IN THE HIGH COURT OF THE DOMINION OF CANADA

(On appeal from the Ontario Court of Appeal)

BETWEEN:

JULIE PERRY, JOHN HUDSON, and MONA SHERWOOD

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Respondents)

FACTUM OF THE APPELLANT

Team #

Counsel for the Appellant

TABLE OF CONTENTS

PART I: OVERVIEW & STATEMENT OF FACTS

Overview

[1] This case centers on the *Canadian Charter of Rights and Freedoms* ["*Charter*"] guarantee articulated in *Andrews* of "a positive right to equality in both the substance and the administration of the law" and what this guarantee means for those historically excluded and disenfranchised by the law. It is also about whether the *Charter* permits the legislature to exclude those in plural relationships from the fundamental social institution of marriage, on the basis of stereotypes and prejudices about power imbalances embedded within plural relationships.

> *Law Society British Columbia v Andrews,* [1989] 1 SCR 143 at para 34, 56 DLR (4th) 1 [*Andrews*].
> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] The appellants bring this application seeking an order declaring that s. 2 of the *Civil Marriage Act* ["*CMA*"] violates s. 15 of the *Charter* and that the words "or more" be read into s. 2 following the word "two."

> *Civil Marriage Act,* SC 2005, c 33, s 2 [*CMA*]

[3] The appellants take the position that s. 2 of the *CMA* violates their equality rights under s. 15(1) of the Charter on the analogous grounds of sexual orientation and family status. The distinctions imposed by the State function on the basis of invidious stereotypes that diminish the worth and dignity of those in plural relationships. The evidence adduced at trial relates to a certain subset of "polygynous" relationships that bears no resemblance to the collective nature of the Pesherson family. These violations are not demonstrably justified under s. 1 of the *Charter*. The appellants submit the most appropriate remedy in this matter is to read

in the phrase "or more" into the current language of s. 2 as the wording does not substantively alter the nature of the legislation. In the alternative, it is appropriate to suspend a declaration of invalidity to allow Parliament the opportunity to legislate a constitutionally appropriate measure.

Official Problem at 4

Statement of Facts

[4] Mona Sherwood, Dr. Julie Perry, and John Hudson are committed conjugal partners who live together as a family with their three children, Sam, Kayla, and Molly, in Riverville, Ontario. None of the children are from previous relationships. The applicants have been in a committed plural relationship for fifteen years, and their first child, Sam, was born eight years ago.

Official Problem at 1, 3.

[5] The applicants are in an exclusive relationship. They are sexually intimate with each other, both in individual pairings and as a group, but none has been involved romantically or sexually with anyone outside their plural relationship since its inception. All three are tied "emotionally, spiritually... socially and economically". Their finances are intertwined, they have joint ownership of their home, and are all beneficiaries under each other's wills.

Official Clarifications.
Official Problem at 3.

[6] Biologically, Sam is the child of Julie and John, and Kayla and Molly are the children of Mona and John. The children regard all three as their parents, however. To the elder children, Mona is "Mama", Julie is "Mom", and John is "Dad"; Molly has not yet learned to speak. All three children have the last name "Pesherson", a

portmanteau of "Perry", "Sherwood", and "Hudson", because it is recognized that all three applicants are *de facto* parents of all the children.

Official Problem at 1.

[7] The Pesherson children are "well-adjusted and behaved", performing appropriately in school, and are at or above the norm in terms of their childhood development.

Official Problem at 6.

[8] The applicants wish to legally formalize the non-biological parent-child relationships within their family. However, they have refrained from doing so until this point, because they wish to make a single adoption application once they "are done adding to their family".

Official Problem at 1.

[9] Because of the egalitarian nature of Mona, John, and Julie's relationship, they have chosen not to pick a pairing within their relationship to become legally married and receive benefits, as it is crucial to them that the law recognizes their full relationship.

Official Problem at 1.

[10] In light of their love and commitment, the applicants wish to become married in a three-person union. They are prevented from doing so by s. 2 of the *Civil Marriage Act*, which stipulates a limit of two parties to civil marriages.

Official Problem at 1.

[11] In 2008, Julie, John, and Mona brought an application to challenge s. 2 of the *Civil Marriage Act* on the ground that it infringes s 15(1) of the *Charter*.

Official Problem at 1.

PART II: POINTS IN ISSUE

[12] This appeal raises the following issues:

Issue #1: Does s. 2 of the *Civil Marriage Act* infringe the applicants' right to equality under s. 15(1) of the *Charter*?

Issue #2: If so, is this breach justified under Section 1 of the *Charter*?

Issue #3: What are the appropriate remedies in these circumstances?

PART III: STATEMENT OF ARGUMENT

ISSUE #1: Does s. 2 of the *Civil Marriage Act* infringe the applicants' right to equality under s. 15(1) of the *Charter*?

1. Section 2 of the *Civil Marriage Act* violates section 15(1) of the *Charter*

[13] In *Kapp*, the Supreme Court framed the current s. 15(1) test: First, does the law create a distinction based on an enumerated or analogous ground? Second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

> *R v Kapp,* 2008 SCC 41 at paras 17, 24, [2008] 2 SCR 483 [*Kapp*].

