PART I - STATEMENT OF FACTS

1. As a result of the decisions of the Courts in British Columbia, Ontario and Quebec the Government of Canada has drafted a law extending the capacity to marry to same-sex couples and brought a Reference to this Court for guidance. Since *Halpern* there have been thousands of same- sex marriages in those three provinces and they continue on a weekly basis.

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

2. The Canadian Unitarian Council (CUC), represents all Unitarian congregations in Canada and is a national religious body that is part of an international movement. Unitarians have been an active part of Canadian religious life since the 1830's. The first Unitarian church in Canada was founded in Montreal in 1842. In 1961, Unitarian churches and fellowships in Canada united to form the CUC. We have 50 congregations or groups in Canada, and number 5,200 members among these groups. We are affiliated continentally with the Unitarian Universalist Association based in Boston; and internationally with both the International Council of Unitarians and Universalists based in Prague, Czech Republic and the International Association for Religious Freedom based in Oxford, England. Arising out of the work of outspoken reformers and dissenters within the Christian tradition five centuries ago, the Unitarian movement today includes Universalists and flows in a broad religious stream augmented by Humanist, earth-centred, Buddhist and other progressive beliefs.

3. Unitarians have a long history of speaking out on justice and equality issues. There has been Unitarian involvement from the early beginnings of the movement for equal marriage in Canada. Unitarian churches have offered both ceremonies for same-sex unions that have been termed marriages as well as ceremonies for same-sex unions that were given names other than marriage since the 1970s. The first court challenge in Canada to the lack of legal recognition of same-sex marriage in Canada began with the marriage of Richard

North and Chris Vogel in 1974. Their marriage was performed by a Unitarian minister, the Reverend Norm Naylor, in the First Unitarian Church of Winnipeg in 1974.

Re North et al. and Matheson (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct.)

4. The CUC has done considerable work on sexual orientation issues in general and on equal marriage rights in particular. The CUC website at www.cuc.ca/queer, titled "The Gender and Sexual Diversity Issues Page", includes links to a number of relevant documents.

Affidavit of J. McRee Elrod, sworn May 7, 2004, Exhibit "A"

5. 64% of Canadian Unitarians are members of welcoming congregations. The Welcoming Congregation Program requires a congregation to undertake an educational program and also do various tasks such as examining their by-laws to ensure they specifically note that gay, lesbian, bisexual, and transgender or transsexual persons are included. Most of CUC's 28 Unitarian ministers and 71 lay chaplains across Canada have performed same-sex commitment ceremonies or weddings. No Canadian Unitarian ministers or lay chaplain would refuse to perform a marriage or union ceremony for a same-sex couple on the basis of their sexual orientation.

Affidavit of J. McRee Elrod, sworn May 7, 2004, Exhibit "B"

6. CUC wrote a brief to the Parliamentary Standing Committee on Justice and Human Rights regarding Same-Sex Marriage that was presented Wednesday February 26, 2003. CUC also participated in the Interfaith Coalition ame-Sex Marriage and wrote a section on the Unitarian position for their brief that was presented to the Parliamentary Committee on February 18, 2003.

Affidavit of J. McRee Elrod, sworn May 7, 2004, Exhibit "B"

7. This intervener accepts the Summary of the Facts as presented by the Attorney General of Canada in his factum.

PART II - POINTS IN ISSUE

8. The Reference asks four questions:

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

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

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

Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the *Federal Law - Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

PART III – ARGUMENT

Question 1

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

9. It was the position of all of the parties to the three equal marriage cases that Parliament had exclusive jurisdiction under section 91(26) of the *Constitution Act* over the capacity to marry and had the authority to pass legislation expanding the definition of marriage to include same-sex couples. As McMurtry C.J.O. said in *Halpern*:

> *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).

CUC has not developed argument on this question and is content with the position taken by the Attorney General of Canada in his factum.

