couples from another of the most basic elements of civic life - marriage - infringes human dignity and violates the Canadian Constitution.

B. FACTS

(1) The parties and the events

[9] Seven[1] gay and lesbian couples ("the Couples") want to celebrate their love and commitment to each other by getting

married in civil ceremonies. In this respect, they share the same goal as countless other Canadian couples. Their reasons for wanting to engage in a formal civil ceremony of marriage are the same as the reasons of heterosexual couples. By way of illustration, we cite the affidavits of three of the persons who seek to be married:

Aloysius Edmund Pittman

I ask only to be allowed the right to be joined together by marriage the same as my parents and my heterosexual friends.

Julie Erbland

I understand marriage as a defining moment for people choosing to make a life commitment to each other. I want the family that Dawn and I have created to be understood by all of the people in our lives and by society. If we had the freedom to marry, society would grow to understand our commitment and love for each other. We are interested in raising children. We want community recognition and support. I doubt that society will support us and our children, if our own government does not afford us the right to marry.

Carolyn Rowe

We would like the public recognition of our union as a “valid” relationship and would like to be known officially as more than just roommates. Married spouse is a title that one chooses to enter into while common-law spouse is something that a couple happens into if they live together long enough. We want our families, relatives, friends, and larger society to know and understand our relationship for what it is, a loving committed relationship between two

people. A traditional marriage would allow us the opportunity to enter into such a commitment. The marriage ceremony itself provides a time for family and friends to gather around a couple in order to recognise the love and commitment they have for each other.

[10] The Couples applied for civil marriage licences from the Clerk of the City of Toronto. The Clerk did not deny the licences but, instead, indicated that she would apply to the court for directions, and hold the licences in abeyance in the interim. The Couples commenced their own application. By order dated August 22, 2000, Lang J. transferred the Couples' application to the Divisional Court. The Clerk's application was stayed on consent.

[11] In roughly the same time frame, the Metropolitan Community Church of Toronto ("MCCT"), a Christian church that solemnizes marriages for its heterosexual congregants, decided to conduct marriages for its homosexual members. Previously, MCCT had felt constrained from performing marriages for same-sex couples because it understood that the municipal authorities in Toronto would not issue a marriage licence to same-sex couples. However, MCCT learned that the ancient Christian tradition of publishing the banns of marriage was a lawful alternative under the laws of Ontario to a marriage licence issued by municipal authorities: see *Marriage Act*, R.S.O. 1990, c. M.3, s. 5(1).

[12] Two couples, Kevin Bourassa and Joe Varnell and Elaine and Anne Vautour, decided to be married in a religious ceremony at MCCT. In an affidavit, Elaine and Anne Vautour explained their decision:

We love one another and are happy to be married. We highly value the love and commitment to our relationship that

marriage implies. Our parents were married for over 40 and 50 years respectively, and we value the tradition of marriage as seriously as did our parents.

[13] The pastor at MCCT, Rev. Brent Hawkes, published the banns of marriage for the two couples during services on December 10, 17 and 24, 2000. On January 14, 2001, Rev. Hawkes presided at the weddings at MCCT. He registered the marriages in the Church Register and issued marriage certificates to the couples.

[14] In compliance with the laws of Ontario, MCCT submitted the requisite documentation for the two marriages to the Office of the Registrar General: see *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 19(1) and the Regulations under the *Marriage Act*, R.R.O. 1990, Reg. 738, s. 2(3). The Registrar refused to accept the documents for registration, citing an alleged federal prohibition against same-sex marriages. As a result, MCCT launched its application to the Divisional Court.

[15] By order dated January 25, 2001, Lang J. consolidated the Couples' and MCCT's applications.

(2) The litigation

[16] The Couples' application and MCCT's application were heard by a panel of the Divisional Court consisting of Smith A.C.J.S.C., Blair R.S.J. And LaForme J. In reasons released on July 12, 2002, the court unanimously held that the common law definition of marriage as the "lawful and voluntary union of one man and one woman to the exclusion of all others" infringed the Couples' equality rights under s. 15(1) of the *Charter* in a manner that was not justified under s. 1 of the *Charter*. The court also held that the remaining

Charter rights claimed by the applicants were either not applicable or not infringed. In particular, the court did not accept MCCT's arguments anchored in s. 2(a), freedom of religion.

[17] The panel's ruling on remedy was not unanimous. Smith A.C.J.S.C. was of the view that Parliament should legislate the appropriate remedy and that it should be given two years to do so, failing which the parties could return to the court to seek an appropriate remedy. LaForme J. favoured immediate amendment, by the court, of the common law definition of marriage by substituting the words "two persons" for "one man and one woman". Blair R.S.J. adopted a middle position; he would have allowed Parliament two years to amend the common law rule, failing which the reformulation remedy proposed by LaForme J. would be automatically triggered. It is Blair R.S.J.'s position that is reflected in the formal judgment of the court.

[18] The appellant Attorney General of Canada ("AGC") appeals from the judgment of the Divisional Court on the equality issue.

[19] The Couples cross-appeal on the question of remedy alone. They seek a declaration of unconstitutionality and a reformulation of the definition of marriage, both to take place immediately, and related personal remedies in the nature of *mandamus*.

[20] MCCT also cross-appeals on the question of remedy. In addition, it cross-appeals from the Divisional Court's dismissal of its claim that the current definition of marriage infringes its ss. 2(a) and 15(1) rights as a religious institution.

[21] Because of the public importance of the issues, several parties were given permission to intervene in the appeal.

[22] The Association for Marriage and the Family in Ontario and the Interfaith Coalition on Marriage and Family support the position of the AGC.

[23] The Canadian Human Rights Commission, Egale Canada Inc. and the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage support the position of the Couples and MCCT.

[24] The Attorney General of Ontario and the Clerk of the City of Toronto take no position with respect to the issues raised by the appeal and the cross-appeal. Both state that they will abide by any order made by this court.

C. ISSUES

[25] We frame the issues as follows:

(1) What is the common law definition of marriage? Does it prohibit same-sex marriages?

(2) Is a constitutional amendment required to change the common law definition of marriage, or can a reformulation be accomplished by Parliament or the courts?

(3) Does the common law definition of marriage infringe MCCT's rights under ss. 2(a) and 15(1) of the *Charter*?