[14] A section 15(1) analysis should focus on the purpose of the equality guarantee, to ensure the protection of "groups who suffer social, political and legal disadvantage in our society" (*Andrews*). The lack of a proper contextual approach that examines both the impugned legislation and the larger context in which it operates risks divorcing a s. 15(1) analysis from its pursuit of substantive equality.

> *Andrews, supra* para 1 at para 10.
> *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at paras 193, 194, [2009] 1 SCR 222 [*Ermineskin*].

[15] It is submitted that the inclusion of the word "two" in the definition of marriage in s. 2 of the *CMA* is contrary to s. 15(1). The distinction is based on two interrelated but distinct analogous grounds: sexual orientation and family status.

> *CMA, supra* para 2 s 2.
> *Halpern v Canada* (AG) (2003), 65 OR (3d) 201 at para 9, 225 DLR (4th) 529 [*Halpern*].

2. Section 2 of the *Civil Marriage Act* creates differential treatment

[16] Section 2 of the *Civil Marriage Act* defines "marriage" as "... the lawful union of two persons to the exclusion of all others". This limitation of "marriage" to two persons creates a *prima facie* distinction between couples and plural unions.

CMA, supra para 2 s 2 [emphasis added].

3. <u>The distinction is based on the grounds of sexual orientation and family status.</u>

[17] The second stage of a section 15(1) inquiry considers whether the differential treatment at issue is based on a prohibited enumerated or analogous ground. Determining whether a particular personal characteristic is analogous to those enumerated in s. 15(1) requires a purposive approach to determine whether the proposed ground would further the purpose of s. 15 – preventing disadvantage based on stereotype and social prejudice.

Kapp, supra para 13 at para 23.

[18] The enumerated and analogous grounds should be instruments for finding discrimination and a means to an end in that regard. A rigid focus on the technicalities of the disputed ground in question threatens to undermine the overarching purpose of s. 15(1), by giving primacy to the enumerated and analogous grounds rather than the word "discrimination" (*Egan*).

> *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at paras 7-8, 173 DLR (4th) 1 [*Corbiere*].
> *Egan v Canada,* [1995] 2 SCR 513 at para 48, 124 DLR (4th) 609, L'Heureux-Dube J, dissenting [*Egan*].

[19] A determination of whether a characteristic is to be considered an analogous ground must also take into consideration a variety of other factors such as:

- The nature and situation of the group at issue, and the "social, political and legal history of Canadian society's treatment of that group";
- Whether the decision adversely impacts on a "discrete and insular minority" which has been historically discriminated against;
- The group's vulnerability to having its interests disregarded.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 93, 170 D.L.R (4th) 1 [*Law*].
Andrews, supra para 1 at para 46.
Miron v Trudel, [1995] 2 SCR 418 at para 149, 23 OR (3d) 160 [*Miron*].

[20] Individuals in plural relationships fit all the indicia of a disadvantaged group. Plural relationships are marked with societal disapproval by an overwhelming portion of Canadians. Those in plural relationships often inhabit a place of isolation from so-called "mainstream" society, an isolation furthered by a lack of formal recognition. Moreover, this lack of legal recognition has led to economic disadvantage for individuals in them, hampering their ability to govern their economic affairs.

Official Problem at 3-5.

3. (a) Sexual Orientation

[21] The Supreme Court has recognized sexual orientation as an analogous ground.

Egan, supra para 18 at para 5.
Vriend v Alberta, [1998] 1 SCR 493 at para 13, 156 DLR (4th) 385 [*Vriend*].
M v H, [1999] 2 SCR 3 at para 2, 43 OR (3d) 254 [*M v H*].

[22] Once a ground has been deemed analogous for the purposes of s. 15(1) it stands as a constant marker of potential legislative discrimination. The appellants submit that the lower Courts were correct in accepting that the ground "sexual orientation" encompasses the nature of the discrimination in this case.

Corbiere, supra para 18 at para 8.

(i) A broad definition of sexual orientation incorporating both "status" and "conduct" is necessary under s.15 (1)

[23] Courts have reinforced that assessment of discrimination must remain adaptive to evolving societal recognition of the harms of discrimination. As held in *Corbiere*, "the second stage (of the Law test) must be flexible enough to adapt to

stereotyping, prejudice or denials of human dignity … and to reflect changing social phenomena or new or different forms of stereotyping or prejudice."

Corbiere, supra para 18 at para 61, L'Heureux-Dube J.
Andrews, supra para 1 at para 175.

[24] A definition of sexual orientation that is fixed in time fails to satisfy the fundamental purpose of equality jurisprudence to extend protection to those who have suffered "social, political and legal disadvantage." (*Andrews*) In defining sexual orientation, the Supreme Court in *Egan* emphasized that sexual orientation as a ground of protection encompassed both "status" and "conduct," and that sexual orientation was "something demonstrated in an individual's conduct by the choice of a partner" (*Egan*). The appellants submit that an inclusive definition of sexual orientation incorporating both status and conduct is: "an individual's sexual identity but also their sexual choices and how they choose to express that identity" (*Hayes*).

Andrews, supra para 1 at para 10.
Egan, supra para 18 at paras 52, L'Heureux-Dube J, dissenting, 172, 175, Cory J, dissenting.
Hayes v Barker, [2005] BCHRT 590 at para 22, [2005] BCHRTD No 590.