Halpern para.38

Question 2

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

10. Not only is the proposed legislation consistent with the *Charter*, but the failure to legally recognize same-sex marriage is a violation of section 15(1) of the *Charter* that is not saved by section 1 and the federal government has an obligation to remedy the situation by introducing legislation that creates a uniform standard for the capacity to marry across Canada.

11. 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. It is sexual orientation that is the basis for differential treatment.

Halpern para.72

12. The failure to allow same sex couples the right to marry if they choose to do so is discrimination. It withholds a benefit from same sex couples in a manner that reflects stereotypical application of personal characteristics, resulting in the perpetuation of the attitude that gays and lesbians are somehow less worthy. It is about human dignity. As Iacobucci J. stated in *Law*:

> 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?
>
> *Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, p.530*

13. Iacobucci J. goes on to identify four factors among those that could be considered when a claimant demonstrates that the impugned law demeans dignity:

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

This Court has ruled on this in relation to gays and lesbians to the extent that there is no doubt of the historical disadvantages, stereotyping and vulnerability experienced by same-sex couples. This is a strong indicator of discrimination that favours a finding of discrimination by this Court.

> *Egan v. Nesbit [1995] 2 S.C.R. 513; M. v. H. [1999] 2 S.C.R. 3; Vriend v. Alberta [1998] 1 S. C. R. 493; Chamberlain v. Surrey School District No. 36 [2002] 4 S.C.R. 710*

> (b) Correspondence between the grounds on which the claim is based and the claimants' actual needs, capacities and circumstances

Same sex couples who wish to marry do so for a myriad of reasons, including intimacy, companionship, societal recognition, and economic benefits to name a few. Same sex couples also conceive or adopt children. As McMurtry C.J.O. declared:

> 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."

From the perspective of same-sex couples, the prohibition against them marrying does not take into account their actual needs, capacities and circumstances. Their human dignity and freedom are adversely affected and it is not appropriate to attempt to justify this breach in a s. 15 analysis by any public policy arguments.

Halpern, supra, para 94

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

In *Law*, Iacobucci J. discusses ameliorative legislation and concludes that legislation that excludes members of a historically disadvantaged group will rarely escape the charge of discrimination. In this case, the discrimination against same-sex couples is a long-term historical disadvantage. Arguments that the exclusion of same-sex couples is intended to benefit opposite-sex couples and children are fallacious. Opposite-sex couples will continue to have all of the benefits of marriage if same-sex couples are allowed to marry. Not all opposite-sex couples have children and some same-sex couples have children, so opening marriage to same-sex couples will benefit children.

Law, supra, p. 539.

(d) Nature of the interest affected

When setting out these factors, this Court adopted the reasoning of L'Heureux-Dube J. in *Egan*, where she said:

> 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 discrimination 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 affect 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 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.

Prior to the successful court challenges, the common law completely excluded same-sex couples from marriage.

Law, supra, pp 550; Egan, supra, para. 64

14. While human dignity and societal recognition are extremely important values in this case there is a significant economic factor as a result of the decision of this Court in *Walsh* where the Court held that excluding common law heterosexual couples from laws concerning matrimonial property was not a contravention of s. 15 of the *Charter*. Similar laws exist in other provinces, for example the *Family Relations Act* in British Columbia.

Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R 325
Family Relations Act, RSBC 238, Part 5

15. In making that finding the Court emphasized that heterosexual common law couples had the right to choose whether to marry or not. Bastarache, J., writing for 7 of the 8 judges in agreement said:

> Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.
>
> *Walsh, supra, para. 43*

He goes on to say:

> Unmarried cohabitants, on the other hand, maintain their respective and proprietary rights and interests throughout the duration of the relationship and at its end. These couples are free to marry, enter into domestic contracts, to own property jointly. In short, if they choose, they are able to access all of the benefits extended to married couples under the MPA.
>
> *Walsh, supra, para. 49, emphasis added*

Gonthier, J., in agreeing with the majority, said:

> The situation of couples who have chosen life commitment through marriage is not comparable to that of unmarried couples when one

> considers the nature of their respective relationships. In the case of married couples, there is a permanent and reciprocal life commitment, to which the legislature has attached, among other things, a presumption of equal division of matrimonial assets, while, in the absence of marriage, this foundational quality does not exist. (para 205)
>
> *Walsh, supra, para. 205*

16. While this Court is prepared to find no discrimination where the choice exists, clearly same sex couples have been denied the right to choose to marry.

