Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;

AND IN THE MATTER OF a Reference by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes, as set out in Order in Council P.C. 2003-1055, dated July 16, 2003

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Indexed as: Reference re Same-Sex Marriage

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Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

reference by governor in council

Constitutional law — Distribution of legislative powers — Marriage — Solemnization of marriage — Federal proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes — Proposed legislation providing that marriage for civil purposes lawful union of two persons to exclusion of all others — Legislation providing also that nothing in Act affecting freedom of officials of religious groups to refuse to perform marriages not in accordance with their religious beliefs — Whether proposed legislation intra vires Parliament — Constitution Act, 1867, ss. 91(26), 92(12).

Constitutional law — Charter of Rights — Equality rights — Freedom of religion — Proposed federal legislation extending right to civil marriage to same-sex couples — Whether proposed legislation consistent with guarantees of equality rights and freedom of religion — Canadian Charter of Rights and Freedoms, ss. 2(a), 15(1).

Constitutional law — Charter of Rights — Freedom of religion — Proposed federal legislation extending right to civil marriage to same-sex couples — Whether guarantee of freedom of religion protects religious officials from being compelled by state to perform same-sex marriage contrary to their religious beliefs — Canadian Charter of Rights and Freedoms, s. 2(a).

Courts — Supreme Court of Canada — Reference jurisdiction — Discretion not to answer reference questions — Whether Court should decline to answer reference questions — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

Pursuant to s. 53 of the *Supreme Court Act*, the Governor in Council referred the following questions to this Court:

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?

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?

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?

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of

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> 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?

The operative sections of the proposed legislation read as follows:

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

Held: Question 1 is answered in the affirmative with respect to s. 1 of the proposed legislation and in the negative with respect to s. 2. Questions 2 and 3 are both answered in the affirmative. The Court declined to answer Question 4.

Question 1

Section 1 of the proposed legislation is *intra vires* Parliament. In pith and substance, s. 1 pertains to the legal capacity for civil marriage and falls within the subject matter of s. 91(26) of the *Constitution Act, 1867*. Section 91(26) did not entrench the common law definition of "marriage" as it stood in 1867. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. Read expansively, the word "marriage" in s. 91(26) does not exclude same-sex marriage. The scope accorded to s. 91(26) does not trench on provincial competence. While federal recognition of same-sex marriage would have an impact in the provincial sphere, the effects are incidental and do not relate to the core of the power in respect of

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"solemnization of marriage" under s. 92(12) of the *Constitution Act, 1867* or that in respect of "property and civil rights" under s. 92(13).

Section 2 of the proposed legislation is *ultra vires* Parliament. In pith and substance, s. 2 relates to those who may (or must) perform marriages and falls within the subject matter allocated to the provinces under s. 92(12).

Question 2

Section 1 of the proposed legislation is consistent with the *Charter*. The purpose of s. 1 is to extend the right to civil marriage to same-sex couples and, in substance, the provision embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the proposed legislation and with the preamble thereto, points unequivocally to a purpose which, far from violating the *Charter*, flows from it. With respect to the effect of s. 1, the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the s. 15(1) rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster. Although the right to same-sex marriage conferred by the proposed legislation may potentially conflict with the right to freedom of religion if the legislation becomes law, conflicts of rights do not imply conflict with the *Charter*; rather, the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation. It has not been demonstrated in this reference that impermissible conflicts — conflicts incapable of resolution under s. 2(*a*) — will arise.

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Question 3

Absent unique circumstances with respect to which the Court will not speculate, the guarantee of religious freedom in s. 2(*a*) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

Question 4

In the unique circumstances of this reference, the Court should exercise its discretion not to answer Question 4. First, the federal government has stated its intention to address the issue of same-sex marriage legislatively regardless of the Court's opinion on this question. As a result of decisions by lower courts, the common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement and the same is true of s. 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*. The government has clearly accepted these decisions and adopted this position as its own. Second, the parties in the previous litigation, and other same-sex couples, have relied upon the finality of the decisions and have acquired rights which are entitled to protection. Finally, an answer to Question 4 has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada. While uniformity would be achieved if the answer were "no", a "yes" answer would, by contrast, throw the law into confusion. The lower courts' decisions in the matters giving rise to this reference are binding in their respective provinces. They would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. These circumstances, weighed against the hypothetical benefit Parliament might derive from an answer, indicate that the Court should decline to answer Question 4.