(4) Does the common law definition of marriage infringe the Couples' equality rights under s. 15(1) of the *Charter*?

(5) If the answer to question 3 or 4 is ‘Yes’, is the infringement saved by s. 1 of the *Charter*?

(6) If the common law definition of marriage is unconstitutional, what is the appropriate remedy and should it be suspended for any period of time?

D. ANALYSIS

[26] Before turning to the issues raised by the appeal, we make four preliminary observations.

[27] First, the definition of marriage is found at common law. The only statutory reference to a definition of marriage is found in s. 1.1 of the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, which provides:

For greater certainty, the amendments made by this 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.

[28] The *Modernization of Benefits and Obligations Act* is the federal government’s response to the Supreme Court of Canada’s decision in *M. v. H.* The Act extends federal benefits and obligations to all unmarried couples that have cohabited in a conjugal relationship for at least one year, regardless of sexual orientation. As recognized by the parties, s. 1.1 does not purport to be a federal statutory definition of marriage. Rather, s. 1.1 simply affirms that the Act does not change the common law definition of marriage.

[29] Second, it is clear and all parties accept that, the common law is subject to *Charter* scrutiny where

government action or inaction is based on a common law rule: see *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130. Accordingly, there is no dispute that the AGC was the proper respondent in the applications brought by the Couples and MCCT, and that the common law definition of marriage is subject to *Charter* scrutiny.

[30] Third, the issues raised in this appeal are questions of law. Accordingly, the standard of review applicable to the decision of the Divisional Court is that of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. As explained by Iacobucci and Major JJ. at para. 9: “[T]he primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill [these] functions, appellate courts require a broad scope of review with respect to matters of law.”

[31] Fourth, this court is not the first court to deal with the issues relating to the constitutionality of the definition of same-sex marriage. In addition to the judgments prepared by the three judges of the Divisional Court, courts in two other provinces have addressed the same issues we must face.

[32] In *Hendricks v. Quebec (Attorney General)*, [2002] J.Q. No. 3816 (S.C.), Lemelin J. declared invalid the prohibition against same-sex marriages in Quebec caused by the intersection of two federal statutes and the *Civil Code of Quebec* on the basis that it contravened s. 15(1) of the *Charter* and could not be saved under s. 1. She stayed the declaration of invalidity for two years.

[33] In *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, released on May 1, 2003, the British Columbia Court of Appeal declared the common law definition of marriage unconstitutional, substituted the words "two persons" for "one man and one woman" and suspended the declaration of unconstitutionality until July 12, 2004, the expiration of the two-year suspension ordered by the Divisional Court in this case.

[34] We want to record our admiration for the high quality of the reasons prepared by all of the judges in these cases. As will become clear, we agree with a great deal of their reasoning and conclusions on the equality issue. Our reasons can be shortened, given the clarity and eloquence of our judicial colleagues.

(1) The common law rule regarding marriage

[35] The preliminary argument on this appeal advanced by the Couples is that there is no common law bar to same-sex marriages. The intervenor Egale Canada Inc. ("Egale") supported this argument and expanded on the Couples' submissions.

[36] As previously mentioned, the classic formulation of marriage is found in the English decision of *Hyde v. Hyde and Woodmansee*, "the voluntary union for life of one man and one woman, to the exclusion of all others." Egale argues that *Hyde and Corbett v. Corbett*, [1970] 2 All E.R. 33 (P.D.A.), the other English case cited as authority for the common law restriction against same-sex marriage, have a weak jurisprudential foundation and ought not to be followed. Egale points out that *Hyde* dealt with the validity of a potentially polygamous marriage, and argues that the

comments in *Hyde* about marriage being between opposite-sex persons are *obiter*. With respect to *Corbett*, Egale argues that it is based on outdated, narrow notions of sexual relationships between women and men. The Couples adopt Egale's submissions, and further argue that *M. v. H.* overruled, by implication, any common law restriction against same-sex marriages.

[37] In our view, the Divisional Court was correct in concluding that there is a common law rule that excludes same-sex marriages. This court in *Iantsis v. Papatheodorou*, [1971] 1 O.R. 245 at 248, adopted the Hyde formulation of marriage as the union between a man and a woman. This understanding of the common law definition of marriage is reflected in s. 1.1 of the *Modernization of Benefits and Obligations Act*, which refers to the definition of marriage as "the lawful union of one man and one woman to the exclusion of all others." Further, there is no merit to the submission that *M. v. H.* overruled, by implication, the common law definition of marriage. In *M. v. H.*, Iacobucci J. stated, at p. 83:

This appeal does not challenge traditional conceptions of marriage, as s. 29 of the [*Family Law Act*, R.S.O. 1990, c. F.3] expressly applies to unmarried opposite-sex couples. *That being said, I do not wish to be understood as making any comment on marriage or indeed on related issues*. [Emphasis added.]

(2) Constitutional amendment

[38] The *Constitution Act*, *1867* divides legislative powers relating to marriage between the federal and provincial governments. The federal government has exclusive

jurisdiction over “Marriage and Divorce”: s. 91(26). The provinces have exclusive jurisdiction over the solemnization of marriage: s. 92(12).

[39] The intervenor, The Association for Marriage and the Family in Ontario (“the Association”), takes the position that the word “marriage”, as used in the *Constitution Act, 1867*, is a constitutionally entrenched term that refers to the legal definition of marriage that existed at Confederation. The Association argues that the legal definition of marriage at Confederation was the “union of one man and one woman”. As a constitutionally entrenched term, this definition of marriage can be amended only through the formal constitutional amendment procedures. As a consequence, neither the courts nor Parliament have jurisdiction to reformulate the meaning of marriage.

[40] In the Divisional Court, LaForme J. rejected this argument. His analysis was adopted by Smith A.C.J.S.C. and Blair R.S.J., as well as by the British Columbia Court of Appeal in *EGALE Canada Inc*. None of the parties or other intervenors supports the Association on this issue.

[41] In our view, the Association’s constitutional amendment argument is without merit for two reasons. First, whether same-sex couples can marry is a matter of capacity. There can be no issue, nor was the contrary argued before us, that Parliament has authority to make laws regarding the capacity to marry. Such authority is found in s. 91(26) of the *Constitution Act, 1867*.