17. The Attorney General of Canada noted in his Supplementary Factum that "While many benefits and obligations have been extended to common-law couples (both opposite-sex and same-sex), in most instances, benefits and obligations do not attach until the couple has been cohabiting for a specified period of time, while married couples have access to all benefits and obligations immediately upon marriage." One significant example of an existing inequality in law between married and common-law couples is in the immigration context. While the *Immigration and Refugee Protection Regulations* recognizes two new categories for sponsorship in the Family Class of common-law partners and conjugal partners, both of these categories require a one year qualifying period before an application can be filed. Spousal sponsorships filed by the married Canadian spouse of an applicant can be filed immediately upon marriage. This one year delay in filing an application imposes a particular hardship on same-sex couples who may be forced to live apart from each other until they meet the one year qualifying period and can file their application.

> *Supplementary Factum of the Attorney General of Canada, para. 15*
> *Immigration and Refugee Protection Regulations, ss.1(1), 1(2),2*

18. There is also the issue of children. Those who stereotype same-sex relationships always question the stability of same-sex relationships and their ability to provide proper care and nurture to children.CUC supports the statement from the Canadian Psychological Association that children raised by gay parents show no difference from other children and, as recommended by CPA president

Patrick O'Neill, all children deserve to feel that society accepts and recognizes their families. Elizabeth Bowen, president of the CUC stated "Gay couples married by Unitarian clergy have told us that they and their children feel much more secure when their union has legal recognition." Legal prohibitions against same-sex marriage harm children raised by same-sex couples by instilling them with the message their families matter less than families of opposite-sex couples. Unitarian congregations offer the children of same-sex parents a supportive and nurturing environment to grow spiritually. We believe it important that the law reflects that children with same-sex parents are valued as much as children with opposite-sex parents.

Affidavit of J. McRee Elrod, Exhibit G

19. Unitarians were intensely involved in the struggle for civil rights in the US and opposed the system of segregation instituted in many of the southern states in the US. The US Supreme Court eventually ruled the doctrine of "separate but equal" was discriminatory and violated equal rights protections in the Fourteenth Amendment. The court held that segregation of white and black children in the public schools of a state solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to black children the equal protection of the laws guaranteed by the Fourteenth Amendment -- even though the physical facilities and other "tangible" factors of white and black schools may be equal. The court resorted to a consideration of intangible considerations and held that separate educational facilities are "inherently unequal". The court noted that separating persons because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. Similarly, the opposite-sex requirement for marriage has an adverse effect on not only same-sex couples, but also their children. It tells the children of same-sex parents they are "inherently unequal" to the children of opposite-sex parents, if same-sex parents are unable to get married.

Brown v. Board of Education, 347 U.S. 483 (1954) (USSC)

20. We submit that in this case a section 1 analysis is unnecessary. However, it is our submission that following the test in *Oakes* there is no pressing and substantial objective to the prohibition against same-sex marriage. As earlier noted, arguments that excluding same-sex couples from marriage will benefit opposite-sex couples or children are fallacious. Alternatively, even if there is some benefit, the means chosen to achieve the objective: (1) are not reasonable and demonstrably justifiable in a free and democratic society as they are not rationally connected to any objective of the law; (2) more than minimally impair the Charter guarantees of same-sex couples; (3) do not provide for proportionality between the effect of the law on same-sex couples and its objective to benefit opposite-sex couples and children.

R. v. Oakes [1986] 1 S.C.R. 103

21. Unitarians recognize that couples make different choices about how to structure and define their relationships. Some couples choose to have a legal marriage and others do not. Even if a couple chooses not to have a legal marriage, they may wish a religious ceremony to publicly acknowledge their relationship. Regardless of the choices couples make in structuring and defining their relationships, Unitarian congregations offer recognition and support to those couples and their children. Unitarians have recognized, affirmed and supported same-sex couples in our congregations and communities. We feel they should be allowed to make the same choices as other couples to structure and define their relationships. Marriage is an essential choice that must be available to same-sex couples.