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Cases Cited

Applied: *In Re Marriage Laws* (1912), 46 S.C.R. 132; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; **not followed:** *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; **referred to:** *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Teagle v. Teagle*, [1952] 3 D.L.R. 843; *Hellens v. Densmore*, [1957] S.C.R. 768; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310; *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44; *Attorney-General of Saskatchewan v. Attorney-General of Canada*, [1949] 2 D.L.R. 145; *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161; *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL), 2004 YKSC 54; *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL); *N.W. v. Canada (Attorney General)*,

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[2004] S.J. No. 669 (QL), 2004 SKQB 434; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83; *Reference re Truscott*, [1967] S.C.R. 309; *Reference re Regina v. Coffin*, [1956] S.C.R. 191; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.

Statutes and Regulations Cited

Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*a*), 15(1).

Constitution Act, 1867, ss. 91, 91(26), 92, 92(12), 92(13).

Constitution Act, 1982, s. 52.

Federal Law–Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, s. 5.

Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes, Order in Council P.C. 2003-1055, preamble, ss. 1, 2.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

REFERENCE by the Governor in Council, pursuant to s. 53 of the *Supreme Court Act*, concerning the constitutional validity of same-sex marriage. Question 1 is answered in the affirmative with respect to s. 1 of the proposed legislation and in the negative with respect to s. 2. Questions 2 and 3 are both answered in the affirmative. The Court declined to answer Question 4.

Peter W. Hogg, *Q.C.*, and *Michael H. Morris*, for the Attorney General of Canada.

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Cathy S. Pike and *Amyn Hadibhai*, for the intervener the Ontario Human Rights Commission.

Aaron L. Berg, for the intervener the Manitoba Human Rights Commission.

Andrew K. Lokan and *Odette Soriano*, for the intervener the Canadian Civil Liberties Association.

Elliott M. Myers, *Q.C.*, and *Rebecca Smyth*, for the intervener the British Columbia Civil Liberties Association.

James L. Lebo, *Q.C.*, for the intervener the Canadian Bar Association.

William J. Sammon, *Kellie Siegner* and *Peter D. Lauwers*, for the interveners the Canadian Conference of Catholic Bishops and the Ontario Conference of Catholic Bishops.

Barry W. Bussey, for the intervener the Seventh-Day Adventist Church in Canada.

John O'Sullivan, for the intervener the United Church of Canada.

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Kenneth W. Smith and *Robert J. Hughes*, for the intervener the Canadian Unitarian Council.

Mark R. Frederick and *Peter D. Lauwers*, for the intervener the Church of Jesus Christ of Latter-Day Saints.

R. Douglas Elliott, *Trent Morris* and *Jason J. Tan*, for the intervener the Metropolitan Community Church of Toronto.

Cynthia Petersen, *Joseph J. Arvay*, *Q.C.*, *Vanessa Payne* and *Kathleen A. Lahey*, for the interveners Egale Canada Inc., Egale Couples (Melinda Roy, Tanya Chambers, David Shortt, Shane McCloskey, Lloyd Thornhill, Robert Peacock, Robin Roberts, Diana Denny, Wendy Young and Mary Teresa Healy) and B.C. Couples (Dawn Barbeau, Elizabeth Barbeau, Peter Cook, Murray Warren, Jane Eaton Hamilton and Joy Masuhara).

Martha A. McCarthy and *Joanna Radbord*, for the interveners the Ontario Couples (Hedy Halpern, Colleen Rogers, Michael Leshner, Michael Stark, Aloysius Pittman, Thomas Allworth, Dawn Onishenko, Julie Erbland, Carolyn Rowe, Carolyn Moffat, Barbara McDowell, Gail Donnelly, Alison Kemper and Joyce Barnet), and the Quebec Couple (Michael Hendricks and René LeBoeuf).

D. Geoffrey Cowper, *Q.C.*, for the intervener the Working Group on Civil Unions.

David M. Brown, for the intervener the Association for Marriage and the Family in Ontario.

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Ed Morgan and *Lawrence Thacker*, for the interveners the Canadian Coalition of Liberal Rabbis for same-sex marriage and Rabbi Debra Landsberg, as its nominee.

Linda M. Plumpton and *Kathleen E. L. Riggs*, for the intervener the Foundation for Equal Families.

Luc Alarie, for the intervener Mouvement laïque québécois.

Noël Saint-Pierre, for the intervener Coalition pour le mariage civil des couples de même sexe.

Peter R. Jervis and *Bradley W. Miller*, for the interveners the Islamic Society of North America, the Catholic Civil Rights League and the Evangelical Fellowship of Canada, collectively known as the Interfaith Coalition on Marriage and Family.

Gerald D. Chipeur, *Dale William Fedorchuk* and *Ivan Bernardo*, for the interveners the Honourable Anne Cools, Member of the Senate, and Roger Gallaway, Member of the House of Commons.

Written submissions only by *Martin Dion*.

