Court File No. C39172
Court File No. C39174

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HEDY HALPERN and COLLEEN ROGERS
MICHAEL LESHNER and MICHAEL STARK
MICHELLE BRADSHAW and REBEKAH ROONEY,
ALOYSIUS PITTMAN and THOMAS ALLWORTH
DAWN ONISHENKO and JULIE ERBLAND
CAROLYN ROWE and CAROLYN MOFFATT
BARBARA MCDOWELL and GAIL DONNELLY and
ALISON KEMPER and JOYCE BARNETT

Applicants
(Respondents in Appeal)

- and-

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF ONTARIO and
NOVINA WONG, THE CLERK OF THE CITY OF TORONTO

Respondents
(Appellant)

-and-

EGALE CANADA INC., METROPOLITAN COMMUNITY CHURCH
OF TORONTO, THE INTERFAITH COALITION ON MARRIAGE AND FAMILY, and
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO,

Interveners

FACTUM OF THE INTERVENER
THE CANADIAN HUMAN RIGHTS COMMISSION

-and-

BETWEEN:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant
(Respondent in Appeal)

-and-

THE ATTORNEY GENERAL OF CANADA, and
THE ATTORNEY GENERAL OF ONTARIO

Respondents
(Appellant)

-and-

HEDY HALPERN and COLLEEN ROGERS
MICHAEL LESHNER and MICHAEL STARK
MICHELLE BRADSHAW and REBEKAH ROONEY,
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EGALE CANADA INC.,
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY, and
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO,

Interveners

FACTUM OF THE INTERVENER
THE CANADIAN HUMAN RIGHTS COMMISSION

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PART I - NATURE OF THE INTERVENTION

1. The Canadian Human Rights Commission ("Commission") was granted intervener status as a friend of the court in the appeal and cross-appeals on March 4, 2003 by Chief Justice McMurtry.

2. The Commission has a long history of promoting equality rights and combating discrimination based on a number of prohibited grounds including: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offense for which a pardon has been granted.

3. The Commission's participation in the appeal and cross-appeals is directed toward assisting the Court in considering the interplay between the interests which have been asserted and the principles of equality that are engaged by the case.

4. The Commission accepts the facts as outlined in the factums of the respondents.

PART II - THE COMMISSION'S POSITION ON THE APPEALS AND CROSS-APPEALS

5. The Commission agrees with the Halpern couples, the Metropolitan Community Church of Toronto ("MCCT") and the intervener EGALE that:

a) the Divisional Court correctly held that there is no statutory provision barring same-sex couples from entering into a valid marriage. The Halpern couples have been denied a marriage licence, and the MCCT couples have been denied registration of their marriage, because of a common law rule that two persons of the same sex do not have the legal capacity to marry each other.

b) the Divisional Court correctly held that the common law rule against same-sex marriage infringes rights and freedoms guaranteed in section 2 and 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and that those infringements are not justifiable pursuant to s.1 of the *Charter*.

c) the majority of the Divisional Court erred in failing to immediately reformulate the common law rule to allow same-sex couples to receive marriage licences and have their marriages registered by the Province of Ontario.

6. The failure to issue marriage licences for civil marriages and to register the marriages solemnized by the MCCT is clearly a violation of section 15(1) of the *Charter* which cannot be saved by section 1. The exclusion of same-sex couples from marriage, and the justifications offered in defence of that exclusion, perpetuate discrimination against same-sex couples and undermine the dignity of the claimants and ultimately all Canadians. Equality demands that same-sex couples be free marry and to have their marriages registered with the state. The Commission agrees with the submissions of the respondents and seeks to add the following perspectives to the appeal and cross-appeals.

PART III - ISSUES AND ARGUMENT

Issue I: Substantive equality can be achieved in this case through the simple removal of the formal barrier.