22. **The CUC submits that section 1 of the proposed legislation is consistent with the Charter.**

Question 3

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

23. This question is of vital concern to CUC as it relates to the issue of freedom of conscience and religion guaranteed under s. 2(a) of the *Charter*. Unitarians have championed religious freedom since our beginnings in Europe five centuries ago as dissenters and religious reformers. Unitarians have never been an established church in any state nor have we been the predominant religious group in any society in history. Historically, Unitarians have supported the separation of Church and state. Unitarians have suffered persecution at various times in our history from religious authorities and are acutely aware of the dangers of the state favouring one religious doctrine or religious group over others. Unitarianism has always placed a premium on unhampered intellectual inquiry, freedom, tolerance and individual seeking of religious truths. One of the "Principles and Sources of Our Religious Faith" adopted by the CUC is "the right of conscience and the use of the democratic process with our congregations and in society at large". Unitarian congregations take pride in being a gathering point for those who reject creeds and dogmas in favour of an open and unfettered exploration of religious traditions. No assent to any creed or statement of belief is required by any person joining a Unitarian society. Members accept the obligation to seek out truth for themselves and to follow that truth wherever it may lead. Unitarians recognize that people will differ in their opinions and lifestyles. We hold that these differences should be not only accepted but also genuinely supported, for each of us needs freedom to grow in ways that will encourage a similar freedom for all others to reach their own highest potentialities.

Affidavit of J. McRee Elrod, sworn May 7, 2004, Exhibit "B"

24. Unitarians differ from many of the other religious interveners as we view marriage as a civil and not a religious institution. We differ from those interveners in support of equal marriage who argue from a secular position as we actively encourage the inclusion of spirituality in daily life, including weddings and marriage. While we are a religious intervener, we do not want religious dogma enshrined in our laws. The Chief Justice of this Court expressed the attitude of

respect for the religious beliefs of others that should be the standard of conduct in a pluralistic, religiously diverse society such as we have in Canada.

> . . . the demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.
>
> *Chamberlain v. Surrey School District No. 36 [2002] 4 S.C.R. 710 at para. 66*

25. Unitarians share with the Metropolitan Community Church (MCC), and even more so with Liberal Rabbis, the conviction that Scripture is misused by the selection of a few verses to support positions contrary to the overarching message of Scripture, that justice should flow down from government like water. Our movement in history has experienced the use of Scripture to defend both slavery and segregation.

26. Unlike the MCC and Judaism, we have as our sources more than Jewish (and Christian in the case of the MCC) Scriptures. Among the several sources of our values is religious humanism, which undergirds our first stated principle, the inherent worth and dignity of each person. Just as Jesus, out of concern for human values, concluded that the Sabbath was made for humanity and not humanity for the Sabbath, we have concluded that in the words of Lowell from one of our hymns: "New occasions teach new duties. Time makes ancient good uncouth. They must upward and onward, Who would keep abreast of truth". This Court held in *Chamberlain* that Canadian law should not be used to enforce the tenets of any particular religious group. The denunciation of Galileo did not restore the earth to the centre of the universe. The Scopes Trial did not banish

evolution from scientific consideration. Progressive Jewish and Christian thinkers have, as a result of the discoveries of scientists such as Galileo and Darwin, reinterpreted the scriptural earth-centered and six day creation view of reality. The discoveries concerning human sexuality by such social scientists as Kinsey, and ongoing genetic research, require a similar reinterpretation of prior understanding. The law must adapt to advances in human awareness and social change. Efforts to impede this process will prove in time to be as futile as was the Scopes Trial in enforcing the ban on the teaching of evolution.