[42] Second, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country’s jurisprudence of progressive constitutional interpretation. This jurisprudence is rooted in Lord Sankey’s words in

Edwards v. A.G. Canada, [1930] A.C. 124 at 136 (P.C.): "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." Dickson J. reiterated the correctness of this approach to constitutional interpretation in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

[43] In *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997) at 15-43 to 15-44, Professor Peter W. Hogg explained that Canada has changed a great deal since Confederation, and "[t]he doctrine of progressive interpretation is one of the means by which the *Constitution Act, 1867* has been able to adapt to the changes in Canadian society."

[44] Under the doctrine of progressive interpretation, activities have been included under ss. 91 and 92 of the *Constitution Act, 1867* that had not previously been included. For example, s. 91(15) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over "Banking,

Incorporation of Banks, and the Issue of Paper Money". In *A.G. Alberta v. A.G. Canada*, [1947] A.C. 503 (P.C.), the province argued that certain credit activities did not fall within the scope of s. 91(15) because "banking" at the time of Confederation did not include these activities. The Privy Council, in rejecting this argument, held that the term "banking" in s. 91(15) is not confined to the extent and kind of business actually carried on by banks in Canada in 1867.

[45] Similarly, in regard to the federal government's authority over "The Criminal Law" under s. 91(27), the Privy Council in *P.A.T.A. v. A.G. Canada*, [1931] A.C. 310, considered the constitutionality of federal legislative provisions intended to protect against restraint of trade. Notwithstanding that the impugned provisions criminalized activity that was not the subject of criminal legislation in 1867, the Privy Council concluded that the legislation was *intra vires* the federal government under its criminal law power. Lord Atkin, writing the unanimous judgment, said at p. 324:

"Criminal law" means "the criminal law in its widest sense"....It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes.

[46] In our view, "marriage" does not have a constitutionally fixed meaning. Rather, like the term "banking" in s. 91(15) and the phrase "criminal law" in s. 91(27), the term "marriage" as used in s. 91(26) of the *Constitution Act, 1867* has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures.

[47] The Association also argues that the *Charter* cannot be used to alter provisions of the *Constitution Act, 1867* and,

accordingly, cannot be the basis for amending the definition of marriage in s. 91(26). The Association points to *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R 1148 at 1197-98, where Wilson J. said: “It was never intended, in my opinion, that the *Charter* could be used to invalidate other provisions of the Constitution”. The Association also relies on *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 373, where McLachlin J. stated: “It is a basic rule...that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution”.

[48] We do not agree with the Association’s argument on this point. *Reference Re Bill 30* dealt with the constitutional recognition accorded to minority religious groups in regard to education. This express constitutional recognition finds its root in the religious compromises achieved at Confederation. We are of the view that, whatever compromises were negotiated to achieve the legislative distribution of power relating to marriage, such compromises were not related to constitutionally entrenching differential treatment between opposite-sex and same-sex couples.

[49] The *Nova Scotia Speaker* case dealt with the decision of the legislature of Nova Scotia to prohibit the televising of its proceedings. The Supreme Court of Canada recognized that parliamentary privilege is necessary to ensure the orderly operation of the legislature, and that this privilege includes the power to exclude strangers from legislative chambers. A majority of the court held that parliamentary privilege is part of the constitution of Canada, and therefore not subject to *Charter* review. In our view, the exercise of a constitutionally recognized parliamentary privilege to exclude strangers from the legislature is not analogous to a law excluding persons from marriage.

[50] Accordingly, we do not accept the Association's submissions on this issue.

(3) Cross-appeal by MCCT: religious rights under sections 2(a) and 15(1) of the *Charter*

[51] In its cross-appeal, MCCT takes the position that the common law definition of marriage breaches its freedom of religion under s. 2(a) of the *Charter* and its right to be free from religious discrimination under s. 15(1). MCCT argues that the common law definition of marriage is rooted in Christian values, as propounded by the Anglican Church of England, which has never recognized same-sex marriages. MCCT contends that this definition, therefore, has the unconstitutional purpose of enforcing a particular religious view of marriage and excluding other religious views of marriage. MCCT also contends that the common law definition of marriage, which provides legal recognition and legitimacy to marriage ceremonies that accord with one religious view of marriage, has the effect of diminishing the status of other religious marriages.

[52] MCCT framed its argument this way in its factum:

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

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

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

[54] Even if we were to see this case as engaging freedom of religion, it is our view that MCCT has failed to establish a breach of s. 2(a) of the *Charter*. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336, Dickson J. described freedom of religion in these terms:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

[55] Dickson J. then identified, at p. 337, the dual nature of the protection encompassed by s. 2(a) as the absence of coercion and constraint, and the right to manifest religious beliefs and practices.

[56] MCCT frames its submissions regarding s. 2(a) in terms of state coercion and constraint. We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only.

[57] In *Big M Drug Mart*, the impugned legislation prohibited all persons from working on Sunday, a day when they would otherwise have been able to work. Thus, the law required all persons to observe the Christian Sabbath. In sharp contrast to the situation in *Big M Drug Mart*, the common law

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

[58] MCCT also argues that the common law's failure to recognize the legal validity of the same-sex marriages it performs constitutes a breach of its right to be free from religious discrimination under s. 15(1) of the *Charter*. We consider the impact of s. 15(1) on the common law definition of marriage in greater detail in the next part of these reasons. For now, it appears clear to us that any potential discrimination arising out of the differential treatment of same-sex marriages performed by MCCT is based on sexual orientation. This differential treatment is not based on the religious beliefs held by the same-sex couples or by the institution performing the religious ceremony. For this reason, we conclude that MCCT has failed to establish religious discrimination under s. 15(1).

(4) Section 15(1) of the *Charter*

(a) Approach to section 15(1)

[59] Section 15(1) of the *Charter* provides that "[e]very 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."

[60] In *Law*, Iacobucci J., writing for a unanimous court, described the purpose of s. 15(1) in the following terms, at p. 529:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[61] Iacobucci J. emphasized that a s. 15(1) violation will be found to exist only where the impugned law conflicts with the purpose of s. 15(1). The determination of whether such a conflict exists must be approached in a purposive and contextual manner: *Law* at 525. To that end, Iacobucci J. articulated a three-stage inquiry, at pp. 548-49:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The claimant has the burden of establishing each of these factors on a balance of probabilities.

(b) The existence of differential treatment

[62] The first stage of the s. 15(1) inquiry requires the court to determine whether the impugned law: (a) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics; or (b) fails to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics.

