IN THE HIGH COURT OF THE DOMINION OF CANADA

(On appeal from the Court of Appeal for Ontario)

BETWEEN:

JULIE PERRY, JOHN HUDSON, and MONA SHERWOOD

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

Team #
Counsel for the Respondent

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PART I – STATEMENT OF FACTS

A. Overview

[1] The Respondent opposes the application brought forward by the Appellants, which, at its core, demands the State sanctify a family structure that is likely to be harmful to women and children. The Appellants seek an order declaring that s. 2 of the *Civil Marriage Act* ["*CMA*"] violates s. 15 of the *Canadian Charter of Rights and Freedoms* ["*Charter*"], and that the words "or more" be read into s. 2, following the word "two". At issue are significant social and economic consequences, which have far-reaching implications beyond the institution of marriage. Polygamous relationships are disproportionately associated with harm to women and children. Parliament's decision to limit the definition of civil marriage to couples is a reasonable attempt to prevent this harm. The limitation does not amount to discrimination under s. 15 of the Charter. If the Appellants establish an infringement of the right to equality, s. 2 of the *CMA* is a justifiable limit in a free and democratic society.

> *Civil Marriage Act,* SC 2005, c 33 [*CMA*].
> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].

B. Polygamous Union at Issue

[2] The Appellants, John Hudson, Julie Perry, and Mona Sherwood live together in a polygamous relationship in the City of Riverville, Ontario. Julie and John have one biological child: Sam; John and Mona have two biological children: Kayla and Molly. The children consider all three adults to be their 'parents'.

> *Official Problem* at 1.

[3] The Appellants submit that they do not find monogamous relationships fulfilling, and that they are disposed to polygamy. Dakana J. refused to make a finding in regards to the biological roots of polygamous tendencies.

Official Problem at 3-4.

[4] The Appellants prefer the term "polyamorous" to refer to their relationship.

Official Problem at 2.

[5] The Appellants consider the option of two of them marrying to be unacceptable. As a three person union, they seek formal recognition as married and seek access to all the benefits that are available to married couples.

Official Problem at 1.

C. Harms Associated with Polygamy

[6] The Appellants have been found to be in a "committed, loving and stable relationship" with "well-adjusted and behaved" children. This dynamic is a rarity among polygamous unions, which disproportionately perpetuate harm to both women and children.

Official Problem at 6.

[7] 97% of polygamous relationships are polygynous.

Official Problem at 5.

[8] Polygynous unions stereotype women into reproductive and service roles.

Official Problem at 4.

[9] Women in polygynous relationships often feel physically, emotionally, sexually and materially neglected. They compete against their co-wives leading to persistent feelings of jealousy, tension and strain within the household.

Official Problem at 4.

[10] Robbed of their personal, intellectual, social, political and moral autonomy, these women are no longer empowered to make choices relating to their sexual intimacy, reproduction or marital status, and are pushed into a low socio-economic status.

Official Problem at 5.

[11] In comparison to women in monogamous relationships, women in polygynous unions experience an increased tendency towards:

- low self-esteem
- low level of personal identity (beyond identities related to their social role)
- stress
- mental health illness
- loneliness

Official problem at 4 -5.

[12] Polygynous unions produce families that experience dysfunction; inadequate health care and nutrition; social isolation; corporal punishment; increased stress in the mother-child relationship; and deprivation of paternal bonding.

Official Problem at 5.

[13] Children to polygynous unions are found to have lower education; lower academic achievement; and lower self-esteem.

Official Problem at 5.

[14] Cultures where polygyny is widespread frequently experience social unrest and disorder attributable to the competition for wives.

Official Problem at 5.

[15] Polygamous unions do not align with the values of Canadian citizens - 96% of Canadians disapprove of polygamy.

Official Problem at 4.

D. Procedural History

[16] Dakana J., at the Superior Court of Justice, held that s. 2 of the *Act* violated s. 15 of the *Charter* based on the analogous ground of sexual orientation. Nonetheless, she went on to find that s. 2 of the *CMA* is a:

> measured response to the evils posed by polygamy, particularly polygyny, and aligns with not only fundamental Canadian equality values but the country's international rights obligations to women and children who often suffer harm as parties to such relationships.

Official Problem at 2.

[17] Justice Shahmoradi, writing for the majority of the Court of Appeal for Ontario, upheld the decision of the trial judge. He had some reservation in finding that s. 2 of the *CMA* violated the equality rights of the Appellants. The Court of Appeal emphasized that marriage is an institution of equals that is "founded upon the value of, among other things, exclusive intimacy between two persons." Section 2 of the CMA was upheld as a reasonable limit under s.1.

Official Problem at 7.

PART II – STATEMENT OF POINTS IN ISSUE

[18] This Court has granted leave to appeal on the following questions:

1. Does s. 2 of the *Civil Marriage Act* infringe the applicants' right to equality under s. 15(1) of the *Charter*?
2. If the answer to (1) is yes, is the infringement reasonable and demonstrably justified in a free and democratic society?