See John Thomas Scopes v. The State (Supreme Court of Tennessee) Opinion filed January 17, 1927, Appeal from the Criminal Court of Rhea County, Hon. J.T. Raulston, Judge; see www.law.umkc.edu/faculty/projects/ftrials/scopes/scopes.htm; Chamberlain v. Surrey School District No. 36 [2002] 4 S.C.R. 710

27. CUC feels that there is new truth available to us now, which should lead us to reconsider long time prejudice. We are compelled to defend our freedom to perform those marriages we feel to be appropriate for our members and friends. CUC submits the proposed legislation does not impair freedom of religion, but in fact is drafted so as to further enhance freedom of religion and allow religious groups that support equal marriage such as CUC, Quaker meetings, liberal rabbis and United Church clergy, to celebrate marriages that are consistent with their faith and practice as well as permit religious groups who oppose equal marriage to not perform same-sex marriages.

28. If, in future, an individual Unitarian ordained minister or lay chaplain decided not to perform same-sex marriages, that would be a matter for the congregation they were serving to determine if they wished to be served by a minister or lay chaplain who took such a position, just as they would do so if there was a refusal to perform an inter-racial or interfaith marriage. While a Unitarian minister or lay chaplain has the right to refuse to officiate a same-sex wedding, they also have the responsibility to be held accountable for their choices. Unitarianism is congregational in polity. Both ordination and selection of lay chaplains is located in the individual congregation. We believe each religious group should make decisions on whether they would perform same-sex

marriages in a manner consistent with their faith and practice without interference from State authorities.

29. Freedom of religion has been interpreted by Canadian courts as the right to hold such religious beliefs as a person chooses and the right to declare religious beliefs openly and without fear of persecution. It has never been held to give religious groups the authority to impose their beliefs on all of Canadian society. In *Big M Drug Mart*, Dickson C.J.C, writing for the majority of this Court reflected that:

> Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.
>
> *R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 336*

30. The religious and conscientious practices of those opposed to equal marriage are in no way affected by the draft Bill that would alter the legal definition of marriage. All religious groups have the right to hold beliefs on whether same-sex marriage is good or bad and to publicly proclaim those beliefs. Religious groups such as Unitarians have had the right to allow their clergy to perform same-sex marriages and recognize them in our congregations even when there was no legal recognition of same-sex marriage. Religious groups that oppose same-sex marriages will have the right to prohibit their clergy from performing same-sex marriages and their congregations may refuse to recognize same-sex marriages as religiously valid. Orthodox Jewish rabbis will not perform a religious marriage between Jews and non-Jews and a Roman Catholic priest will not perform a religious marriage where one of the spouses in a couple has previously been divorced. The religious freedom of Jews and Catholics has not been impaired because Unitarian ministers have performed religious marriages for mixed marriages between Jews and non-Jews or divorced Catholics. Similarly, the religious freedom of religious groups who oppose equal marriage will not be impaired if the state legalizes civil marriage for same-sex couples and

same-sex couples get married by the civil authorities or by religious groups such as the Unitarians whose religious beliefs support equal marriage.

This Court has interpreted s. 2(a) of the *Charter* to mean an absence of coercion or constraint by the state. Dickson C.J.C. pointed out that:

> In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.
>
> *Big M Drug Mart Ltd.,supra. at p. 350*

31. The religious interveners who oppose equal marriage have argued the state should impose coercion or constraint to compel individuals and religious groups who believe in equal marriage from performing the otherwise harmless act of a same-sex marriage because of the religious significance of the act to their beliefs. This would then put the state in the indefensible position of favouring the religious beliefs of one group over the religious beliefs of another group. This is unacceptable even if the majority of Canadians hold a certain religious belief.