7. The respondents seek the same access to marriage that their heterosexual counterparts enjoy. The Attorney General of Canada ("AGC") asserts that requiring identical access to marriage is formalistic and regressive. They plead, for example that treating same-sex couples differently from opposite-sex couples is what would achieve substantive equality, since same-sex couples and opposite-sex couples are inherently different. This assertion rests on the validity of the AGC's position that same-sex couples are "different" in a way that is rationally connected to maintaining the formal barrier to marriage.

Factum of the AGC at paras. 117, 118 and 199.

8. While the argument makes reference to difference, there is no elaboration of that position or an attempt to define the differences which make same-sex couples incompatible with civil marriage. There is also no exploration of the needs of same-sex couples and their families which the AGC asserts can be met through an "alternative" regime of statutory benefits.

9. The argument of the AGC represents an inversion of substantive equality theory. The movement from formal equality to substantive equality or from a focus on the "direct" nature of discrimination to its "impact", actually occurred in a context where formal equality proved to be limited in its ability to deliver substantive equality. In the *Bliss* case, for example the Supreme Court of Canada asserted that "any inequality between the sexes in this area (pregnancy discrimination) was created not by legislation but by nature". Subsequent Supreme Court cases exposed the limits of this analysis, by demonstrating that a focus on the *impact* of a seemingly neutral rule will expose the discrimination. This analysis has been an important addition to the tools that Canadian courts have used in deciding equality rights claims.

> *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 at page 190;
> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219;
> *Law Society v. Andrews*, [1989] 1 S.C.R. 143 ("*Andrews*") at page 167-168;
> *Law v. Canada (Minister of Employment and Immigtation)*, [1999] 1 S.C.R. 497 ("*Law*") at paras. 23-27;
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 85.

10. While the Supreme Court has moved from formal equality to substantive equality this does not suggest that there are no longer circumstances where discrimination manifests itself as a formal distinction where substantive equality can be achieved by identical treatment. The Supreme Court has simply developed its equality analysis to include consideration of the *impact* of a law where, for example, identical treatment will not satisfy the demands of substantive equality. In *Law* for example, the Court reinforced the views of McIntyre J. in *Andrews* emphasizing that true equality does not ***necessarily*** result from identical treatment:

> The main consideration, McIntyre J. stated, at p. 165, must be the impact of the law upon the individual or group to whom it applies, as well as upon those whom it excludes from its application. He explained that the determination of the impact of legislation, by its nature, must be undertaken in a contextual manner, taking into account the content of the law, its purpose, and the characteristics and circumstances of the claimant, among other things. Hence, equality in s. 15(1) must be viewed as a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society.
>
> *Law, supra* at para. 25.

11. In other words, differential treatment may sometimes be necessary to achieve substantive equality in those cases where the removal of formal barriers alone will not achieve this important goal. The argument of the AGC inverts this analysis by suggesting differential treatment for exactly the opposite purpose: to ***reinforce*** a formal barrier to equality. The Commission urges the Court to reject this analysis which is completely inconsistent with the purpose of section 15(1) and the development of substantive equality principles in the human rights context..

Law, supra at paras. 23-27
Andrews, supra at page 163 - 172

12. The Commission further submits that identical treatment is still an instrument which, in some circumstances, delivers substantive equality. In the Commission's respectful submission the Court can remove the barrier without suggesting that same-sex couples are the "same" as their opposite-sex counterparts. The barrier should be removed because the argument of the AGC fails to define any "difference" between opposite-sex couples and same-sex couples which is rationally connected to maintaining a formal barrier against same-sex marriage.

13. In the circumstances of this case, the issuance of marriage licences and the registration of same-sex marriages presents a formal barrier to equality. Giving same-sex couples the same access to a civil licencing and registration scheme as opposite sex couples enjoy will eradicate an important formal legal distinction between them and contribute to the movement toward greater substantive equality for gay, lesbian and bisexual citizens.

Issue II: Giving life to the purpose of section 15(1) by maintaining a clear analytical distinction between section 15(1) and section 1, and focussing on the contextual experience of gay, lesbian and bisexual Canadians.

14. Apart from the movement from formal to substantive equality, there have been other developments in equality law which are relevant to this appeal and which the parties have addressed in different ways. The Commission seeks to add the following perspective to these submissions.