3. If the answer to (2) is no, what is the appropriate remedy?

[19] It is respectfully submitted that this Court should answer these three questions as follows:

1. The ameliorative purposes of the *CMA* shield s. 2 from scrutiny under s. 15(1). In the alternative, the Appellants have not demonstrated a violation of s. 15(1). They are not members of a group identified by an analogous or enumerated ground, nor does the impugned provision reflect reliance on prejudice or stereotype necessary to a finding of discrimination in a substantive sense. In addition, defining marriage as a union between two persons is consistent with s. 28 of the *Charter,* which ensures that rights are guaranteed equally to women and men.
2. An analysis under s. 1 of the *Charter* corroborates the constitutionality of this legislation: it is carefully crafted to respond to the harms posed by most polygamous unions and upholds Canada's commitment to ensuring women's equality and children's security.
3. This application should be dismissed. In the alternative, should the legislation be declared of no force or effect, this Court should suspend the declaration of invalidity.

PART III – STATEMENT OF ARGUMENT

A. SECTION 15

[20] This Court does not need to engage in a substantive analysis under s. 15(1) of the *Charter*. The purpose of the *CMA* is to promote the realization of s. 15(1) rights and, as such, it is an ameliorative law protected under s. 15(2) of the *Charter*. In the alternative, if this Court considers it necessary to engage in a s. 15(1) analysis, the Appellants have failed to meet their burden. The distinction produced by s. 2 of the *CMA* is not based on an enumerated or analogous ground and is not substantively discriminatory within the meaning of s. 15.

Section 15(2)

I. The ameliorative purposes of the *CMA* shield the impugned provision from challenge under s. 15(1).

[21] Section 15(1) and 15(2) work together to promote the achievement of substantive equality. In order for a law to be afforded protection under section 15(2), the government must demonstrate that: a) the law has an ameliorative or remedial purpose; b) the law targets a disadvantaged group identified by one of the enumerated or analogous grounds; and c) the law is rationally related to the ameliorative goal.

R v Kapp, 2008 SCC 41 at paras16, 41,49, [2008] 2 SCR 483[*Kapp*].

[22] The overarching statutory purpose of the *CMA* is ameliorative (*Preamble, SSM Reference*). By extending the civil definition of marriage to same-sex couples, the *CMA* enhances their rights under the *Charter*. Same-sex couples have been delineated as a group deserving of protection within the recognized analogous ground of sexual orientation (*Egan*).

CMA, supra para 1 at Preamble.

Reference Re Same-Sex Marriage, 2004 SCC 79 at paras 41, 43, 73, [2004] 3 SCR 698 (2004) [*SSM Reference*].
Egan v Canada, [1995] 2 SCR 513 at para 5, 124 DLR (4th) 609 [*Egan*].

[23] An additional ameliorative purpose is assigned to the impugned provision. Parliament's decision to limit the definition of marriage to two persons was an effort to limit the proliferation of polygamous unions in order to prevent the harm to women and children traditionally associated with the vast majority of these relationships. Sex and age are enumerated grounds in s. 15. Women and children have been identified as groups deserving of particular protection.

Official Problem at 7.
Charter, *supra* para 1 at s 15.

[24] The ameliorative purpose identified by government need not be the sole object of the legislation, nor does government need to demonstrate that the legislation achieved the intended purpose. The law need only be rationally related to the objective, meaning it must be "plausible that the program may indeed advance the stated goal of combating disadvantage". This law is an example of such a scheme, as contemplated by the court in *R v Kapp*.

Kapp, *supra* para 21 at paras 47-49, 51-52.

II. Protecting the *CMA* from challenge under section 15(1) is consistent with the broader purpose of s. 15(2).

[25] To overly scrutinize government's attempts at amelioration nullifies the purpose of s. 15(2), which is to "[enable] governments to pro-actively combat existing discrimination through affirmative measures". Courts have recognized that this process does not produce perfect outcomes, "programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups". Accordingly, the standard under s. 15(2) permits significant deference to Parliament.

Kapp, supra para 21 at paras 25, 28, 49.

[26] Passing legislation to include same-sex couples within the definition of civil marriage was a high-profile, highly controversial, and heavily debated process, which required a great deal of legislative effort and political commitment. Failing to exercise deference in this case risks discouraging Parliament from enacting ameliorative legislation for disadvantaged groups in the future.

Section 15(1)

[27] In the alternative, if it is necessary to proceed to a consideration of s. 15(1), the Appellants have not met their burden of establishing a violation. The Respondent's submissions under s. 15(1) are guided by the following three considerations:

- Marriage is the union of a couple. Should the court grant the Appellants' request, the Court will be sanctioning a novel form of social relationship. The consideration of such a radical redefinition of a fundamental social and legal institution should be left to elected officials.
- The practice of polygyny is overwhelmingly embedded in social structures that oppress women.
- The claimants' relationship is unique. However, laws are necessarily drafted to address the general rather than the idiosyncratic. There are exceptions and individual circumstances to every general situation but these exceptions and unique cases do not in and of themselves, make the law unconstitutional.

I. <u>The criteria necessary for a challenge under s. 15(1) are not established.</u>

[28] The Supreme Court's decision in *Kapp* confirms that in order to establish a violation of s. 15(1) a claimant must prove that:

a. The impugned law creates a distinction based on an enumerated or analogous ground

b. The distinction creates a disadvantage by perpetuating prejudice or stereotyping

Kapp, supra para 21 at para 17.
Ermineskine Indian Band and Nation v Canada, 2009 SCC 9 at para 188, [2009] 1 SCR 222 [*Ermineskine*].

a. The distinction that results from limiting marriage to two persons is not based on an enumerated or analogous ground.