(ii) Polyamory and a predisposition towards plural relationships falls within the definition of sexual orientation

[25] It is unnecessary for the appellants to prove their sexual predispositions are physiologically rooted in order to meet the definition of sexual orientation. Rather, the Supreme Court requires only "constructive immutability," that the characteristic in question is deeply personal and "changeable only at [an] unacceptable personal cost" which the State has no legitimate interest in imposing (*Egan*).

Corbiere, supra para 18 at paras 13, 14.
Official Problem at 3.
Egan, supra para 18 at para 5.

[26] The configuration of the appellants' relationship is not a mere personal preference, but a fundamental part of their identity. Each applicant has been unable to form a fulfilling long-term two-person relationship and only found satisfaction in their current, plural relationship. The length of the relationship and its stable, egalitarian nature indicate more than a passing preference towards plural relationships by the appellants, but a family structure that reflects their way of life.

Official Problem at 3.

[27] The appellants submit that nothing within the *core* meaning of sexual orientation articulated in *Egan* excludes them from the ground of sexual orientation. The crucial element of Cory J's definition was the recognition that an individual's sexual predispositions and choice of partners has served as a basis for discrimination and persecution throughout history. The vulnerability and disadvantage that homosexual persons have historically faced as a result of their departure from sexual norms is *precisely* the same type of disadvantage the appellants seek to redress. A narrow definition of sexual orientation in this context would come at the expense of ameliorating the serious disadvantage of a class of persons.

Egan, supra para 18 at paras 172 and 175, Cory J, dissenting.
Egan v Canada, [1993] FC 401 at 625, 103 DLR (4th) 336 (CA) [*Egan FCA*].

3. (b) Family Status

[28] The appellants submit that family status should be recognized as an analogous ground, on the basis of which they have been discriminated against.

[29] There are no good reasons to deviate from the Federal Court of Appeal's determination in *Thibaudeau* that family status is analogous to the enumerated grounds in s. 15(1). As Hugessen J stated:

> I consider it to be almost self-evident that such status [referring to "family status"] has historically been, and is still, used as a basis for stereotyping … the fact that family status or some similar expression figures as a prohibited ground of discrimination in most human rights statutes also serves to confirm its analogous nature to the grounds enumerated in the *Charter*.
>
> *Thibaudeau v MNR*, [1994] 2 FC 189 at para 44, 114 DLR (4th) 261 (CA) , rev'd on other grounds [1995] 2 SCR 627, 125 DLR (4th) 449 [*Thibaudeau*].

(i) Domestic Human Rights Provisions

[30] An important factor in recognizing an analogous ground is pre-existing legislative recognition (*Miron*). The enumeration of "family status" in nearly all provincial and territorial human rights legislations serves as recognition of the very type of vulnerability s. 15(1) seeks to protect.

> *Human Rights Code (Ontario),* RSO 1990, c H 19, s 10(1).
> *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 3(1)(b), 44(1)(f).
> *Miron, supra* para 19 at paras 148,149.
> *Thibaudeau, supra* para 29 at paras 41, 44.

(ii) A broader definition of family status satisfies the purpose of section 15

[31] While legislative enumeration is an important factor in establishing an analogous ground, key conceptual differences between s. 15(1) and human rights legislation warrant caution in importing definitions into s. 15(1) of the Charter.

> *Andrews, supra* para 1 at paras 37, 38.
> *Miron, supra* para 19 at para 61.

[32] Narrowing the definition of family status to "a parent-child" relationship has the effect of excluding important familial relationships and family configurations. This would have the perverse effect of excluding qualitatively familial relationships that experience disadvantage because of their departure from the nuclear family model. As the Ontario Human Rights Commission conceded:

> The Code's current definition on family status is under inclusive and may have an adverse impact on a number of groups protected by the *Code*. The *Code* should be amended to include a broader range of relationships that is more reflective of current family and caregiving relationships in Ontario.
>
> Ontario Human Rights Commission, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consultation/famconsult/pdf > at 21, 24, 25 [*Cost of Caring*].
> *Canada (Attorney General) v Mossop,* [1993] 1 SCR 554 at paras 116, 121, 100 DLR (4th) 658, 46 CCEL 1, L'Heureux-Dubé J, dissenting [*Mossop*].

[33] It is submitted that an example of an inclusive definition of family status is "the status of being discriminated against on the basis of a) the configuration of one's family or b) relation to another person by blood, marriage, adoption." This functional definition would protect "family status" relationships already defined under human rights legislation but also protect the increasingly broad range of family structures that differ from a traditional nuclear family model (*Mossop*).

> *Mossop, supra* para 33 at paras 116, 117, L'Heureux-Dubé J, dissenting.
> *Alberta Human Rights Act, supra* para 31 ss 3(1)(b), 44(1)(f).

[34] Though there exist a multiplicity of ways to define "family", it is submitted that there are five critical attributes that assist in definition:

i. The family is a system or unit.
ii. Its members may or may not be related and may or may not live together.
iii. The unit may or may not contain children.
iv. There is commitment and attachment among unit members that include future obligation.
v. The unit caregiving functions consist of protection, nourishment and socialization of its members.

> *Mossop, supra* para 33 at para 116, L'Heureux-Dube J, dissenting.

[35] The appellants meet all of the relevant factors fundamental to a conception of family. They are a stable, supportive and loving family unit living together with their

three children. Insofar as the law has not impeded their ability to do so, the appellants have taken steps to support each other socially, emotionally and economically. It is submitted that a purposive approach to s. 15(1) necessitates the inclusion of the appellants family configuration within a definition of "family status."