[63] This stage of the inquiry recognizes that the equality guarantee in s. 15(1) of the *Charter* is a comparative concept. As explained by Iacobucci J. in *Law* at 531:

The object of a s. 15(1) analysis is not to determine equality in the abstract; it is to determine whether the impugned legislation creates differential treatment between the claimant and others on the basis of enumerated or analogous grounds, which results in discrimination.

[64] Accordingly, it is necessary to identify the relevant comparator group in order to determine whether the claimants are the subject of differential treatment. Generally speaking, the claimants choose the group with whom they wish to be compared for the purpose of the discrimination inquiry: *Law* at 532.

[65] In this case, the Couples submit that the common law definition of marriage draws a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. Opposite-sex couples have the legal capacity to marry; same-sex couples do not.

[66] The AGC submits that marriage, as an institution, does not produce a distinction between opposite-sex and same-sex couples. The word “marriage” is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm. Marriage is not a common law concept; rather, it is a historical and worldwide institution that pre-dates our legal framework. The Canadian common law captured the definition of marriage by attaching benefits and obligations to the marriage relationship. Accordingly, it is not the definition of marriage itself that is the source of the differential treatment. Rather, the individual pieces of legislation that provide the authority for the distribution of government benefits and obligations are the source of the differential treatment. Moreover, since the enactment of the *Modernization of Benefits and Obligations Act*, same-sex couples receive substantive equal benefit and protection of the federal law.

[67] In our view, the AGC’s argument must be rejected for several reasons.

[68] First, the only issue to be decided at this stage of the s. 15(1) analysis is whether a distinction is made. The fact that the common law adopted, rather than invented, the opposite-sex feature of marriage is irrelevant. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 543-44, Cory J. stated:

[T]he respondents' contention that the distinction is not created by law, but rather exists independently of [Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2] in society, cannot be accepted….It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.

[69] Second, Canadian governments chose to give legal recognition to marriage. Parliament and the provincial legislatures have built a myriad of rights and obligations around the institution of marriage. The provincial legislatures provide licensing and registration regimes so that the marriages of opposite-sex couples can be formally recognized by law. Same-sex couples are denied access to those licensing and registration regimes. That denial constitutes a formal distinction between opposite-sex and same-sex couples. The words of La Forest J. in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 678 are instructive:

This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner….In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons [citations omitted].

[70] Third, whether a formal distinction is part of the definition itself or derives from some other source does not change the fact that a distinction has been made. If marriage were defined as “a union between one man and one woman of the Protestant faith”, surely the definition would be drawing a formal distinction between Protestants and all other persons. Persons of other religions and persons with no religious affiliation would be excluded. Similarly, if marriage were defined as “a union between two white persons”, there would be a distinction between white persons and all other racial groups. In this respect, an analogy can be made to the anti-miscegenation laws that were declared unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967) because they distinguished on racial grounds.

[71] Fourth, an argument that marriage is heterosexual because it “just is” amounts to circular reasoning. It sidesteps the entire s. 15(1) analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory: see *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-93 per McLachlin J.

[72] Accordingly, in our view, there is no doubt that the common law definition of marriage creates a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. The first stage of the s. 15(1) inquiry has been satisfied.

(c) Differential treatment on an enumerated or analogous ground

[73] The second stage of the s. 15(1) inquiry asks whether the differential treatment identified under stage one of the inquiry is based on an enumerated or analogous ground.

[74] In *Egan* at 528, the Supreme Court of Canada recognized sexual orientation as an analogous ground, observing that sexual orientation is a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.

[75] In this case, the AGC properly conceded that, if this court determined that marriage imposes differential treatment, then sexual orientation, as an analogous ground, is the basis for such differential treatment.[2]

[76] Accordingly, stage two of the s. 15(1) inquiry has been met.

(d) The existence of discrimination

[77] The third stage of the s. 15(1) inquiry requires the court to determine whether the differential treatment imposes a burden upon, or withholds a benefit from, the claimants in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

[78] This stage of the inquiry in the s. 15(1) analysis is concerned with substantive equality, not formal equality: *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at

para. 22. The emphasis is on human dignity. In Law at 530, Iacobucci J. elaborated on the meaning and importance of respecting human dignity, particularly within the framework of equality rights:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[79] The assessment of whether a law has the effect of demeaning a claimant's dignity should be undertaken from a subjective-objective perspective. The relevant point of view is not solely that of a "reasonable person", but that of a "reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member": *Egan* at 553; *Law* at 533-34. This requires a court to consider the individual's or group's traits, history, and circumstances in order to evaluate whether a

reasonable person, in circumstances similar to the claimant, would find that the impugned law differentiates in a manner that demeans his or her dignity: *Law* at 533.

[80] The court is required to examine both the purpose and effects of the law in question. It is clear that a law that has a discriminatory purpose cannot survive s. 15(1) scrutiny. However, a discriminatory purpose is not a requirement for a successful s. 15(1) challenge; it is enough for the claimant to demonstrate a discriminatory effect. As stated in *Law* at 535:

[A]ny demonstration by a claimant that a legislative provision or other state action has *the effect* of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society…will suffice to establish an infringement of s. 15(1). [Emphasis added.]

[81] In Law at 550-52, Iacobucci J. identified four contextual factors that a claimant may reference in order to demonstrate that the impugned law demeans his or her dignity in purpose or effect. The list of factors is not closed and not all of the factors will be relevant in every case. The four factors identified by Iacobucci J. are examined below.

(i) Pre-existing disadvantage, stereotyping or vulnerability of the claimants

[82] The first contextual factor to be examined is the existence of a pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue. While this contextual factor is not determinative, it is “probably the most compelling factor favouring a conclusion that differential treatment imposed by

legislation is truly discriminatory": *Law* at 534. As explained by Iacobucci J., at pp. 534-35:

These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

[83] The disadvantages and vulnerability experienced by gay men, lesbians and same-sex couples were described by Cory J. in Egan at 600-602:

The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation….They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation….The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.

…

Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner….[S]tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

See also Vriend at 543; M v. H. at 52-55.

[84] The AGC acknowledges that gay men and lesbians have been recognized as a disadvantaged group in Canada. It emphasizes, however, that historical disadvantage is not presumed to embody discrimination. It points to the Supreme Court of Canada's recent decision in *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, where, despite the fact that cohabiting common law couples have been recognized as a historically disadvantaged group, the court found that the impugned law was not discriminatory.