[29] The Respondent concedes that individuals in polygamous unions are subject to differential treatment by s. 2 of the *CMA* relative to couples. The Courts below found a distinction based on sexual orientation. The Appellants submit that their rights are also violated on the grounds of both family and marital status. The distinction is not based on any of these three grounds. Participants in a multiple party conjugal relationship are not distinguished by their sexual orientation, family, or marital status, as those terms are understood in *Charter* jurisprudence. Further, polygamy is not a personal characteristic of the sort that the *Charter* seeks to protect.

1. Sexual orientation is not so broad as to include a tendency towards multiple partners contemporaneously.

i. Sexual orientation does not include number of partners.

[30] The ground of sexual orientation has been recognized exclusively by reference to an orientation towards a partner of the same-sex or opposite-sex or mix (bisexual): "Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual." [*emphasis added*] The tendency towards a multiple party conjugal relationship is not inherent in one's predisposition as a homosexual, heterosexual or bisexual. No court has recognized this tendency as included within the ambit of sexual orientation.

Egan, supra para 22 at para 175.

ii. Polyamorous couples do not share the historical disadvantage experienced by homosexuals.

[31] The process of recognizing sexual orientation as an analogous ground involved a consideration of the historical disadvantage and discrimination experienced by homosexuals. In *Egan*, the majority relies on the description of historical disadvantage provided by Cory J. in dissent:

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation. [...] They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation [...]. [*emphasis added*]
>
> *Egan, supra* para 22 at paras 171, 173.

[32] There is no evidence before the court to conclude that polygamous unions, as a diffuse group, share a history of disadvantage that would be comparable to that of homosexuals.

iii. Polygamy is a personal preference.

[33] An individual's decision to be with multiple parties contemporaneously is distinct from the immutable or constructively immutable nature of sexual orientation. Dakana J. refused to establish that a tendency towards polygamy was biologically determined. In the absence of supporting evidence, this Court should be wary of concluding that a sexual preference is a constructively immutable characteristic (not alterable except on the basis of unacceptable costs) (*Corbiere*). Changing a sexual preference will always come with some costs; determining, however, that sexual preferences are alterable only on the basis of *unacceptable* costs and are therefore constructively immutable, opens the definition of sexual orientation to an infinite variety of sexual preferences.

Official Problem at 4.
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 at para 13, 173 D.L.R. (4th) 1 [*Corbiere*].

2. Marital status does not include a preference towards multiple partners.

[34] Marital status is not an appropriate ground to capture a distinction based on the number of persons in a conjugal relationship. This ground has a precise and well-understood meaning in Canadian anti-discrimination law. The Ontario *Human Rights Code* defines marital status as "the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship". This definition of marital status is consistent with the courts understanding of marital status as an analogous ground under s. 15. The distinction at hand is not based on marital status. The Appellants are not being treated differently on the basis of whether or not they are married, single, widowed, divorced, separated or in a conjugal relationship. The distinction drawn by this law is based on the number of persons in a conjugal union.

Human Rights Code (Ontario), RSO 1990, c H 19, s 10(1) [*Human Rights Code*]
Miron v Trudel, [1995] 2 SCR 418 at para 150, 23 OR (3d) 160 [*Miron*].

3. Family status is not recognized as an analogous or an enumerated ground under the *Charter*.

[35] The Supreme Court has refused to recognize family status as an analogous ground under s. 15 of the *Charter*. While the Federal Court of Appeal accepted family status as an analogous ground of discrimination in *Thibaudeau v MNR,* this same Court later rejected family status as an analogous ground in *Pilette v Canada.*

Thibaudeau v Canada, [1995] 2 SCR 627, 124 DLR (4th) 449.
Thibaudeau v MNR (FCA), [1994] 2 FC 189 at paras 45, [1994] FCJ No 577.
Pilette v Canada, 2009 FCA 367 at para 43, 402 NR 183.

[36] Even if the Appellants establish that family status should be an analogous ground under the *Charter,* family status is predominantly defined as a parent-child relationship

(including blood and those arising from bonds of marriage, sanguinity or legal adoption). It does not include the number of persons within a family.

See e.g. *Human Rights Code*, supra para 34.

4. There are sound reasons for why this Court should not expand or establish a new analogous ground for the purposes of including polygamous unions.

[37] The purpose of the enumerated and analogous grounds are to recognize fundamental characteristics which "often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic" that is either immutable or constructively immutable. There is no accepted evidence that polygamy is an immutable characteristic, or that this tendency is linked to a pattern of disadvantage that is not easily escaped. The Appellants are attempting to equate a personal preference with immutability. The *Charter* is not intended to constitutionally protect the personal preferences of every individual – not only would this exhaust judicial resources, but it would also compromise the purpose of s. 15.

Corbiere, supra para 33 at para 13.