Official Problem at 3-5.

4. Section 2 of the *Civil Marriage Act* perpetuates disadvantage and prejudice

[36] The final stage of the *Kapp* test assesses whether the distinction creates disadvantage by perpetuating prejudice or stereotyping. This question must account for broader social, political and legal contexts and is undertaken from the point of view of "a reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as the claimant."

Kapp, supra para 13 at para 17.
Ermineskin, supra para 14 at paras 193, 194.
Law, supra para 19 at para 7.

[37] It is submitted that the appellants' exclusion from the institution of marriage:

i. is a result of stereotypical assumptions about power imbalances within all plural relationships;
ii. disproportionately impacts an already historically disadvantaged group; and
iii. undermines their autonomy and ability to make fundamental choices over their lives.

[38] The trial judge's definition of "polygny" and the adduced findings of fact signal the stereotyping prevalent towards individuals in plural relationships. Evidence adduced at trial relating to a particular subset of "polygynous" relationships was conflated to encompass *all* plural relationships throughout the analysis of the lower courts. The Peshersons are a well adjusted, stable family, exhibiting none of the hallmarks of oppression said to exist within plural relationships. To assume this

gendered power imbalance, even benign, harms the self-worth of the male cast as an oppressor as well as the women in the relationship. Both women are career minded individuals who are the primary wage–earners in the family. To attribute a sense of victimhood and subservience on them on the basis of their sexual predisposition is to replicate the same patriarchal power relations the state seeks to remedy.

Official Problem at 1, 2.

[39] In *Kapp* the Supreme Court emphasized that the four contextual factors identified in *Law* should not be "read strictly as if they were legislative dispositions" but rather to inform the central concern of s. 15 – combating discrimination. It is submitted that two of the *Law* factors are particularly relevant to the appeal at bar: pre-existing disadvantage and the nature of the interest affected.

Kapp, supra para 13 at para 24.

(i) Pre-existing disadvantage

[40] The presence of a pre-existing disadvantage amongst the claimant group is particularly relevant when assessing the impact of the impugned provisions and whether the provisions perpetuate or promote the pre-existing disadvantage.

Law, supra para 19 at para 64.

[41] Inaccurate assumptions and stereotypes about the qualities of a particular group can connote second-class status. Furthermore, the fact that a claimant belongs to a historically disadvantaged group may indicate a longstanding failure by the legal system and society at large to extend a feeling of equal respect and concern.

> Denise Reaume, "Discrimination and Dignity" in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the* Charter, (Toronto: Irwin Law, 2006) 123 at 125, 139, 141 [*Discrimination and Dignity*].

[42] Individuals in plural relationships have historically experienced disadvantage as a result of their departure from prevailing social norms. They have been marked by non-recognition and exclusion from spousal and familial benefits that flow to those in a monogamous relationship. The disadvantage endured by those in plural relationships is particularly relevant to their exclusion from legal benefits that only flow to two-person marriage; an exclusion which is premised, in part, on a moral judgment that two-person monogamous relationships are the ideal model and an inappropriate conflation of *all* plural relationships as patriarchal polygynist relationships (Emens). Historically, the law has further imposed moral blameworthiness on plural relationships by way of criminal sanctions. As evidence tendered at trial indicates, plural relationships continue to be met with social hostility and revulsion by a significant majority of Canadians. The appellants submit that these factors indicate that those in plural relationships experience pre-existing disadvantage.

> Elizabeth F Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence," (2004) 29 NYU Rev L & Soc Change 277 at 283, 285.
> *Egan FCA*, *supra* para 28 at 630-631.
> *Official Problem* at 1, 2-4.

(ii) Nature of the interest affected

[43] Marriage is one of the most significant forms of personal relationships and the decision to marry is a profound personal choice. Like the claimants in *Halpern, Egale* and *Hendricks* the appellants want access to one of our most fundamental social institutions. The importance of the interest is a factor weighing in favour of the appellants, both for the corresponding spousal benefits those in plural relationships may currently be excluded from as well as marriage's symbolic importance.

Halpern, supra para 15 at paras, 3-6.
EGALE Canada v Canada (AG), 2003 BCCA 251, 225 DLR (4th) 472 [*EGALE*].
Catholic Civil Rights League v. Hendricks (2004), 238 DLR (4th) 577, 131 ACWS (3d) 705.
Miron, supra para 19 at para 102.

[44] Whether a legislative distinction is discriminatory must be determined in light of *Charter* values, and one of those essential values is liberty and the ability to make fundamental choices regarding one's life (*Walsh*). Denying consenting adults access to marriage on the basis of stereotypes seriously undermines both the appellants' sense of self-worth and their agency. This denial perpetuates the same affront to dignity recognized in *Halpern;* that plural relationships are not capable of engendering loving and lasting bonds like monogamous relationships and are not worthy of the same respect. It is submitted that the limitations imposed by the government restricting the freedom of choice of those in plural relationships offends our sense of liberty and constitutes discrimination under s. 15(1) of the *Charter.*

Halpern, supra para 15 at paras 93, 95, 107.
Nova Scotia (Attorney General) v Walsh, 2002 SCC 84 at para 62-64, [2002] 4 SCR 325 [*Walsh*].
Discrimination and Dignity, supra para 27 at 157.