The following is the opinion delivered by

THE COURT —

I. Introduction

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1 On July 16, 2003, the Governor in Council issued Order in Council P.C. 2003-1055 asking this Court to hear a reference on the federal government's *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* ("*Proposed Act*"). The operative sections of the *Proposed Act* read as follows:

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

It will be noted that s. 1 of the *Proposed Act* deals only with civil marriage, not religious marriage.

2 The Order in Council sets out the following questions:

> 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?
>
> 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?
>
> 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?

3 On January 26, 2004, the Governor in Council issued Order in Council P.C. 2004-28 asking a fourth question, namely:

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> 4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 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?

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4 With respect to Question 1, we conclude that s. 1 of the *Proposed Act* is within the exclusive legislative competence of Parliament, while s. 2 is not.

5 With respect to Question 2, we conclude that s. 1 of the *Proposed Act*, which defines marriage as the union of two persons, is consistent with the *Canadian Charter of Rights and Freedoms*.

6 With respect to Question 3, we conclude that the guarantee of freedom of religion in the *Charter* affords religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs.

7 For reasons to be explained, the Court declines to answer Question 4.

II. The Reference Questions

8 Certain interveners suggest that the Court should decline to answer any of the questions posed on this Reference on the ground that they are not justiciable. They argue that the questions are essentially political, should be dealt with in Parliament and lack sufficient precision with respect to the *Proposed Act*'s purpose to permit of *Charter* analysis.

9 The reference provisions of the *Supreme Court Act*, R.S.C. 1985, c. S-26, are broad. In particular, s. 53(1) provides:

> **53.** (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> . . .
>
> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

10 The Court has recognized that it possesses a residual discretion not to answer reference questions where it would be inappropriate to do so because, for example, the question lacks sufficient legal content, or where the nature of the question or the information provided does not permit the Court to give a complete or accurate answer: see, e.g., *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 545; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806; and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at paras. 26-30.

11 We conclude that none of the questions posed here lack the requisite legal content for consideration on a reference. The political underpinnings of the instant reference are indisputable. However, much as in the *Secession Reference*, these political considerations provide the context for, rather than the substance of, the questions before the Court. Moreover, any lack of precision with respect to the *Proposed Act*'s purpose can be addressed in the course of answering the questions.

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12 Question 4 raises other concerns. While it possesses the requisite legal content to be justiciable, it raises considerations that render a response on this reference inappropriate, as discussed more fully below.

A. *Question 1: Is the Proposed Act Within the Exclusive Legislative Authority of the Parliament of Canada?*

13 It is trite law that legislative authority under the *Constitution Act, 1867* is assessed by way of a two-step process: (1) characterization of the "pith and substance" or dominant characteristic of the law; and (2) concomitant assignment to one of the heads of power enumerated in ss. 91 and 92 of that Act: see, e.g., *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 23, *per* Lamer C.J. and Iacobucci J. (dissenting, but not on this point).

14 An answer to Question 1 requires that we engage in this process with respect to both operative sections of the *Proposed Act*.

(1) Section 1 of the *Proposed Act*

15 Section 1 of the *Proposed Act* provides:

> **1.** Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

(a) *Determination of Legislative Competence*

16 The dominant characteristic of s. 1 of the *Proposed Act* is apparent from its plain text: marriage as a civil institution. In saying that marriage for civil purposes is

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"the lawful union of two persons to the exclusion of all others", this section stipulates the threshold requirements of that institution: "two persons", regardless of gender, are legally capable of being married. In pith and substance, therefore, the section pertains to the capacity for marriage.

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17 Turning to the assignment of this matter to an enumerated head of power, we note that legislative authority in respect of marriage is divided between the federal Parliament and the provincial legislatures. Section 91(26) of the *Constitution Act, 1867* confers on Parliament competence in respect of "Marriage and Divorce" whereas s. 92(12) of that Act confers on the provinces competence in respect of "[t]he Solemnization of Marriage in the Province."

18 As early as 1912, this Court recognized that s. 91(26) confers on Parliament legislative competence in respect of the capacity to marry, whereas s. 92(12) confers authority on the provinces in respect of the performance of marriage once that capacity has been recognized: see *In Re Marriage Laws* (1912), 46 S.C.R. 132. Subsequent decisions have upheld this interpretation. Thus, the capacity to marry in instances of consanguinity (*Teagle v. Teagle*, [1952] 3 D.L.R. 843 (B.C.S.C.)) or in view of prior marital relationships (*Hellens v. Densmore*, [1957] S.C.R. 768) falls within the exclusive legislative competence of Parliament.

19 We have already concluded that, in pith and substance, s. 1 of the *Proposed Act* pertains to legal capacity for civil marriage. *Prima facie*, therefore, it falls within a subject matter allocated exclusively to Parliament (s. 91(26)).