[38] Enumerated and analogous grounds are not easily repealed or amended (*Andrews*). For this reason, particular care should be taken before recognizing a novel personal characteristic as an analogous ground. Courts exercise this care by constitutionally recognizing analogous grounds under s. 15 after they have achieved legislative consensus (*Egan*). For instance, sexual orientation was not recognized as an analogous ground of discrimination until it was included in the human rights statutes of eight Canadian provinces (*Pentney, Egan*). Similarly, all the provincial human rights codes recognized marital status prior to it being recognized as an analogous ground under

the *Charter* in 1995 (*Miron*). No Canadian human rights code recognizes polygamy as a legitimate ground for discrimination that needs state protection.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 38, 56 DLR (4th) 1 [*Andrews*].
> *Egan, supra* para 22 at paras 178, 5.
> William F. Pentney et al, *Discrimination and the Law: Including Equality Rights Under the Charter*, vol 2 loose-leaf (consulted on 6 February 2010), (Toronto: Thomson Reuters Canada Ltd., 2004), ch 9 at 1, 48, 63 [*Pentney*].
> *Miron, supra* para 34.

b. Limiting the definition of marriage to two persons is a legitimate, non-discriminatory and calculated response to the ills of polygamy.

[39] The Respondent concedes that the distinction created by limiting marriage to couples creates a disadvantage; persons in polygamous unions cannot marry.

[40] Not all legislative distinctions on an enumerated or analogous ground can amount to an infringement of s. 15(1). This would paralyze Parliament's capacity to act in the best interest of Canadians. Therefore, only distinctions which amount to discrimination fall within the scope of s. 15(1).

> *Andrews, supra* para 38 at para 10.
> *Ermineskine, supra* para 28 at para 188.

[41] The proper analysis for determining whether an impugned provision is discriminatory is detailed in *Kapp* and reaffirmed in *Ermineskine*. The Supreme Court, reverting back to the approach under *Andrews*, calls for a focus on combating discrimination, defined in terms of perpetuating disadvantage and stereotyping, thus abandoning the dispositive weight once placed on the four contextual factors established in *Law*.

> *Ermineskine, supra* para 28 at para 188.
> *Kapp, supra* para 21 at para 24.
> *Andrews, supra* para 38 at para 43, 46.

[42] The terms 'prejudice' and 'stereotype' are not judicially defined in a clear and consistent fashion. The Respondent submits that these terms should be understood as follows: **Prejudice:** "A legislative distinction based on prejudice denies a class of persons a benefit out of *animus* or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status" (*Reaume*). **Stereotype**: A stereotype is operating when "a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess". It involves attributing characteristics which are false. However, where a description is an accurate account of the group – no stereotype is present (*Law, Gosselin*).

> Denise Reaume, "Discrimination and Dignity" in Fay Faraday, Maragret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the* Charter, (Toronto: Irwin Law, 2006) 123 at 149 [*Reaume*].
> *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para 64, 170 DLR (4th) 1 [*Law*].
> *Gosselin v Quebec (Attorney General),* 2002 SCC 84 at para 56, [2002] 4 SCR 429 [*Gosselin*].

[43] There is no evidence that persons in plural unions have experienced pre-existing disadvantage. However, even if this Court proceeds on the assumption that polygamous unions have been historically disadvantaged, polyamorous unions should be excluded from this assumption. A sub-group within a larger group that does not share a similar history of being undervalued cannot rely on the pre-existing disadvantage of the larger group for the purposes of the discrimination analysis. (*Gosselin*) The Appellants', as a polyamorous union, have a strong social network and are active participants in 'mainstream' society. Polyamorous unions do not share a history of disadvantage.

> *Gosselin, supra* para 42 at para 32.

[44] The distinction arising from the limitation in s. 2 of the *CMA* is not a result of prejudice or stereotype, but arises from three valid considerations: 1) the differences

between couples and polygamous unions; 2) the impact on the economic, social, and legal structure of Canadian society, and; 3) Parliament's commitment to gender equality.

1) The practice of polygamy is not recognized under the *CMA* because of its harmful effects on women and children.

[45] This legislation responds to the exploitative and harmful dynamics found to exist in polygynous unions, which constitute the vast majority of polygamous relationships. There is no stereotype at play when a group based generalization is accurate. Many evidence-based group generalizations have been sustained by the Supreme Court even though exceptions within the group may exist.

Gosselin, supra para 42 at para 56.

[46] Polygynous unions do not typically feature the sort of loving, intimate relationship associated with marriage. Women are often stereotyped into service roles whereby they are deprived of full intellectual, social, political and moral autonomy. Rather than experiencing intimacy with their partners, women are frequently lonely, and must compete for physical, emotional, sexual and material attention, as well as economic security.

Official Problem at 4-5.

[47] Children raised in polygynous households are deprived of the paternal bonding found in coupled marriages. These children face inadequate health care and nutrition, lower levels of education and academic achievement as well as social isolation.

Official problem at 5.

[48] The state is not barred from creating a distinction that takes into account the prevailing social reality of a particular group. The evidence illustrates that this legislative distinction is based on a true appreciation of the facts. Extending the civil definition of

marriage to include polygynous unions would impose a harmful family structure on this social institution and effectively strip it of its recognized values.

2) Canada's social, economic, and legal structure is inextricably intertwined with units of two persons.