5. The *Civil Marriage Act* does not qualify as an ameliorative program for the purposes of s. 15(2) of the *Charter*

[45] Recourse to *s. 15(2)* is only available *if* the government can demonstrate that: (1) the program in question has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. The appellants submit that even if the *CMA* is an "ameliorative program," its underinclusive nature demands full *Charter* scrutiny.

Kapp, supra para 13 at paras 40, 41.

Cunningham v Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239 at paras 24-26, 27, 457 AR 297 [*Cunnigham*].

(i) Underinclusive ameliorative schemes demand full Section 15(1) scrutiny

[46] For the purposes of s. 15(2), an ameliorative scheme need not address all forms of discrimination, and can be specifically targeted to assist a specific disadvantaged group. However, the government cannot *further* weaken a historically disadvantaged group also affected by that ground or any other enumerated or analogous ground. As Iacobucci J stated in *Law*, "underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination."

Law, supra para 19 at para 72.

[47] In a challenge of underinclusiveness to an ameliorative scheme by a disadvantaged group, the relevant consideration is the basis of the exclusion of the claimants from the ameliorative scheme and the effects of that exclusion, *not* the ameliorative purpose of the impugned scheme. This analysis is long-recognized under s. 14(2) of the *Ontario Human Rights Code.* Being able to defend a claim of underinclusiveness by pointing to an ameliorative purpose completely bypasses the issue of discrimination and is inconsistent with substantive equality. If discriminatory effects of specific provisions could be protected by an overall ameliorative purpose, cases like *Vriend* would no longer be good law (*Cunningham*).

Jonette Watson-Hamilton and Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-Kapp," (2010) 47 Alta L Rev 927 at 948-949.
Ontario Human Rights Commission v. Ontario (1994), 117 DLR (4th) 297, 73 OAC 20.
Cunningham, supra para 46 at paras 23.

[48] A deferential approach that would dispose of the appellant's claim of underinclusiveness would create an uneven system of equality. It would ignore discriminatory distinctions within an ameliorative scheme that served to obscure the experiences of those increasingly marginalized and exacerbate their disadvantage. Equality within the purposes of the *Charter* cannot be a zero-sum game for historically disadvantaged groups. At its core s. 15(2) was meant to address and remedy power imbalances, not create new ones.

> *Kapp, supra* para 13 at paras 46-48, 58.
> *Cunningham, supra* para 46 at paras 25-27.

ISSUE #2: Is the infringement justified under s. 1 of the *Charter*?

1. Overview – The *Oakes* Test

[49] *R v Oakes* established the test for determining whether or not a limitation on a *Charter* right is justifiable under s. 1 of the *Charter*. The test has two main components. It is first necessary to determine whether the limitation has an objective that is sufficiently "pressing and substantial in a free and democratic society". If such an objective is found to exist, the Court will then conduct a proportionality analysis in order to determine whether the means of the limitation are proportional to the objective and the effects of the limitation. This proportionality analysis has three sub-tests: the "rational connection" test, the "minimal impairment" test, and the balancing of the deleterious and salutary effects (*Dagenais*) of the legislation. The onus remains on the government during the entire s 1 analysis (*Oakes*).

> *R v Oakes*, [1986] 1 SCR 103 at paras 66, 69-70, 26 DLR (4th) 200, 14 OAC 335 [*Oakes*].
> *Charter*, *supra* para 1 at s 1.
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 20 OR (3d) 816, 120 DLR (4th) 12 [*Dagenais]*.

2. (a) The objective of the limitation cannot be said to be pressing and substantial because it is indeterminate

[50] McLachlin J held in *RJR-MacDonald*: "Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified". This reasoning was affirmed in *Toronto Star*.

> *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 144, 127 DLR (4th) 100 CCC (3d) 449, McLachlin J [*RJR-MacDonald*].
> *Toronto Star Newspapers v Canada*, 2010 SCC 21 at para 20, [2010] 1 SCR 721 [*Toronto Star*].

[51] In *Charter* cases involving underinclusive legislation, while courts have considered the objective of the law as a whole, the objective test nonetheless cannot be satisfied without a sufficient objective attaching to the limitation itself.

> *Vriend*, *supra* para 21 at paras 108-116.
> *M v H*, *supra* para 21.
> *Halpern*, *supra* para 15.

[52] It is submitted that the only clearly discernable objective in s. 2 of the *CMA* is the broad objective of recognizing same-sex civil marriages, and that the government has not discharged its burden of demonstrating an objective particular to the impugned limitation. Nowhere in the Preamble or provisions of the *CMA* is rationale for the term "two". There is nothing in the evidentiary record, no accepted legislative fact from trial, to support the assertion that any part of s. 2 represents, as the respondents argued at trial, "a measured response to the evils posed by polygamy".

> *Official Problem* at 2.

[53] The *CMA* was enacted subsequent to rulings in cases such as *EGALE* and *Halpern*, which held the common-law definition of marriage, which was historically the "lawful and voluntary union of one man and one woman to the exclusion of all

others", to be contrary to s 15(1) of the *Charter*. Prior to its enactment, the *CMA* was addressed in the *Same-Sex Marriage Reference*, where the Supreme Court explicitly said of what is now s 2: "The purpose of s. 1 of the *Proposed Act* is to extend the right to civil marriage to same-sex couples... [T]he provision is a direct legislative response to the findings of several courts" in cases such as those identified above.