(b) *Objections: The Purported Scope of Section 91(26)*

20 Some interveners nevertheless suggested that s. 91(26) cannot be interpreted as granting legislative competence over same-sex marriage to Parliament. Any law allowing same-sex marriage is alleged to exceed the bounds of s. 91(26) in two key respects: (i) the meaning of "marriage" is constitutionally fixed, necessarily incorporating an opposite-sex requirement; and (ii) any such law would trench upon subject matters clearly allocated to the provincial legislatures.

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(i) The Meaning of Marriage Is Not Constitutionally Fixed

21 Several interveners say that the *Constitution Act, 1867* effectively entrenches the common law definition of "marriage" as it stood in 1867. That definition was most notably articulated in *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, at p. 133:

> What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

22 The reference to "Christendom" is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. In the 1920s, for example, a controversy arose as to whether women as well as men were capable of being considered "qualified

persons" eligible for appointment to the Senate of Canada. Legal precedent stretching back to Roman Law was cited for the proposition that women had always been considered "unqualified" for public office, and it was argued that this common understanding in 1867 was incorporated in s. 24 of the *Constitution Act, 1867* and should continue to govern Canadians in succeeding ages. Speaking for the Privy Council in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) (the "*Persons*" case), Lord Sankey L.C. said at p. 136:

> Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the [B.N.A.] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. [Emphasis added.]

This approach applies to the construction of the powers enumerated in ss. 91 and 92 of the *Constitution Act, 1867*.

23 A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. For instance, Parliament's legislative competence in respect of telephones was recognized on the basis of its authority over interprovincial "undertakings" in s. 92(10)(*a*) even though the telephone had yet to be invented in 1867: *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C.). Likewise, Parliament is not limited to the range of criminal offences recognized by the law of England in 1867 in the exercise of its criminal law power in s. 91(27): *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (P.C.), at

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p. 324. Lord Sankey L.C. noted in the *Persons* case, at p. 135, that early English decisions are not a "secure foundation on which to build the interpretation" of our Constitution. We agree.

24 The arguments presented to this Court in favour of a departure from the "living tree" principle fall into three broad categories: (1) marriage is a pre-legal institution and thus cannot be fundamentally modified by law; (2) even a progressive interpretation of s. 91(26) cannot accommodate same-sex marriage since it falls outside the "natural limits" of that head of power, a corollary to this point being the objection that s. 15 of the *Charter* is being used to "amend" s. 91(26); and (3) in this instance, the intention of the framers of our Constitution should be determinative. As we shall see, none of these arguments persuade.

25 First, it is argued, the institution of marriage escapes legislative redefinition. Existing in its present basic form since time immemorial, it is not a legal construct, but rather a supra-legal construct subject to legal incidents. In the *Persons* case, Lord Sankey L.C., writing for the Privy Council, dealt with this very type of argument, though in a different context. In addressing whether the fact that women never had occupied public office was relevant to whether they could be considered "persons" for the purposes of being eligible for appointment to the Senate, he said at p. 134:

> The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.
>
> Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.
>
> The appeal to history therefore in this particular matter is not conclusive.

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Lord Sankey L.C. acknowledged, at p. 134, that "several centuries ago" it would have been understood that "persons" should refer only to men. Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today.

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26 Second, some interveners emphasize that while Lord Sankey L.C. envisioned our Constitution as a "living tree" in the *Persons* case, he specified that it was "capable of growth and expansion within its natural limits" (p. 136). These natural limits, they submit, preclude same-sex marriage. As a corollary, some suggest that s. 1 of the *Proposed Act* would effectively amount to an amendment to the *Constitution Act, 1867* by interpretation based on the values underlying s. 15(1) of the *Charter*.

27 The natural limits argument can succeed only if its proponents can identify an objective core of meaning which defines what is "natural" in relation to marriage. Absent this, the argument is merely tautological. The only objective core which the interveners before us agree is "natural" to marriage is that it is the voluntary union of two people to the exclusion of all others. Beyond this, views diverge. We are faced with competing opinions on what the natural limits of marriage may be.

28 Lord Sankey L.C.'s reference to "natural limits" did not impose an obligation to determine, in the abstract and absolutely, the core meaning of constitutional terms. Consequently, it is not for the Court to determine, in the abstract, what the natural limits of marriage must be. Rather, the Court's role is to determine whether marriage as defined in the *Proposed Act* falls within the subject matter of s. 91(26).

29 In determining whether legislation falls within a particular head of power, a progressive interpretation of the head of power must be adopted. The competing submissions before us do not permit us to conclude that “marriage” in s. 91(26) of the *Constitution Act, 1867*, read expansively, excludes same-sex marriage.

30 Third, it is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44. That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here.