[85] We agree that the existence of historical disadvantage is not presumptive of discrimination. In *Law* at 536, Iacobucci J. stated:

At the same time, I also do not wish to suggest that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. This may be the result, but whether or not it is the result will depend upon the circumstances of the case and, in particular, upon whether or not the distinction truly affects the dignity of the claimant. There is no principle or

evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory.

[86] However, as previously stated, Iacobucci J. also made it clear that historical disadvantage is a strong indicator of discrimination: see *Law* at 534-35. Therefore, the historical disadvantage suffered by same-sex couples favours a finding of discrimination in this case.

[87] Furthermore, we note that in *Walsh* the court determined that the impugned legislation was not discriminatory because the distinction the legislation created between married couples and common law couples respected the liberty interest of individuals to make fundamental choices regarding their lives. Bastarache J. stated, at para. 63:

Finally, it is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life….Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.

In this case, the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice – whether or not to marry their partner.

(ii) Correspondence between the grounds and the claimant’s actual needs, capacities or circumstances

[88] The second contextual factor is the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacities or circumstances of the claimant or others with similar traits: Law at 537, 551. As illustrated in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, legislation that accommodates the actual needs, capacities and circumstances of the claimants is less likely to demean dignity.

[89] The AGC submits that marriage relates to the capacities, needs and circumstances of opposite-sex couples. The concept of marriage - across time, societies and legal cultures - is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it.

[90] We cannot accept the AGC's argument for several reasons.

[91] First, it is important to remember that the purpose and effects of the impugned law must at all times be viewed from the perspective of the claimant. The question to be asked is whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples. In *Law* at 538, Iacobucci J. cautioned that "[t]he fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee."

[92] Second, the AGC's argument on this point is more appropriately considered in the context of a s. 1 justification

analysis. We find the comments of Bastarache J. in *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at 809-10 to be apposite:

In measuring the appellants' subjective experience of discrimination against an objective standard, it is crucial not to elide the distinction between the claimant's onus to establish a *prima facie* s. 15(1) violation and the state's onus to justify such a violation under s. 1. Section 15(1) requires the claimant to show that her human dignity and/or freedom is adversely affected. The concepts of dignity and freedom are not amorphous and, in my view, do not invite the kind of balancing of individual against state interest that is required under s. 1 of the *Charter*. On the contrary, the subjective inquiry into human dignity requires the claimant to provide a rational foundation for her experience of discrimination in the sense that a reasonable person similarly situated would share that experience. …

By contrast, the government's burden under s. 1 is to justify a breach of human dignity, not to explain it or deny its existence. This justification may be established by the practical, moral, economic, or social underpinnings of the legislation in question, or by the need to protect other rights and values embodied in the *Charter*. It may further be established based on the requirements of proportionality, that is, whether the interest pursued by the legislation outweighs its impact on human dignity and freedom. However, the exigencies of public policy do not undermine the prima facie legitimacy of an equality claim. *A law is not "non-discriminatory" simply because it pursues a pressing objective or impairs equality rights as little as possible. Much less is it "non-discriminatory" because it reflects an international consensus as to the appropriate limits on equality rights. While these are highly relevant considerations at the s. 1 stage, the suggestion that*

governments should be encouraged if not required to counter the claimant's s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other Charter rights. [Emphasis added.]

[93] Third, a law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. While it is true that, due to biological realities, only opposite-sex couples can "naturally" procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination. An increasing percentage of children are being conceived and raised by same-sex couples: *M. v. H.* at 75.

[94] Importantly, no one, including the AGC, is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. As recognized in *M. v. H.* at 50, same-sex couples are capable of forming "long, lasting, loving and intimate relationships." Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

[95] Accordingly, in our view, the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of

same-sex couples. This factor weighs in favour of a finding of discrimination.

(iii) Ameliorative purpose or effects on more disadvantaged individuals or groups in society

[96] The third contextual factor to be considered is whether the impugned law has an ameliorative purpose or effect upon a more disadvantaged person or group in society. The question to be asked is whether the group that has been excluded from the scope of the ameliorative law is in a more advantaged position than the person coming within the scope of the law. In *Law* at 539, Iacobucci J. emphasized that “[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination”.

[97] The AGC cites La Forest J. in *Egan* at 539 for the proposition that, since opposite-sex couples raise the vast majority of children, supporting opposite-sex relationships “does not exacerbate an historic disadvantage; rather it ameliorates an historic economic disadvantage”.

[98] We do not accept the AGC’s submission. The critical question to be asked in relation to this contextual factor is whether opposite-sex couples are in a more disadvantaged position than same-sex couples. As previously stated, same-sex couples are a group who have experienced historical discrimination and disadvantages. There is no question that opposite-sex couples are the more advantaged group.

[99] In our view, any economic disadvantage that may arise from raising children is only one of many factors to be considered in the context of marriage. Persons do not marry

solely for the purpose of raising children. Furthermore, since same-sex couples also raise children, it cannot be assumed that they do not share that economic disadvantage. Accordingly, if alleviating economic disadvantages for opposite-sex couples due to childrearing were to be considered an ameliorative purpose for the opposite-sex requirement in marriage, we would find the law to be underinclusive. The principle from *Law* that "[u]nderinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination" would be applicable.

(iv) Nature of the interest affected

[100] The fourth contextual factor to be examined is the nature of the interest affected by the impugned law. The more severe and localized the effect of the law on the affected group, the greater the likelihood that the law is discriminatory: *Egan* at 556; *Law* at 540.

[101] In Law at 540, the court adopted L'Heureux-Dubé J.'s description of this factor in *Egan*, where she emphasized that s. 15(1) of the *Charter* protects more than "economic rights". She stated, at p.556:

Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. *Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution*, or affects a basic aspect of full membership in Canadian

society (e.g. voting, mobility). Finally, *does the distinction constitute a complete non-recognition of a particular group?* It stands to reason that a group's interests will be more adversely affected in cases involving complete exclusion or non-recognition than in cases where the legislative distinction does recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like. [Emphasis added.]