> *EGALE*, *supra* para 44.
> *Halpern, supra* para 15 at para 16.
> *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 41, [2004] 3 SCR 698, 246 D.L.R. (4th) 193 [*Same-Sex Marriage Reference*] (emphasis added).

[54] In *A c B*, it was argued before the Quebec Superior Court that the term "deux" in s 2 of the French version of the *CMA* involved a response to the issue of polygamy. That court ultimately found that "[l]e seul but poursuivi par le Parlement en adoptant la *Loi sur le mariage civil* était de modifier la definition traditionnelle du mariage comme institution hétérosexuelle".

> *A c B*, 2009 QQCS 3210 at paras 156, 162, 67 RFL (6th) 315, [2009] RJQ 2070, varied on other grounds 2010 QCCA 1978, JE 2010-1970.

[55] Section 2 of the *CMA* reflects an adjustment to the common law definition of marriage, made in order to meet one objective. The impugned limitation has carried over from the common law, and the government has not demonstrated a valid objective behind its inclusion.

2. (b) Objectives that promote social or moral agendas cannot be pressing and substantial

[56] Certain types of objectives cannot satisfy s. 1 of the *Charter*. These include promotion of a moral mandate that does not derive from a "fundamental conception of morality" specifically rooted in *Charter* values (*Butler*), and reinforcement of a legal or social norm itself being scrutinized (*Halpern*).

R v Butler, [1992] 1 SCR 452 at paras 77-80, 89 DLR (4th) 449, [1992] 2 WWR 577 [*Butler*].
Halpern, *supra* para 15 at para 119.

[57] The appellants submit that, in the absence of a sufficient evidentiary record or judicial consideration of s. 2, this Court ought to infer no more than necessary in order to make sense of the limitation. The objectives that require minimum inference are the promotion of two-person marriages for their own sake and the reinforcement of a moral mandate. All that follows from the existence of the limitation is the fact that Parliament favours two-person marriages. Susan Drummond emphasizes that the legal rejection of polygamy is rooted in religious imperatives. Similarly the *Same-Sex Marriage Reference,* citing *Hyde*, acknowledged the Christian root of the traditional conception of marriage. The appellants submit that it is more reasonable to infer an objective rooted in reinforcement of norms than an objective directed toward protection of women and children from harm.

Susan G Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall LJ 317 at 359-360.
Same-Sex Marriage Reference, *supra* para 53 at paras 21-22.
Hyde v Hyde (1866), [1866] CCS No 30, LR 1 P & D 130.

3. The restriction of marriage to two persons is not rationally connected to the protection of women and/or children from of harm

[58] The government submits that its objective is "the protection of women and children from harmful polygynous relationships". While it is acknowledged that the "rational connection" component of the *Oakes* can be satisfied "by applying reason and logic" (*Toronto Star*), there is no such basis on which to believe that the impugned infringement can further the alleged legislative objective.

Official Problem at 2.
Toronto Star, *supra* para 56 at para 25.

[59] The impugned measure in this case is not a restriction on plural relationship structures or activity, but on the legal recognition of plural *marriage*. As the dissent of Blin JA acknowledged in light of relevant scholarship, "legal prohibitions on polygamy do little to dissuade people from practicing it". Any harms may associated with the practice of polygamy are not addressed by a prohibition on marriage.

Official Problem at 7.

[60] The government's assertion at trial that the impugned limitation is part of a "regulatory scheme" suggests that it is believed to be at least a necessary, if not sufficient, condition to satisfying the government's objective. By comparison, however, a ban on "monogamous" marriage is not a necessary condition for preventing abuse between domestic partners. The prohibition is divorced from the harm – they are not rationally related. Likewise, a ban on plural marriage cannot reasonably address harms potentially found within such relationships.

Official Problem at 2.

4. (a) The infringement does not minimally impair the appellants' right because the government's objective requires only the targeting of unlawful harms

[61] The government must also demonstrate that the means by which it operates impair the relevant *Charter* right as little as possible while still largely achieving the objective set out by Parliament. The Supreme Court in *Hutterian Brethren* held that "the court need not be satisfied that [any] alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure", lest such a stringent standard "effectively immunize the law from scrutiny".

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 55, [2009] 2 SCR 567, 310 DLR (4th) 193 [*Hutterian Brethren*].

[62] The focus of relevant legislation should be on harms that are currently considered unlawful. These include sex-related harms, abuse of children and young women, and corporal punishment. Harms that exist in particular cases of "polygyny" will continue with or without a ban on plural marriage. The government's objective is best met not via a principled objection to plural relationships, but by targeting unlawful harms that are always wrong, in any type of relationship. This "targeting" approach has been entertained by scholars writing on plural relationships.

> Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall LJ 183 at 225.
> Drummond, *supra* para 63 at 321, 362-366.

[63] Statutory frameworks exist that are intended to address harm to children. In Ontario, for example, Part III of the *Child and Family Services Act* (especially ss. 37 and 57-57.1) gives the court authority to intervene for the benefit of a "child in need of protection" and offers a robust framework for protecting children from domestic harms. Additionally, corporal punishment is prohibited by s 43 of the *Criminal Code*.

> *Child and Family Services Act*, RSO 1990, c C.11 ss 37-87 [*CFSA*].
> *Criminal Code*, RSC 1985, c C-46 s 43.