(ii) The Scope Accorded to Section 91(26) Does Not Trench on Provincial Competence

31 The potential impact on provincial powers of a federal law on same-sex marriage does not undermine the constitutionality of s. 1 of the *Proposed Act*. Arguments to the effect that it does can be met: (1) they ignore the incidental nature of any effect upon provincial legislative competence; and (2) they conflate same-sex relationships with same-sex marriage.

32 Clearly, federal recognition of same-sex marriage would have an impact in the provincial sphere. For instance, provincial competence over the solemnization of marriage provided for in s. 92(12) would be affected by requiring the issuance of marriage licences, the registration of marriages, and the provision of civil solemnization services to same-sex couples. Further, provincial competence in relation to property and civil rights provided for in s. 92(13) would be affected in that a host of legal incidents

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attendant upon marital status would attach to same-sex couples: e.g., division of property upon dissolution of marriage. These effects, however, are incidental and do not relate to the core of the powers over solemnization and property and civil rights. Incidental effects of federal legislation in the provincial sphere are permissible so long as they do not relate, in pith and substance, to a provincial head of power (*Attorney-General of Saskatchewan v. Attorney-General of Canada*, [1949] 2 D.L.R. 145 (P.C.), at p. 152).

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33 Our law has always recognized that some conjugal relationships are based on marital status, while others are not. The provinces are vested with competence in respect of non-marital same-sex relationships, just as they are vested with competence in respect of non-marital opposite-sex relationships (via the power in respect of property and civil rights under s. 92(13)). For instance, the province of Quebec has established a civil union regime as a means for individuals in committed conjugal relationships to assume a host of rights and responsibilities: see the *Act instituting civil unions and establishing new rules of filiation*, S.Q. 2002, c. 6. Marriage and civil unions are two distinct ways in which couples can express their commitment and structure their legal obligations. Civil unions are a relationship short of marriage and are, therefore, provincially regulated. The authority to legislate in respect of such conjugal relationships cannot, however, extend to marriage. If we accept that provincial competence in respect of same-sex relationships includes same-sex marriage, then we must also accept that provincial competence in respect of opposite-sex relationships includes opposite-sex marriage. This is clearly not the case. Likewise, the scope of the provincial power in respect of solemnization cannot reasonably be extended so as to grant jurisdiction over same-sex marriage to the provincial legislatures. Issues relating to solemnization arise only upon conferral of the right to marry. Just as an opposite-sex

couple's ability to marry is not governed by s. 92(12), so a same-sex couple's ability to marry cannot be governed by s. 92(12).

34 The principle of exhaustiveness, an essential characteristic of the federal distribution of powers, ensures that the whole of legislative power, whether exercised or merely potential, is distributed as between Parliament and the legislatures: *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 (P.C.) at p. 581; and *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). In essence, there is no topic that cannot be legislated upon, though the particulars of such legislation may be limited by, for instance, the *Charter*. A jurisdictional challenge in respect of any law is therefore limited to determining to which head of power the law relates. Legislative competence over same-sex marriage must be vested in either Parliament or the legislatures. Neither s. 92(12) nor s. 92(13) can accommodate this matter. Given that a legislative void is precluded, s. 91(26) most aptly subsumes it.

(2) Section 2 of the *Proposed Act*

35 Section 2 of the *Proposed Act* provides:

> **2.** Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

36 Section 2 of the *Proposed Act* relates to those who may (or must) perform marriages. Legislative competence over the performance or solemnization of marriage is exclusively allocated to the provinces under s. 92(12) of the *Constitution Act, 1867*.

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37 The Attorney General of Canada suggests that s. 2 of the *Proposed Act* is declaratory, merely making clear Parliament's intention that other provisions of the *Proposed Act* not be read in a manner that trenches on the provinces' jurisdiction over the solemnization of marriage. The provision might be seen as an attempt to reassure the provinces and to assuage the concerns of religious officials who perform marriages. However worthy of attention these concerns are, only the provinces may legislate exemptions to existing solemnization requirements, as any such exemption necessarily relates to the "solemnization of marriage" under s. 92(12). Section 2 of the *Proposed Act* is therefore *ultra vires* Parliament.

38 While it is true that Parliament has exclusive jurisdiction to enact declaratory legislation relating to the interpretation of its own statutes, such declaratory provisions can have no bearing on the constitutional division of legislative authority. That is a matter to be determined, should the need arise, by the courts. It follows that a federal provision seeking to ensure that the Act within which it is situated is not interpreted so as to trench on provincial powers can have no effect and is superfluous.

39 The Court is asked in Question 1 whether s. 2 of the *Proposed Act* is within the exclusive legislative competence of Parliament. Because s. 2 of the *Proposed Act* relates to a subject matter allocated to the provinces, it follows that it does not fall within the exclusive legislative competence of Parliament. The answer to the second part of the first question must therefore be "no".