[49] The *CMA* limits marriage to two persons not out of prejudice or stereotype, but out of recognition that the possibility of an indeterminate number of people in marriage creates countless practical difficulties.

[50] Regulations under the *Immigration and Refugee Protection Act*, for instance, permit a permanent resident or Canadian citizen to sponsor his or her spouse as a member of the family class. Polygamous relationships are currently excluded from this definition of spouse. If polygamous marriages are recognized under the *CMA*, migration will likely rise significantly, and arbitrary distinctions on spousal sponsorship might become necessary in order to curb the influx of immigrants.

Immigration and Refugee Protection Regulations, SOR/2002-227, ss 5, 117(1)(a).

[51] Legally recognizing marital communes of an indeterminate number of persons will require an overhaul of the economic and social foundations on which our society is built. Parliament was not exercising prejudice or stereotype by limiting marriage to two persons. Rather, this decision was made on the basis of sensible policy considerations. If legal recognition were given to unions consisting of up to a dozen members, many of the social and economic schemes administered by the government would be stretched beyond practical means.

3) The definition of civil marriage adheres to Parliament's commitment to gender equality under s. 28 of the *Charter*.

[52] The meaning and purpose of s. 15(1) can be enhanced by reference to other specific rights and freedoms of the *Charter* (*Big M.*). Section 28 of the *Charter* provides

as follows: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Feminist activists who lobbied for s. 28 were concerned that s. 15(1) would only protect formal equality, rendering the provision incapable of remedying sex discrimination. Moreover, activists wanted assurance that government's efforts to preserve multicultural heritage under s. 27, would not result in legislating the unequal treatment of women.

> *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 117, 60 AR 161 [*Big M*].
> *Charter, supra* at para 1 ss 27, 28.
> Beverley Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms:* A Purposive Interpretation" (2005) 17 CJWL 46 at 47-48, 51-52 [*Baines*].

[53] Jurists and commentators alike have treated s. 28 as an interpretive and "rights-enhancing" provision (*Bains, Red Hot).* Parliament intended *Charter* rights to apply equally to men and women, and sought to eliminate the possibility that a claimant's success under s. 15(1) could result in further subordination of women.

> *Baines, supra* para 52 at 52, 68.
> *R v. Red Hot Video Ltd.* (1985), 18 CCC (3d) 1 at para 31-32, 45 CR (3d) 36 (BCCA).

[54] Expanding marriage to include unions of two or more would constitutionalize the protection of relationships that exacerbate female oppression. Polygamy is not gender-neutral. Polygynous relationships are far more prevalent than polyandrous relationships or "group marriages". Limiting marriage to two persons is not discriminatory; it is in accordance with Parliament's commitment to ensuring that rights are guaranteed equally to men and women.

B. SECTION 1

Limiting the definition of marriage to 'couples' is a justifiable limit on the right to equality under s. 1 of the Charter.

[55] If this Court finds the definition of marriage in s. 2 of the *CMA* to be an infringement of the Appellants' right to equality under s. 15 of the *Charter*, the test for justification under s. 1 must be applied. The appropriate test was set out by the Supreme Court in *R v. Oakes*. The first step is to determine whether the objectives of the legislation are sufficiently important to justify limiting the *Charter* right. Secondly, the means chosen to attain those objectives must be proportional to the ends. This second requirement has three criteria: (1) the rights violation must be rationally connected to the objective of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) the salutary benefits must outweigh the deleterious effects of the legislation.

> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, 14 OAC 335 [*Oakes*].
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 20 OR (3d) 816.

[56] The trial judge and the Court of Appeal were correct in finding that s. 2 of the *CMA* was justified under s. 1 of the *Charter*. Limiting the definition of civil marriage to couples is based on a pressing and substantial objective. The provision is rationally connected to the objective, it impairs the right to equality as little as possible, and its benefits outweigh the deleterious effects.

I. The objectives of s. 2 of the *CMA* are pressing and substantial.

[57] When a law has been found to violate the *Charter* due to underinclusion, both the objective of the exclusion or limitation and the objective of the law as a whole must be considered. The latter provides the necessary context for the limitation "in order to

provide a more complete understanding of its operation in the broader scheme of the legislation."

Vriend v. Alberta, [1998] 1 SCR 493 at paras 109-113, 156 DLR (4th) 385.

a. The objective of the limitation is to prevent harm to women and children.

[58] As accepted by Justice Shamoradi at the Court of Appeal for Ontario, the objective of limiting civil marriage to couples in s. 2 of the *CMA* is to withhold legal recognition and discourage the creation of polygamous unions in an effort to prevent the harm to women and children traditionally associated with the vast majority of these relationships.

Official Problem at 7.

[59] It is a general rule of statutory interpretation that legislation is "presumed to be coherent and effective, and provisions are presumed to be straightforward, exact, grammatically correct, [...] and consistent." Parliament's use of the word "two" illustrates their direct intention to limit the institution of marriage to couples, and explicitly exclude groups of more or less than two.

Ruth Sullivan, *Sullivan on Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc., 2008) at 206.