[102] The AGC submits that the existence of the *Modernization of Benefits and Obligations Act* precludes a finding of discrimination. With this Act, Parliament amended 68 federal statutes in order to give same-sex couples the same benefits and obligations as opposite-sex couples. The AGC also points to recent amendments to provincial legislation that similarly extended benefits to same-sex couples. As a result, same-sex couples are afforded equal treatment under the law.

[103] In our view, the AGC's submission must be rejected.

[104] First, we do not agree that same-sex couples are afforded equal treatment under the law with respect to benefits and obligations. In many instances, benefits and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations.

[105] Additionally, not all benefits and obligations have been extended to cohabiting couples. For example, in *Walsh* the Supreme Court of Canada upheld Nova Scotia's legislation that provides only married persons with equalization of net family property upon breakdown of the relationship. Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, similarly excludes cohabiting opposite-sex and same-sex couples from

equalization of net family property. Opposite-sex couples are able to gain access to this legislation as they can choose to marry. Same-sex couples are denied access because they are prohibited from marrying.

[106] Second, the AGC's submission takes too narrow a view of the s. 15(1) equality guarantee. As the passage cited from *Egan* indicates, s. 15(1) guarantees more than equal access to economic benefits. One must also consider whether persons and groups have been excluded from fundamental societal institutions. A similar view was expressed by Cory J. in *M. v. H.* at 53:

The respondent H. has argued that the differential treatment imposed by s. 29 of the [*Family Law Act*, R.S.O. 1990, c. F.3] does not deny the respondent M. the equal benefit of the law since same-sex spouses are not being denied an economic benefit, but simply the opportunity to gain access to a court-enforced process. Such an analysis takes too narrow a view of "benefit" under the law. It is a view this Court should not adopt. The type of benefit salient to the s. 15(1) analysis cannot encompass only the conferral of an economic benefit. It must also include access to a process that could confer an economic or other benefit. . . .

[107] In this case, same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-

sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

(v) Conclusion

[108] Based on the foregoing analysis, it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” violates s. 15(1) of the *Charter*. The next step is to determine whether this violation can be justified under s. 1 of the *Charter*.

(5) Reasonable limits under section 1 of the *Charter*

(a) The necessity of a s. 1 analysis

[109] 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.

[110] In this case, the parties agree that the common law requirement that marriage be between two persons of the opposite sex is “prescribed by law”: see *Swain* at 979. However, the Couples submit that a s. 1 analysis is not required because this case concerns a challenge to a common law or “judge-made” rule rather than a legislative

provision. Relying on *Swain* at 978, the Couples submit that the court may proceed to cure the *Charter* infringement by fashioning a new rule that complies with constitutional requirements.

[111] While it may not be strictly necessary to consider the application of s. 1 of the *Charter*, we find the words of Lamer C.J.C. in Swain at 979-80 to be compelling:

The *Oakes* test provides a familiar structure through which the objectives of the common law rule can be kept in focus and alternative means of attaining these objectives can be considered. Furthermore, the constitutional questions were stated with s. 1 in mind. While this is not, in and of itself, determinative, the Court has had the benefit of considered argument under s. 1 both from the immediate parties and from a number of interveners. In my view, it would be both appropriate and helpful for the Court to take advantage of these submissions in considering the objective of the existing rule and in considering whether an alternative common law rule could be fashioned….

[112] Further, since marriage is the foundation for a myriad of government benefits, and since Parliament "confirmed" the opposite-sex definition of marriage in s. 1.1 of the *Modernization of Benefits and Obligations Act*, we consider a s. 1 justification analysis to be appropriate. We also note that, during oral argument, counsel for the Couples conceded that it would be suitable for this court to conduct the s. 1 inquiry.

(b) Approach to section 1

[113] In *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-39, Dickson C.J.C. formulated the test for determining whether a law is a reasonable limit on a *Charter* right or freedom in a free and democratic society. The party seeking to uphold the impugned law has the burden of proving on a balance of probabilities that:

(1) The objective of the law is pressing and substantial; and

(2) The means chosen to achieve the objective are reasonable and demonstrably justifiable in a free and democratic society. This requires:

(A) The rights violation to be rationally connected to the objective of the law;

(B) The impugned law to minimally impair the *Charter* guarantee; and

(C) Proportionality between the effect of the law and its objective so that the attainment of the objective is not outweighed by the abridgement of the right.

See *Eldridge* at 684; *Vriend* at 554.

(c) Pressing and substantial objective

[114] The first stage of the *Oakes* test involves a two-step process: (i) the objective(s) of the impugned law must be determined; and (ii) the objective(s) of the impugned law must be evaluated to see if they are capable of justifying limitations on *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 20.

[115] When a law has been found to violate the *Charter* due to underinclusion, both the objective of the law as a whole and the objective of the exclusion must be considered: *Vriend* at 554-55; *M. v. H.* at 62.

[116] The AGC submits that marriage, as a core foundational unit, benefits society at large in that it has proven itself to be one of the most durable institutions for the organization of society. Marriage has always been understood as a special kind of monogamous opposite-sex union, with spiritual, social, economic and contractual dimensions, for the purposes of uniting the opposite sexes, encouraging the birth and raising of children of the marriage, and companionship.

[117] No one is disputing that marriage is a fundamental societal institution. Similarly, it is accepted that, with limited exceptions, marriage has been understood to be a monogamous opposite-sex union. What needs to be determined, however, is whether there is a valid objective to maintaining marriage as an exclusively heterosexual institution. Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a *Charter* guarantee.

[118] We now turn to the more specific purposes of marriage advanced by the AGC: (i) uniting the opposite sexes; (ii) encouraging the birth and raising of children of the marriage; and (iii) companionship.

[119] The first purpose, which results in favouring one form of relationship over another, suggests that uniting two persons of the same sex is of lesser importance. The words

of Dickson C.J.C. in Oakes at 136 are instructive in this regard:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Accordingly, a purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial. A law cannot be justified on the very basis upon which it is being attacked: *Big M Drug Mart* at 352.

[120] The second purpose of marriage, as advanced by the AGC, is encouraging the birth and raising of children. Clearly, encouraging procreation and childrearing is a laudable goal that is properly regarded as pressing and substantial. However, the AGC must demonstrate that the objective of maintaining marriage as an exclusively heterosexual institution is pressing and substantial: see *Vriend* at 554-57.

[121] We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual

institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.