32. Dickson C.J.C. stated 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".
>
> *R. v. Big M Drug Mart, supra. at 337*

33. After reviewing the above quotation, Prowse J., stated:

> 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*.
>
> *Egale Canada Inc. v. Canada (Attorney General) (2003) 13 B.C.L.R. (4TH) (C.A)*, at 132

34. Discussions about whether equality rights under section 15 of the *Charter* "trump" religious freedom under section 2(a) are misleading. The equality rights of same-sex couples and religious groups and others who believe in equal marriage are not in opposition to freedom of conscience and religion. Freedom to hold religious beliefs and practice them is not impaired by the proposed legislation. It is therefore unnecessary in this case for the Court to engage in the exercise of balancing equality rights with religious freedom. Alternatively, even if there is some minimal impairment of freedom of conscience or religion on some, to not pass the legislation would have a far greater impairment of the freedom of conscience and religion of others as well their equality rights.

35. Unitarians do not wish to impose their religious beliefs on others any more than we want others to impose their religious beliefs on us. While we disagree with the beliefs of some other religious groups on the issue of equal marriage, we respect their right to hold those beliefs and would be opposed to any actions by the state to compel a religious group or its clergy to perform a same-sex marriage against their will.

36. It is CUC's position that to do so would be a clear violation of section 2(a) of the *Charter*. As Elizabeth Bowen, President of the CUC, wrote in response to the proposed equal marriage legislation:

> "Freedom of Religion" is a notion that is sometimes, and erroneously, interpreted to mean "the freedom to have our religious beliefs trump yours." True Freedom of Religion (i) allows all individuals to choose their own religious affiliation, if any, and (ii) allows each religious/faith group to abide by its won principles and beliefs. In the case of Equal Marriage, we would respect the right of some other faith groups to not support or performs such marriages, and we would expect that they show our denomination the same respect for our wish to follow our deeply held beliefs in this matter.
>
> *Affidavit of J. McRee Elrod, Exhibit H*

Prowse J. commented in *Egale*:

> [133] 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 intervener, 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.
>
> *Egale, supra. at para. 133-134*

McKenzie J. also reiterated the same point when he stated:

> . . .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.
>
> *Egale, supra. at para. 181*

37. **CUC submits that the answer to question 3 is yes.**

Question 4 - Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the *Federal Law - Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

38. We have submitted that the exclusion of same-sex couples in the common law definition of marriage contravenes the *Charter.* The Ontario Court of Appeal has indicated that s. 1.1 of *the Modernization of Benefits and Obligations Act* is interpretive. Therefore s. 5 of the *Federal Law - Civil Law Harmonization Act, No. 1*, must also be inconsistent with the *Charter* or merely interpretive, or both. There has been some discussion as to whether maintaining the opposite-sex requirement for marriage and implementing a registered domestic partnership scheme that would be available for same-sex couples would be consistent with the *Charter.* In 2002 the government of Quebec attempted to give as many of the benefits and obligations of marriage under its jurisdiction as possible through Bill 84. CUC submits that if the federal government were to offer the alternative of a civil union to persons of the same sex in lieu of the extension of the capacity to marry that this would violate the *Charter*.

An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, C. 6, S. 22
Modernization of Benefits and Obligations Act, section 1.1
Halpern, at para. 28

39. It should be noted that the first named couple in the BC equal marriage case, Dawn Barbeau and Elizabeth Barbeau, are members of the Unitarian Church of Vancouver and were married by a Unitarian minister. The BC Court of Appeal in *Egale* examined the option of maintaining the exclusion of same-sex couples from legal marriages and instead creating a new legal relationship for same-sex couples that could have many or all of the same rights and obligations as marriage. As Prowse J. observed:

> [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. . .

[154] . . . 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 the prohibition of 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 LaForme J. 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.
>
> *Egale, supra. at para. 153-156*

40. The CUC totally agrees. It would be insulting to offer RDP to same-sex couples as an alternative to equal marriage.

41. The opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the *Federal Law - Civil Law Harmonization Act, No. 1*, if not merely interpretive , is inconsistent with the *Charter.*

42. **CUC would answer "no" to question 4. It violates s. 15 of the *Charter* and cannot be saved by s. 1**

PART V – NATURE OF ORDER SOUGHT

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

(a) Question 1: yes
(b) Question 2: yes
(c) Question 3: yes
(d) Question 4: no

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver this 8th day of May, 2004.

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Kenneth W. Smith and Robert J. Hughes
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