B. *Question 2: Is Section 1 of the Proposed Act, Which Extends Capacity to Marry to Persons of the Same Sex, Consistent With the Charter?*

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40 To determine whether a provision is consistent with the *Charter*, it is first necessary to ascertain whether its purpose or effect is to curtail a *Charter* right: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331. If so, the further question arises of whether the curtailment is justified under s. 1 of the *Charter*.

(1) Purpose of Section 1 of the *Proposed Act*

41 The purpose of s. 1 of the *Proposed Act* is to extend the right to civil marriage to same-sex couples. The course of events outlined below in relation to Question 4 suggests that the provision is a direct legislative response to the findings of several courts that the opposite-sex requirement for civil marriage violates the equality guarantee enshrined in s. 15(1) of the *Charter*: see *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 BCCA 251; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); and *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup. Ct.).

42 The preamble to the *Proposed Act* is also instructive. The Act's stated purpose is to ensure that civil marriage as a legal institution is consistent with the *Charter*:

. . .

> WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended to couples of the same sex;
>
> AND WHEREAS everyone has the freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms* and officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs;

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43 Turning to the substance of the provision itself, we note that s. 1 embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the *Proposed Act* and with the preamble thereto, points unequivocally to a purpose which, far from violating the *Charter*, flows from it.

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(2) Effect of Section 1 of the *Proposed Act*

44 Section 1 of the *Proposed Act* was impugned before this Court on the basis that, in its effect, it violates ss. 15(1) and 2(*a*) of the *Charter*.

(a) *Section 15(1): Equality*

45 Some interveners submit that the mere legislative recognition of the right of same-sex couples to marry would have the effect of discriminating against (1) religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples. No submissions have been made as to how the *Proposed Act*, in its effect, might be seen to draw a distinction for the purposes of s. 15, nor can the Court surmise how it might be seen to do so. It withholds no benefits, nor does it impose burdens on a differential basis. It therefore fails to meet the threshold requirement of the s. 15(1) analysis laid down in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

46 The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.

(b) *Section 2(a): Religion*

47 The question at this stage is whether s. 1 of the proposed legislation, considered in terms of its effects, is consistent with the guarantee of freedom of religion under s. 2(*a*) of the *Charter*. It is argued that the effect of the *Proposed Act* may violate freedom of religion in three ways: (1) the *Proposed Act* will have the effect of imposing a dominant social ethos and will thus limit the freedom to hold religious beliefs to the contrary; (2) the *Proposed Act* will have the effect of forcing religious officials to perform same-sex marriages; and (3) the *Proposed Act* will create a "collision of rights" in spheres other than that of the solemnization of marriages by religious officials.

48 The first allegation of infringement says in essence that equality of access to a civil institution like marriage may not only conflict with the views of those who are in disagreement, but may also violate their legal rights. This amounts to saying that the mere conferral of rights upon one group can constitute a violation of the rights of another. This argument was discussed above in relation to s. 15(1) and was rejected.

49 The second allegation of infringement, namely the allegation that religious officials would be compelled to perform same-sex marriages contrary to their religious beliefs, will be addressed below in relation to Question 3.

50 This leaves the issue of whether the *Proposed Act* will create an impermissible collision of rights. The potential for a collision of rights does not necessarily imply unconstitutionality. The collision between rights must be approached on the contextual facts of actual conflicts. The first question is whether the rights alleged to conflict can be reconciled: *Trinity Western University v. British Columbia College*

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of Teachers, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the *Charter*: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at paras. 73-74. In both steps, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877) and that the right to religious freedom enshrined in s. 2(*a*) of the *Charter* is expansive.

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51 Here, we encounter difficulty at the first stage. The *Proposed Act* has not been passed, much less implemented. Therefore, the alleged collision of rights is purely abstract. There is no factual context. In such circumstances, it would be improper to assess whether the *Proposed Act*, if adopted, would create an impermissible collision of rights in as yet undefined spheres. As we stated in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.

52 The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(*a*). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

53 The protection of freedom of religion afforded by s. 2(*a*) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.

54 In summary, the potential for collision of rights raised by s. 1 of the *Proposed Act* has not been shown on this reference to violate the *Charter*. It has not been shown that impermissible conflicts — conflicts incapable of resolution under s. 2(*a*) — will arise.