[60] When the *CMA* was passed in 2005, Parliament was operating in a context where polygamy was a criminal offence under s. 293 of the Criminal Code. Limiting the definition of marriage to couples in s. 2 of *CMA* was a necessary part of a regulatory regime aimed at preventing the spread of harm to women and children associated with this criminal practice.

Official Problem at 2.

[61] This objective is pressing and substantial because it fulfills the state's commitment to upholding the equality rights of women, and accords with Canada's international human rights obligations. In *R. v. Keegstra*, the Court noted that "the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself." If a value has the status of an international human right, this should generally be indicative of a high degree of importance attached to that objective (*Slaight*).

> *R v Keegstra*, [1990] 3 SCR 697 at 750, [1991] 2 WWR 1.
> *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 at 1056-7, 59 DLR (4th) 416, [*Slaight*].

[62] As a party to the *Convention on the Elimination of all Forms of Discrimination Against Women*, Canada has an obligation to take measures to safeguard women's right to equality. Article 16 states that parties must take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. In particular, states must "[...] ensure, on a basis of equality of men and women: (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent."

> *Convention on the Elimination of All Forms of Discrimination against Women,* 34 UN GAOR Suppl. (No. 21) (A/34/46), UN Doc. A/Res/34/180 (1979) *[Women's Convention].*

[63] Article 2(a) states that parties to the Convention must undertake to "embody the principle of the equality of men and women in their national constitutions or other appropriate legislation...and to ensure, through law and other appropriate means, the practical realization of this principle." [*emphasis added*] Polygynous unions are associated with harms such as a lack of marital choice for women, diminished sexual and

reproductive choice, lack of independent access to wealth and assets, and deprivation of full intellectual, social, political and moral autonomy for women.

> *Women's Convention*, *supra* para 62, Art. 2(a).
> *Official Problem* at 4-5.

[64] Canada also has international obligations with regards to the rights of children. For example, as a signatory to the *Convention on the Rights of the Child*, Canada must ensure that state action, including legislation, is taken with regard to the "best interests of the child" (Article 3.1). The facts indicate that polygynous relationships have been linked with lower education levels for children, lower levels of academic achievement, as well as lower levels of self-esteem.

> *Convention on the Rights of the Child,* UNGA Res. 44/25. UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989).

[65] Withholding state sanction of polygamous relationships in Canada's domestic marriage law coincides with our international human rights obligations towards women and children, and amounts to a pressing and substantial objective under s. 1 of the *Charter*.

b. The overall objective of s. 2 and the *CMA* as a whole is to respect the equality rights of same-sex couples.

[66] The objective of s. 2, as well as the *CMA* as a whole, is to extend the right to civil marriage to same-sex couples. This is pressing and substantial because it fulfills the right of same-sex couples to equality without discrimination in accordance with the requirements of s. 15 of the *Charter*.

> *CMA, supra* para 1 at Preamble.
> *SSM Reference*, *supra* at para 22 at para 41.

[67] When reviewing the constitutionality of what was to become s. 2 in the *Reference re Same-Sex Marriage*, the Supreme Court found the provision to be consistent with the

Charter, and stated that "[s.2], combined with the circumstances giving rise to the Proposed Act and with the preamble [...] points unequivocally to a purpose which, far from violating the *Charter*, flows from it."

SSM Reference, *supra* para 22 at para 43.

c. The objective of s. 2 is not an attempt to legislate morality.

[68] The objective of limiting marriage to couples is not an attempt by Parliament to legislate morality. Rather, excluding plural unions from the legal institution of marriage is based on a belief that they tend to have a detrimental impact on individuals involved, especially women and children, and consequently on society as a whole.

[69] Writing for the majority in *Butler*, Sopinka J. held that Parliament has the right to legislate "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society." Thus, a law grounded in morality remains a proper legislative objective so long as it is aligned with *Charter* values. Limiting the definition of marriage to couples is in line with the *Charter* value of equality for women, and prevents state sanction of a relationship structure that is inherently discriminatory, and is known to bear an increased risk of harm.

R v Butler, [1992] 1 SCR 452 at para 80, 89 DLR (4^{th}) 449 [*Butler*].

[70] This case is fundamentally different from cases seeking to recognize same-sex marriage. Recognizing the right to same-sex marriage furthered the goals of equality enshrined in s. 15 of the *Charter*. Polygamous unions are fundamentally different. These relationships are likely to be inherently unequal, demeaning to women, and contrary to fundamental Canadian values. In asking the court to grant marriage status to polygamous relationships, the Appellants ask the court to sanction a form of social relationship that

has never had state or social sanction in a Western liberal democracy. Further consideration of this issue ought to be left to the legislative branch of government.

> *EGALE Canada v Canada (AG)*, 2003 BCCA 251, 225 DLR (4th) 472.
> *Hendricks v Québec (Procureur général),* [2002] RJQ 2506, [2002] RDF 1022.
> *Halpern v. Canada* (A.G.) (2003), 65 OR (3d), 225 DLR (4th) 529.

II. Proportionality

a. Section 2 is rationally connected to the objective of protecting women and children.

[71] Limiting the definition of marriage to couples is required in order to prevent the harms to women and children that are traditionally associated with the vast majority of polygamous relationships. The definition is not "arbitrary, unfair or based on irrational considerations," but is instead rooted in reliable evidence.