[64] Statutory regimes exist in other provinces that are designed to minimize harm to children in family environments. This protection typically extends beyond physical harm or sexual abuse and into "emotional harm" (*CPA*).

> *Child, Family and Community Service Act*, RSBC 1996, c 46.
> *Child and Family Services Act,* CCSM, c C80.
> *Child Protection Act,* RSPEI 1988, c C-5.1 s 9(k)-(n) [*CPA*].

[65] The evidentiary record suggests concerns with young girls becoming married in "polgygamous" unions. Legal endorsement of plural marriage would not suddenly open the door to children marrying adults. In Ontario, for example, minors cannot be

married without parental consent, and even then the age threshold is sixteen (*Marriage Act*). This would be the case no matter the definition of marriage.

> *Official Problem* at 4.
> *Marriage Act,* RSO 1990, c M.3 s 5(2).

[66] With respect to adult women, domestic violence legislation can offer particularized protection beyond that offered by the *Criminal Code* for assault and sexual assault. For example, the Saskatchewan *Victims of Domestic Violence Act* gives the court discretion to intervene quickly where necessary through an "emergency intervention order", or a "victim's assistance order" that can include temporary "exclusive occupation of the residence", compensation for losses flowing from the domestic abuse, and temporary possessory orders regarding important shared personal property.

> *Criminal Code*, *supra* para 69 ss 265-269, 271-273.2.
> *Victims of Domestic Violence Act*, SS 1994, c V-6.02 ss 3, 7.

[67] Even where certain protections may not exist in particular jurisdictions, the question is not whether legislation already exists but whether it *would* be the means that least infringes the appellant's *Charter* right while largely achieving the objective.

[68] Some protections are unlikely to be made available *without* access to marriage. For example, Ontario's statutory family property regime is only available to married couples, and cannot be accessed by the very women that the government seeks to protect from "lack of independent access to wealth and assets for women".

> *Family Law Act*, RSO 1990, c F.3 ss 1(1), 4-16 [*FLA*].
> *Official Problem* at 5.

[69] As more effective and less impairing measures are available, the impugned limitation must fail on the minimal impairment test.

4.(b) The infringement ignores a crucial and categorical distinction between types of plural unions

[70] If the Court requires some limitation on access to marriage, the appellants are nonetheless in a discrete category of "polygamous" relationship which ought not to be excluded. All of the evidence before the court that addresses the "harms" of "polygamy" is directed toward a very specific kind of "polygynous" relationship. Any restriction on marriage should be directed only at what the appellents submit are "true polygynous" relationships, which are categorically distinguishable from "nominally polygynous" and other *bona fide* plural unions.

[71] The broad definition of "polygyny" employed by the trial judge does not sufficiently correspond to the type of relationship with which the government is concerned. At trial, Dakana J used the term "polygyny" "to refer to the situation of one man having several wives". Nominally, the appellants are in a "polygynous" relationship, as the appellant Mr. Hudson would, were the appellants married, have more than one wife. However, this emphasis ignores the fact Dr. Perry and Ms. Sherwood would not merely be "co-wives" to Mr. Hudson but would be *married to each other,* sharing all of the love and commitment that flows from that relationship.

Official Problem at 2, 4.

[72] The distinction between what the appellants identify as "true polygyny" and "nominal polygyny" is not made explicit in the evidence before the court, but follows the language of the trial judgment and its review of the evidence and findings of fact.

[73] Defining "polygyny" as "the situation of one man having several wives" has the implication that all formal relationships flow through the man. Wives, on this account, are something that the man "has". Otherwise, polygyny could be described

as a relationship in which (for example) 'multiple parties are married to each other, only one of whom is a man'. There is no reason to emphasize the man's role unless the "wives" do not have a marriage relationship to each other. This is the relationship emphasized by Dakana J, identified by the appellants as "true polygyny", and which scholar Lisa Kelly describes as a configuration of "dyadic multiple partnerships".

> Lisa M Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65:1 UT Fac L Rev 1 at 8.

[74] "Nominal polygyny", on the other hand, is a plural relationship where only one party is a man. This relationship is communal, egalitarian, and not gender-focused. Substantively, it is a "plural union", not "polygyny".

[75] The evidentiary record suggests that the alleged harms derive from the "true polygyny" relationship. Dakana J's findings of fact refer to "competition among co-wives". The term "co-wife" implies a relationship where women share only the quality of being married to a single husband. Similarly, the evidence warns of "substantially increased feelings of loneliness among women in polygynous relationships". It stands to reason that this derives from sharing the time, energy and attention of a single spouse. Also referred to are situations in which male children are expelled from polygynous societies in light of "the competition for wives"; if women could have multiple partners, "competition" would presumably not be a problem.

> *Official Problem* at 4-5.

[76] *Bona fide* plural unions are distinguishable from truly polygynous relationships which run the risk of being inegalitarian in their structure. It follows that the appellants' rights are not minimally impaired when plural unions are excluded from the legal definition of marriage.

4.(c) A minimally impairing definition can require that all parties be married to all others in a collective union

[77] Assuming a limitation on marriage, a minimally impairing definition will require all parties to plural unions to make a marriage commitment to all others. This creates a marriage that is structurally egalitarian, is not a genuine source of the government's concern. The corollary of this is that the government avoids being forced to recognize a form of relationship that its evidence suggests is problematic, but also does not infringe the s 15(1) rights of those in *bona fide* plural unions.