[122] The AGC submits that the union of two persons of the opposite sex is the only union that can “naturally” procreate. In terms of that biological reality, same-sex couples are different from opposite-sex couples. In our view, however, “natural” procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. As previously stated, same-sex couples can have children by other means, such as adoption, surrogacy and donor insemination. A law that aims to encourage only “natural” procreation ignores the fact that same-sex couples are capable of having children.

[123] Similarly, a law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of childrearing. The AGC has put forward no evidence to support such a proposition. Neither is the AGC advocating such a view; rather, it takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons.

[124] The third purpose of marriage advanced by the AGC is companionship. We consider companionship to be a laudable goal of marriage. However, encouraging companionship cannot be considered a pressing and substantial objective of the *omission* of the impugned law.

Encouraging companionship between only persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships.

[125] Accordingly, it is our view that the AGC has not demonstrated any pressing and substantial objective for excluding same-sex couples from the institution of marriage. For that reason, we conclude that the violation of the Couples' rights under s. 15(1) of the *Charter* cannot be saved under s. 1 of the *Charter*.

(d) Proportionality analysis

[126] Our conclusion under the first stage of the *Oakes* test makes it unnecessary to consider the second stage of the test. However, as has become the norm, we will go on to briefly consider the remainder of the test.

(i) Rational Connection

[127] Under the rational connection component of the proportionality analysis, the party seeking to uphold the impugned law must demonstrate that the rights violation is rationally connected to the objective, in the sense that the exclusion of same-sex couples from marriage is required to encourage procreation, childrearing and companionship.

[128] The AGC submits that the rational connection for the opposite-sex nature of marriage is "self-evident", considering its universality and its effectiveness in bringing the two sexes together, in sheltering children, and in providing a stable institution for society.

[129] The difficulty with the AGC's submission is its focus. It is not disputed that marriage has been a stabilizing and effective societal institution. The Couples are not seeking to abolish the institution of marriage; they are seeking access to it. Thus, the task of the AGC is not to show how marriage has benefited society as a whole, which we agree is self-evident, but to demonstrate that maintaining marriage as an exclusively heterosexual institution is rationally connected to the objectives of marriage, which in our view is *not* self-evident.

[130] First, the AGC has not shown that the opposite-sex requirement in marriage is rationally connected to the encouragement of procreation and childrearing. The law is both overinclusive and underinclusive. The ability to "naturally" procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children.

[131] Second, the AGC has not demonstrated that companionship is rationally connected to the exclusion of same-sex couples. Gay men and lesbians are as capable of providing companionship to their same-sex partners as persons in opposite-sex relationships.

[132] Accordingly, if we were of the view that the objectives advanced by the AGC were pressing and substantial, we would conclude that the objectives are not rationally connected to the opposite-sex requirement in the common law definition of marriage.

(ii) Minimal Impairment

[133] With respect to minimal impairment, the AGC submits that there is no other way to achieve Parliament's objectives than to maintain marriage as an opposite-sex institution. Changing the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. The AGC points to no-fault divorce as an example of how changing one of the essential features of marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results. Therefore, a cautious approach is warranted.

[134] We reject the AGC's submission as speculative. The justification of a *Charter* infringement requires cogent evidence. In our view, same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.

[135] The AGC further submits that the means chosen by Parliament to achieve its objectives impair the rights of same-sex couples as minimally as possible. Although same-sex relationships are not granted legal recognition, gay men and lesbians have the right to choose their partners and to celebrate their relationships through commitment ceremonies. Additionally, same-sex couples have achieved virtually all of the federal benefits that flow from marriage with the passing of the *Modernization of Benefits and Obligations Act*.

[136] We do not accept these submissions. As explained in our s. 15(1) analysis, it is our view that same-sex couples have not achieved equal access to government benefits. There are significant waiting periods involved before cohabiting couples can access these benefits. Some benefits and obligations are available only to married couples. Importantly, the benefits of marriage cannot be viewed in purely economic terms. The societal significance surrounding the institution of marriage cannot be overemphasized: see *M. v. H.* at 57.

[137] Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. This is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.

[138] Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion under s. 2(a) of the *Charter* ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.

[139] In our view, the opposite-sex requirement in the definition of marriage does not minimally impair the rights of the claimants. Same-sex couples have been completely excluded from a fundamental societal institution. Complete exclusion cannot constitute minimal impairment.

(iii) Proportionality between the effect of the law and its objective

[140] The final branch of the proportionality test requires an examination of whether the deleterious effects caused by excluding same-sex couples from marriage are so severe that they outweigh its purposes.

[141] Since we have already concluded that the objectives are not rationally connected to the opposite-sex requirement of marriage, and the means chosen to achieve the objectives do not impair the Couples' rights as minimally as possible, it is axiomatic that the deleterious effects of the exclusion of same-sex couples from marriage outweigh its objectives.

(e) Conclusion

[142] Accordingly, we conclude that the violation of the Couples' equality rights under s. 15(1) of the *Charter* is not justified under s. 1 of the *Charter*. The AGC has not demonstrated that the objectives of excluding same-sex couples from marriage are pressing and substantial. The AGC has also failed to show that the means chosen to achieve its objectives are reasonable and justified in a free and democratic society.

(6) Remedy

[143] Having found that the common law definition of marriage violates the Couples' equality rights under s. 15(1) of the *Charter* in a manner that is not justified under s. 1 of the *Charter*, we turn to consider the appropriate remedy.

[144] The Couples and MCCT seek an immediate declaration that the common law definition of marriage is invalid, and an order reformulating the definition to refer to the union of “two persons” to the exclusion of all others. Additionally, the Couples seek an order directing the Clerk of the City of Toronto to issue a marriage licence to each of them, and an order directing the Registrar General of the Province of Ontario to register same-sex marriages. MCCT also seeks an order that the Registrar General register the marriages of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour. The AGC takes the position, in the event that we dismiss its appeal, that the appropriate remedy is to declare the common law definition of marriage unconstitutional, but to suspend the declaration of invalidity for two years.

[145] *Schachter v. Canada*, [1992] 2 S.C.R. 679, remains the seminal authority regarding constitutional remedies. Lamer C.J.C. identified the court’s obligation to fashion a remedy for a constitutional breach and the scope of such remedies, at p. 695:

Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only “to the extent of the inconsistency”. Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in.