> *Oakes*, *supra* para 55 at para 70.

[72] Proof that the government's long term strategy of limiting marriage to couples is rationally connected to the objective does not need to be proven on a balance of probabilities. It is sufficient for the government to demonstrate that they had a basis grounded in reason, logic or common sense for believing a rational connection exists. In *Hutterian Brethren*, McLachlin C.J states "the government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567, 310 DLR (4th) 193 [*Hutterian Brethren*].

[73] Although many of the harms cited in paras 6-15 relate to the experiences of women and children in relatively insular polygynous societies, almost 97% of polygamous unions worldwide are polygynous; a small minority are polyandrous unions or "group marriages". The practice of polygyny is overwhelmingly embedded in, and an expression of, a social structure that oppresses women.

[74] Any assertion by the Appellants that the evidence before this Court on polygyny is irrelevant, and therefore not applicable to their situation, ought to be rejected. Section 2 of the *CMA* is a law of general application regulating the definition of marriage for the general public. McLachlin C.J stated in *Hutterian Brethren*:

> The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact.
>
> *Hutterian Brethren, supra* para 72 at para 69.

b. Section 2 minimally impairs the equality rights of those in polygamous relationships.

[75] Parliament's decision to limit civil marriage to couples falls within a range of "reasonable alternatives" and should be afforded a high degree of deference by this Court. When assessing whether or not the limitation impairs the right as little as possible, La Forest J in *McKinney v. University of Guelph* stated: "we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values." He went on to cite the majority of the Court in *Irwin Toy*:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> *McKinney v University of Guelph,* [1990] 3 SCR 229 at 285-286, 2 OR (3d) 319. *Irwin Toy Ltd. v Quebec (Attorney General),* [1989] 1 SCR 927 at 993-994, 58 DLR (4th) 577.

[76] There is no other reasonable alternative to limiting the definition of marriage to couples that would still achieve the government's objective. Changing the definition of

marriage to incorporate unions of more than two persons would profoundly change the very essence of this fundamental social institution. There would be nothing to preclude entire communities, towns, or cities from getting married. To remove the essential component of marriage as a union between two persons is to render the institution of marriage meaningless.

[77] In order to preserve the integrity of the institution of marriage as a basis of the family unit, it is necessary to draw boundaries on what this institution requires. As noted by Dakana J. at trial, any attempt by Parliament to delineate a precise legislative distinction between consensual polygamous unions and harmful ones would likely require the introduction of inappropriate subjective standards and troubling invasions of privacy. This would be akin to creating a "marriage test", requiring participants to put forward highly personal evidence in an effort to justify the merits of their relationship.

Official Problem at 2.

[78] Alternatives that might draw a more precise line between consensual polygamous relationships, such as that of the Appellants, and harmful coercive ones, will not achieve the desired objective. For example, legislation requiring members of polygamous unions to marry as a group, as opposed to one man taking multiple wives, will not eliminate the risk of harm the current limitation is designed to prevent. On its face, this type of marriage might appear equal, but there would be nothing to stop the patriarch of a coercive polygynous union from exerting pressure on each co-wife to marry each other so as to make the marriage valid.

[79] If there is agreement that there must be limitations on the definition of marriage in order to give the institution meaning within society, it follows that any limitation would be subject to challenge. The Respondent submits that the choice made by Parliament to

limit the definition of civil marriage to a union of "two persons" was a reasonable one based on the *Charter* value of equality, as well as international obligations. This Court should not be "called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."

> *Official Problem* at 2.
> *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at paras 137, 147, 35 DLR (4^{th}) 1.

c. <u>The salutary benefits of limiting the definition of marriage to couples outweigh its deleterious effects.</u>

[80] The final stage of the s.1 analysis requires a determination of whether the deleterious effects of a measure on individuals or groups outweigh the salutary benefits gained from the measure.

> *Oakes*, *supra* para 55.
> *Dagenais, supra* para 55 at para 95.
> *Hutterian Brethren, supra* para 72 at para 77-78.

[81] The Respondent acknowledges the Appellants' unique situation. There is little doubt about their genuine desire to be included in the institution of marriage. However, this is not enough to deem the legislation unconstitutional. Conduct that might interfere with the *Charter* rights of others is not automatically protected. In this case, the right to equal access to the institution of marriage must be measured in relation to the right to equality for women.

> *Syndicat Northcrest v Anselem*, 2004 SCC 47, [2004] 2 SCR 551 at 585-586.

i. <u>Salutary Benefits</u>

[82] Limiting marriage to couples prevents the state from sanctioning a family structure that is out of step with Canada's international human rights obligations, overwhelmingly discriminatory, and contrary to women's equality. In addition, the

measure serves to discourage the creation of polygamous unions, thereby helping to prevent further harm to women and children.

[83] Canada has been a strong contributor to the international women's rights movement. Should this Court require the Canadian government to legalize polygamous marriage in the name of equality, Canada would lose credibility in the international community on the important issue of gender equality, and it might preclude Canada from speaking out on these issues in the future.

[84] If polygamous marriage were state sanctioned and legal, there is potential for polygamous groups from all over the world to migrate to Canada to get married. Limiting marriage to couples prevents Canada from becoming a haven for polygamous unions.