5. The impugned measure affords no real, material benefits, but imposes heavy burdens

[78] The final stage of the *Oakes* test requires that the salutary effects of the infringement be balanced against the deleterious. Introduced in *Dagenais*, this approach has departed from the original requirement that the objective be balanced. The current test was affirmed in *Hutterian Brethren*: while "the first three stages of *Oakes* are anchored in an assessment of the law's purpose", the balancing test asks "whether the benefits of the impugned law are worth the cost of the rights limitation".

> *Oakes*, supra para 55.
> *Dagenais*, supra para 55 at para 95.
> *Hutterian Brethren*, supra para 67 at paras 76-77 (emphasis added).

[79] As has been submitted, nothing in the evidentiary record sufficiently suggests how the refusal to legally recognize plural marriages will accrue practical benefits.

[80] There are, however, a number of deleterious effects that flow from the infringement. The most obvious is loss of dignity. Ms. Sherwood, Dr. Perry, and Mr. Hudson, like the applicants in *Halpern*, desire to have their relationship recognized in the eyes of the law, but are currently delegitimized by the law and, accordingly, the community. As *Halpern* cited one of the affiants in that case:

> I want the family that [we] have created to be understood by all of the people in our lives and by society. If we had the freedom to marry, society would grow to understand our commitment and love for each other... We want community recognition and support. I doubt that society will support us and our children, if our own government does not afford us the right to marry.

These words could apply to the appellants. *Halpern* held that exclusion from marriage is itself harmful. This is a harm the appellants now suffer.

> *Official Problem* at 1.
> *Halpern*, supra para 15 at paras 9, 107.

[81] Practical consequences flow from this infringement. As Dakana J found at trial, "the applicants are unable to claim all the benefits that are available to married couples". As discussed above, for example, the Ontario property equalization regime is available only to married couples. Furthermore, as *Halpern* identified, under the *FLA*, where unmarried spouses are eligible for benefits such as spousal support, they must have cohabited for three years first; married couples have immediate access to this regime. Finally, it is uncertain whether those in plural relationships can successfully claim spousal benefits under existing legislation.

> *Official Problem* at 3.
> *Family Law Act*, *supra* para 74 ss 1(1), 4-16, 29 [*FLA*].
> *Halpern*, *supra* para 15 at para 104.
> Kelly, *supra* para 79 at 33-34.

[82] The Courts below recognized the risks posed to the very groups government claims it is seeking to protect. As Blin JA noted in light of relevant scholarship, prohibitions on polygamous marriage "are likely to further isolate polygamists from mainstream society" and "also deny women in polygynous relationships access to the full protection of the family law, which is available to spouses in traditional monogamous marriages". Dakana J found that academic evidence indicates "that the

lack of official recognition of polygamous relationships exacerbates a number of the problems experienced by women and children in polygynous families". In short, by pushing these relationships away from legal recognition, we also push individuals away from the watchful eyes and protective shelter of the law.

Official Problem at 5, 7.

ISSUE #3: What is an appropriate remedy?

1. Overview

[83] It is submitted that the most appropriate remedy in this case is reading in the words "or more" after the word "two" and before the word "persons" in s 2 of the *CMA*. In the alternative, the appellants request that the Court suspend a declaration of invalidity of the infringing measure for a limited time, so Parliament may legislate a constitutionally-appropriate alternative.

2. It is most appropriate to read the phrase "or more" into s. 2 of the *CMA*

[84] The Supreme Court in *Schachter* held that it can be appropriate to read relevant language into an unconstitutionally underinclusive provision in order to make it compliant. The Court did determine that in certain circumstances, such as when reading in would involve "complex" measures resembling legislative action, or where the change would alter or contravene the nature or purpose of the legislation, the Court would be limited in its ability to "read in". The Court's concern was respect for the sole authority of Parliament to craft legislative measures.

Schachter v Canada, [1992] 2 SCR 679 at para 55, 51-69, 93 DLR (4th) 1, 10 CRR (2d) 1 [*Schachter*].

[85] The reading in of the phrase "or more" falls within the *Schachter* parameters, and simply extends "marriage" to include those who, *as of right*, should have access

to it. If remedy is being considered, an unjustifiable *Charter* infringement has already been established. As the Court in *Vriend* held, "the closest a court can come to respecting the legislative intention is to determine what the legislature would likely have done if it had known that its chosen measures would be found unconstitutional". To suggest that reading in the phrase "or more" fundamentally changes the nature the legislation is to revert to the same mode of thinking that the appellants have demonstrated is discriminatory: it presumes marriage to be a two-person institution.

Schachter, *supra* para 90.
Vriend, *supra* para 21 at para 167.

PART IV: Order Sought

[86] The Appellants, Julie Perry, Mona Sherwood, and John Hudson, respectfully request:

(a) an Order declaring s 2 of the *Civil Marriage Act* unconstitutional to the extent that it limits to two the number of persons who can enter into a marriage;
(b) an Order declaring that
(i) the phrase "or more" be read in to s 2 of the *Civil Marriage Act* after the word "two" and before the word "persons"; or
(ii) in the alternative, an Order suspending an official declaration of invalidity for no more than twelve months; and

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated February 11, 2011

Team #

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