C. *Question 3: Does the Freedom of Religion Guaranteed by Section 2(a) of the Charter Protect Religious Officials From Being Compelled to Perform Same-Sex Marriages Contrary to Their Religious Beliefs?*

55 The *Proposed Act* is limited in its effect to marriage for civil purposes: see s. 1. It cannot be interpreted as affecting religious marriage or its solemnization. However, Question 3 is formulated broadly and without reference to the *Proposed Act*. We therefore consider this question as it applies to the performance, by religious officials, of both religious and civil marriages. We also must consider the question to mean "compelled by the state" to perform, since s. 2(*a*) relates only to state action; the protection of freedom of religion against private actions is not within the ambit of this question. We note that it would be for the Provinces, in the exercise of their power over the solemnization of marriage, to legislate in a way that protects the rights of religious officials while providing for solemnization of same-sex marriage. It should also be noted that human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*.

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56 Against this background, we return to the question. The concern here is that if the *Proposed Act* were adopted, religious officials could be required to perform same-sex marriages contrary to their religious beliefs. Absent state compulsion on religious officials, this conjecture does not engage the *Charter*. If a promulgated statute were to enact compulsion, we conclude that such compulsion would almost certainly run afoul of the *Charter* guarantee of freedom of religion, given the expansive protection afforded to religion by s. 2(*a*) of the *Charter*.

57 The right to freedom of religion enshrined in s. 2(*a*) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice: *Big M Drug Mart*, *supra*, at pp. 336-37. The performance of religious rites is a fundamental aspect of religious practice.

58 It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(*a*) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.

59 The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the

compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.

60 Returning to the question before us, the Court is of the opinion that, absent unique circumstances with respect to which we will not speculate, the guarantee of religious freedom in s. 2(*a*) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

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D. *Question 4: Is the Opposite-Sex Requirement for Marriage for Civil Purposes, as Established by the Common Law and Set Out for Quebec in Section 5 of the Federal Law–Civil Law Harmonization Act, No. 1, Consistent With the Charter?*

(1) Threshold Issue: Whether the Court Should Answer Question 4

61 The first issue is whether this Court should answer the fourth question, in the unique circumstances of this reference. This issue must be approached on the basis that the answer to Question 4 may be positive or negative; the preliminary analysis of the discretion not to answer a reference question cannot be predicated on a presumed outcome. The reference jurisdiction vested in this Court by s. 53 of the *Supreme Court Act* is broad and has been interpreted liberally: see, e.g., *Secession Reference*, *supra*. The Court has rarely exercised its discretion not to answer a reference question reflecting its perception of the seriousness of its advisory role.

62 Despite this, the Court may decline to answer reference questions where to do so would be inappropriate, either because the question lacks sufficient legal content (which is not the case here) or because attempting to answer it would for other reasons be problematic.

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63 In the *Secession Reference*, *supra*, at para. 30, we noted that instances where the Court has refused to answer reference questions on grounds other than lack of legal content tend to fall into two broad categories: (1) where the question is too ambiguous or imprecise to allow an accurate answer: see, e.g., *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 485; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 256; and (2) where the parties have not provided the Court with sufficient information to provide a complete answer: see, e.g., *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at pp. 75-77; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 257. These categories highlight two important considerations, but are not exhaustive.

64 A unique set of circumstances is raised by Question 4, the combined effect of which persuades the Court that it would be unwise and inappropriate to answer the question.

65 The first consideration on the issue of whether this Court should answer the fourth question is the government's stated position that it will proceed by way of legislative enactment, regardless of what answer we give to this question. In oral argument, counsel reiterated the government's unequivocal intention to introduce legislation in relation to same-sex marriage, regardless of the answer to Question 4. The government has clearly accepted the rulings of lower courts on this question and has adopted their position as its own. The common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement. In addition, s. 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, no longer imports an opposite-sex requirement. Given the government's stated commitment to this

course of action, an opinion on the constitutionality of an opposite-sex requirement for marriage serves no legal purpose. On the other hand, answering this question may have serious deleterious effects, which brings us to our next point.

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66 The second consideration is that the parties to previous litigation have now relied upon the finality of the judgments they obtained through the court process. In the circumstances, their vested rights outweigh any benefit accruing from an answer to Question 4. Moreover, other same-sex couples acted on the finality of *EGALE*, *Halpern* and *Hendricks* to marry, relying on the Attorney General of Canada's adoption of the result in those cases. While the effects of the *EGALE* and *Hendricks* decisions were initially suspended, the suspensions were lifted with the consent of the Attorney General. As a result of these developments, same-sex marriages have generally come to be viewed as legal and have been regularly taking place in British Columbia, Ontario and Quebec. Since this reference was initiated, the opposite-sex requirement for marriage has also been struck down in the Yukon, Manitoba, Nova Scotia and Saskatchewan: *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL), 2004 YKSC 54; *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL) (Q.B.); *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL) (S.C.); and *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL), 2004 SKQB 434. In each of those instances, the Attorney General of Canada conceded that the common law definition of marriage was inconsistent with s. 15(1) of the *Charter* and was not justifiable under s. 1, and publicly adopted the position that the opposite-sex requirement for marriage was unconstitutional.