Official Problem at 5.

[85] There is a difference between removing criminal prohibitions on polygamy, which have only recently been repealed, and legitimizing and sanctioning polygamous marriages by giving them full recognition and benefit under the *Charter*. In *Egan*, Sopinka J. upheld an infringement of s.15 partially on the basis that Parliament had not had sufficient time to consider the issue. When discussing proportionality, he stated:

> [...] only in recent years have lower courts recognized sexual orientation as an analogous ground, and this Court will have done so for the first time in this case. While it is true [...] that many provincial legislatures have amended human rights legislation to prohibit discrimination on the basis of sexual orientation, these amendments are of recent origin. [...] Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the *Charter*.

Egan, supra para 22 at para 111.

[86] This reasoning can be applied here. Polygamous marriage is not state sanctioned in any Western liberal democracy. If this Court were to find that s. 2 of the *CMA* is not a

reasonable limit on the right to equality under s. 1, it would result is a significant departure from accepted norms in Western society. It would serve to deny women the right to equality and would defy Canada's obligations in international law. It is not the place of this Court to determine complex social policy without Parliament having an adequate opportunity to debate these issues.

[87] Giving family structures that are inherently discriminatory a degree of formal legitimacy though legal marriage would send a "dysfunctional message" to Canadians. Rather "than suggesting that some types of relationships are less worthy than others, as the non-recognition of same-sex couples did, recognizing polygyny would signal that some individuals are less worthy than others." It is more desirable to withhold legal recognition at the point of formation (marriage), and attempt to build structures through family law that can help to give parties legal rights at the time of dissolution.

> Lisa Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family law Treatment of Polygamy" (2007) 65:1 U. T. Fac. L. Rev. 1 at 27.

ii. Deleterious Effects

[88] It is regrettable that there may be deleterious effects on the individual Appellants in this case. However, the Appellants' form of "polyamorous" group marriage is not the dominant model of plural union, thus the deleterious effects of the measure as a whole are unlikely to be widespread. The salutary benefits of excluding polygamous unions from the institution of marriage outweigh any deleterious effects on the individuals in such unions.

III. Conclusion

[89] The Respondent has met the test for justification under s. 1. Maintaining the definition of marriage as a union between two persons is a proportionate response to the

harms associated with the vast majority of polygamous unions. The change sought by the Appellants is beyond the scope of the rights afforded to them under the Charter.

C. REMEDY

[90] In the event that the Court finds s. 2 of the *CMA* violates s. 15 of the *Charter* and cannot be saved under s. 1, the Court must turn its mind to the appropriate remedy. This analysis should be "guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature."

Schachter v Canada, [1992] 2 SCR 679 at 700-701, 93 DLR (4th) 1 [*Schachter*].

I. A temporary suspension of invalidity is the most appropriate remedy.

[91] The appropriate remedy is a suspended general declaration of invalidity. The Court has emphasized the need to consider the effect of its order on the democratic process (*Corbiere*). A change to the number of persons who can legally marry has widespread and significant implications for many different aspects of the law. This, coupled with the fact that approximately 96% of Canadians are against polygamy, indicates that a remedy respecting the democratic process is required.

Corbiere, supra para 33 at paras 116, 118, 119.

II. Reading in the words 'or more' is inappropriate in this case.

[92] It would be inappropriate for this Court to read in the words "or more" after the word "two" and before the word "persons". Reading in is not appropriate when the question of how the statute ought to be extended in order to comply with the *Charter* cannot be answered with a sufficient degree of precision (*Schachter*). This change would result in an imprecise definition of marriage that would not delineate between harmful and non-harmful polygamous unions. It would fundamentally alter the nature of the legislation, and would amount to an excessive intrusion into the legislative sphere.

Schachter, supra para 90 at 706.

[93] The Court can refuse to read in when it would directly contradict Parliament's intention in enacting the provision (*Seaboyer*). Reading in language that would change the definition of marriage in this case would disregard Parliament's express intention to maintain marriage as a union between two persons.

R v Seaboyer, [1991] 2 SCR 577 at 628, 83 DLR (4th) 193, 66 CCC (3d) 321.

[94] Budgetary considerations are relevant when determining the appropriate remedy for a Charter violation (*Schachter*). This change will affect various provincial requirements for solemnization, as well as federal and provincial statutes that grant benefits and obligations based on the current definition. In light of the widespread implications, the legislatures ought to be given time to address these issues in a more comprehensive fashion.

Schachter, supra para 90 at 709.
M v H, [1999] 2 SCR 3 at para 147, 43 OR (3d) 254, 171 DLR (4th) 577.

PART IV – ORDER SOUGHT

[95] The Respondent asks the Court to dismiss the application.

[96] In the alternative, if the Court declares that the definition of marriage is unconstitutional, the Respondent asks the Court to declare that the definition is of no force and effect, but suspend the effect of such a declaration of invalidity for a sufficient period of time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated Feb 10, 2011

Counsel for the Attorney General of Canada
Team #

LIST OF AUTHORITIES

LEGISLATION **PARA #s**

JURISPRUDENCE **PARA #s**

SECONDARY SOURCES **PARA #s**

INTERNATIONAL MATERIALS **PARA #s**