[146] Lamer C.J.C. set out three steps to be followed in determining the appropriate remedy for a *Charter* breach. First, the court is to define the extent of the impugned law’s inconsistency with the *Charter*. Second, it should select the

remedy that best corrects the inconsistency. Third, the court should assess whether the remedy ought to be temporarily suspended.

[147] Turning to the first step, we hold that the common law definition of marriage is inconsistent with the *Charter* to the extent that it excludes same-sex couples.

[148] With respect to the second step, in our view the remedy that best corrects the inconsistency is to declare invalid the existing definition of marriage to the extent that it refers to “one man and one woman”, and to reformulate the definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”. This remedy achieves the equality required by s. 15(1) of the *Charter* but ensures that the legal status of marriage is not left in a state of uncertainty.

[149] We reject the AGC’s submission that the only remedy we should order is a declaration of invalidity, and that this remedy should be suspended to permit Parliament to respond. A declaration of invalidity alone fails to meet the court’s obligation to reformulate a common law rule that breaches a *Charter* right. Lamer C.J.C. highlighted this obligation in *Swain* at 978:

[B]ecause 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. …

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.

No argument was presented to us that the reformulated common law definition of marriage would conflict with the principles of fundamental justice. Nor is there any issue that the reformulated definition would violate the *Charter*.

[150] In addition to failing to fulfil the court's obligation, a declaration of invalidity, by itself, would not achieve the goals of s. 15(1). It would result in an absence of any legal definition of marriage. This would deny to all persons the benefits of the legal institution of marriage, thereby putting all persons in an equally disadvantaged position, rather than in an equally advantaged position. Moreover, a declaration of invalidity alone leaves same-sex couples open to blame for the blanket denial of the benefits of the legal institution of marriage, a result that does nothing to advance the goal of s. 15(1) of promoting concern, respect and consideration for all persons.

[151] We are also of the view that the argument made by the AGC and several of the intervenors that we should defer to Parliament once we issue a declaration of invalidity is not apposite in these circumstances. *Schachter* provides that the role of the legislature and legislative objectives is to be considered at the second step of the remedy analysis when a court is deciding whether severance or reading in is an appropriate remedy to cure a legislative provision that breaches the *Charter*. These considerations do not arise where the genesis of the *Charter* breach is found in the common law and there is no legislation to be altered. Any lacunae created by a declaration of invalidity of a common law rule are common law lacunae that should be remedied

by the courts, unless to do so would conflict with the principles of fundamental justice.

[152] The third step remains to be considered, that is, whether to temporarily suspend the declaration of invalidity. As previously noted, the AGC argues for a suspension in order to permit Parliament an opportunity to respond to the legal gap that such a declaration would create. Again, *Schachter* provides guidance on the resolution of this issue. Lamer C.J.C. emphasized, at p. 716, that "[a] delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation." He stated, at pp. 715-16 and 719, that temporarily suspending a declaration of invalidity is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying deserving persons of benefits under the impugned law. Further, Lamer C.J.C. pointed out, at p. 717, that respect for the role of the legislature is not a consideration at the third step of the analysis:

The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the court and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public [*i.e.* potential public danger, threat to the rule of law, or denial of benefit to deserving persons].

[153] There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. We observe that there was no evidence before us that the

reformulated definition of marriage will require the volume of legislative reform that followed the release of the Supreme Court of Canada's decision in *M. v. H.* In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s. 15(1) of the *Charter*.

[154] Accordingly, we would allow the cross-appeal by the Couples on remedy. We would reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". We decline to order a suspension of the declaration of invalidity or of the reformulated common law definition of marriage. We would also make orders, in the nature of *mandamus*, requiring the Clerk of the City of Toronto to issue marriage licences to the Couples, and requiring the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.[3]

E. DISPOSITION

[155] In summary, we have concluded the following:

(1) the existing common law definition of marriage is "the voluntary union for life of one man and one woman to the exclusion of all others";

(2) the courts have jurisdiction to alter the common law definition of marriage; resort to constitutional amendment procedures is not required;

(3) the existing common law definition of marriage does not infringe MCCT's freedom of religion rights under s. 2(a) of

the *Charter* or its equality rights on the basis of religion under s. 15(1) of the *Charter*;

(4) the existing common law definition of marriage violates the Couples' equality rights on the basis of sexual orientation under s. 15(1) of the *Charter*; and

(5) the violation of the Couples' equality rights under s. 15(1) of the *Charter* cannot be justified in a free and democratic society under s. 1 of the *Charter*.

[156] To remedy the infringement of these constitutional rights, we:

(1) declare the existing common law definition of marriage to be invalid to the extent that it refers to "one man and one woman";

(2) reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others";

(3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;

(4) order the Clerk of the City of Toronto to issue marriage licenses to the Couples; and

(5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.

[157] In the result, the AGC's appeals are dismissed. MCCT's cross-appeal relating to s. 2(a) of the *Charter* and s. 15(1) of the *Charter* on the basis of religion is dismissed.

The Couples' cross-appeal and MCCT's cross-appeal on remedy are allowed.

[158] If the AGC, the Couples and MCCT are unable to agree on costs, they may speak to the matter by filing brief written submissions within two weeks of the release of these reasons. There will be no costs awarded to or against the Clerk of the City of Toronto, the Attorney General of Ontario, or any of the intervenors.

RELEASED: June 10, 2003
("RRM")

"R. Roy McMurtry C.J.O."
"J. C. MacPherson J.A."
"E. E. Gillese J.A."

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[1] Eight gay and lesbian couples originally challenged the decision of the Clerk of the City of Toronto not to grant them marriage licences. One of the couples separated after the decision of the Divisional Court but before the hearing of this appeal. The persons involved indicated that they did not wish to continue to participate in the proceedings.

[2] The Couples also submit that the common law definition of marriage violates s. 15(1) of the *Charter* on the basis of sex. In our view, sexual orientation is the most applicable ground of discrimination under s. 15(1) of the *Charter*. Accordingly, we find it unnecessary to decide whether there is a *Charter* violation on the basis of sex.

[3] We recognize that an order requiring the Registrar General of the Province of Ontario to accept for registration

the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour does not flow from our rejection of MCCT's legal arguments. However, given our conclusion on the equality issue, and bearing in mind the consolidation of the two applications, we are of the view that a remedy for the two couples involved in the MCCT application is also appropriate.