67 As noted by this Court in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 43:

> The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.

The parties in *EGALE*, *Halpern* and *Hendricks* have made this intensely personal decision. They have done so relying upon the finality of the judgments concerning them. We are told that thousands of couples have now followed suit. There is no compelling basis for jeopardizing acquired rights, which would be a potential outcome of answering Question 4.

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68 There is no precedent for answering a reference question which mirrors issues already disposed of in lower courts where an appeal was available but not pursued. Reference questions may, on occasion, pertain to already adjudicated disputes: see, e.g., *Reference re Truscott*, [1967] S.C.R. 309; *Reference re Regina v. Coffin*, [1956] S.C.R. 191; *Reference re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248; and *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 866. In those cases, however, no appeal to the Supreme Court was possible, either because leave to appeal had been denied (*Truscott* and *Milgaard*) or because no right of appeal existed (*Coffin* and *Minimum Wage Act of Saskatchewan*). The only instance that we are aware of where a reference was pursued in lieu of appeal is *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86. That reference is also distinguishable: unlike the instant reference, it was not a direct response to the findings of a lower appellate court and the parties involved in the prior proceedings had consented to the use of the reference procedure.

69 The final consideration is that answering this question has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada. There is no question that uniformity of the law is essential. This is the very reason that Parliament was accorded legislative competence in respect

of marriage under s. 91(26) of the *Constitution Act, 1867*. However, as discussed, the government has already chosen to address the question of uniformity by means of the *Proposed Act*, which we have found to be within Parliament's legislative competence and consistent with the *Charter*. Answering the fourth question will not assist further. Given that uniformity is to be addressed legislatively, this rationale for answering Question 4 fails to compel.

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70 On the other hand, consideration of the fourth question has the potential to undermine the uniformity that would be achieved by the adoption of the proposed legislation. The uniformity argument succeeds only if the answer to Question 4 is "no". By contrast, a "yes" answer would throw the law into confusion. The decisions of the lower courts in the matters giving rise to this reference are binding in their respective provinces. They would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. The result would be confusion, not uniformity.

71 In sum, a unique combination of factors is at play in Question 4. The government has stated its intention to address the issue of same-sex marriage by introducing legislation regardless of our opinion on this question. The parties to previous litigation have relied upon the finality of their judgments and have acquired rights which in our view are entitled to protection. Finally, an answer to Question 4 would not only fail to ensure uniformity of the law, but might undermine it. These circumstances, weighed against the hypothetical benefit Parliament might derive from an answer, convince the Court that it should exercise its discretion not to answer Question 4.

(2) The Substance of Question 4

72 For the reasons set out above, the Court exercises its discretion not to answer this question.

III. Conclusion

73 The Court answers the reference questions as follows:

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?

   Answer: With respect to s. 1: Yes. With respect to s. 2: No.

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?

   Answer: Yes.

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?

   Answer: Yes.

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 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?

   Answer: The Court exercises its discretion not to answer this question.

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74 A number of interveners have sought costs. In accordance with its usual practice on references brought pursuant to s. 53(1) of the *Supreme Court Act*, the Court denies the requests for costs.

The questions referred to were answered as follows:

Question 1: With respect to s. 1, yes. With respect to s. 2, no.

Question 2: Yes.

Question 3: Yes.

Question 4: The Court exercises its discretion not to answer this question.

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Solicitors for the interveners Egale Canada Inc. and Egale Couples: Sack Goldblatt Mitchell, Toronto; Arvay Finlay, Victoria.

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Solicitors for the interveners the Ontario Couples and the Quebec Couple: Epstein Cole, Toronto.

Solicitors for the intervener the Working Group on Civil Unions: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Association for Marriage and the Family in Ontario: Stikeman Elliott, Toronto.

Solicitor for the interveners the Canadian Coalition of Liberal Rabbis for same-sex marriage and Rabbi Debra Landsberg, as its nominee: Ed Morgan, Toronto.

Solicitors for the intervener the Foundation for Equal Families: Torys, Toronto.

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Solicitors for the intervener Mouvement laïque québécois: Alarie, Legault, Hénault: Montréal.

Solicitors for the intervener Coalition pour le mariage civil des couples de même sexe: Saint-Pierre, Grenier, Montréal.

Solicitors for the intervener the Interfaith Coalition on Marriage and Family: Lerners, Toronto.

Solicitors for the interveners the Honourable Anne Cools, Member of the Senate, and Roger Gallaway, Member of the House of Commons: Chipeur Advocates, Calgary.

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