15. In the Commission's respectful submission there are three broad principles which the Supreme Court has consistently reinforced in recent cases under section 15(1):

1. that the purpose of section 15(1) is to deliver substantive equality;
2. that there is a need to avoid conflating section 15(1) with section 1; and
3. that contextual factors, carefully considered, are meant to assist in measuring the impact of the impugned rule against the purposes of section 15(1).

There is no question that the role of "context" in the section 15(1) analysis is evolving and that there has been disagreement about how best to achieve the balance between the distinct analytical frameworks demanded by section 15(1) and section 1. However, in the Commission's submission, the above three principles should guide this Court in its analysis of section 15(1).

Law, supra;
Lavoie v. Canada, [2002] S.J. No. 24 at paras. 47-53 per Bastarache J., paras. 73-96 per Arbour J. See discussion *infra*.
Gosselin v. Quebec (Attorney General), [2002] S.C.J. No. 85 at paras. 224-245 per Bastarache J. See discussion *infra*.

16. The Commission submits that the focus of the section 15(1) analysis should be on the contextual experience of gay, lesbian and bisexual Canadians and that any concentration on 'the context of marriage' and the defence of marriage as an "inherently" heterosexual institution, as in the AGC's s. 15 submissions, creates the potential for a blurring of the analytical distinctions between section 15(1) and section 1. Such submissions also tend to efface the experiences of gay, lesbian and bisexual Canadians at the stage in the section 15(1) analysis where the focus should in fact be on the claimants and not the defence of the impugned rule.

Factum of the AGC at para. 72

A: *Andrews* and the original intention of section 15

17. The original purpose of s. 15(1) was articulated in *Andrews* at paragraph 10: "...to protect those groups who suffer social, political and legal disadvantage in our society". That basic purpose has been consistently affirmed and refined by the Supreme Court of Canada[1]. In *Law* at para. 51, the Court further affirmed that the general purpose of section 15(1):

[1] See for example: "to foster the dignity of every individual through the recognition of equality, and to achieve equality through the recognition of the intrinsic worthiness and importance of every individual" (*Vriend v. Alberta, supra* at paras. 69, 67), "to combat the "evil of discrimination"" (*Law* at para. 23).

> is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

18. In *Andrews, supra*, McIntyre J. surveyed discrimination jurisprudence to arrive at a definition of discrimination, and then wrote at length about the importance of keeping section 15(1) and section 1 "analytically distinct". McIntyre J.'s ratio is highly instructive. Not only did he reject the proposition that every distinction amounted to discrimination, but he also expressly rejected the proposition that "any justification, any consideration of the reasonableness of the enactment...any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment" could take place under s. 15(1). Such analysis, he firmly stated, was properly the subject of s. 1.

Andrews, supra, at paras. 46, 47

19. In a decision which strikes a balance between a strict distinction-based approach and a one which allows for the import of any justification of the impugned rule, McIntyre J. espoused an analysis which allowed for the consideration of the "*context of the enumerated grounds and those analogous to them*", and which limited the notion of distinction to strictly distinctions which "*involve prejudice or disadvantage*" (paras. 41-47, quote from para. 43).

20. In other words, McIntyre J. envisioned that "context" would only come into play in determining whether a given group was the kind which s. 15(1) was "designed to protect." A contextual approach was not advocated in order to analyze or justify the impugned rule; indeed it was expressly rejected.

> I would reject, as well, the approach adopted by McLachlin J.A. She seeks to define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction. In so doing she avoids the mere distinction test but also makes a radical departure from the analytical approach to the Charter which has been approved by this Court. In the result, the determination would be made under s. 15(1) and virtually no role would be left for s. 1.
>
> *Andrews, supra* at para. 45.

21. Wilson J.'s ratio supports this proposition. Not only did she expressly agree with McIntyre J.

as to the "way in which s. 15(1) and s. 1 of the *Charter* interact" (para. 1), but she used the word 'context' for the purpose of determining whether the claimant came within an analogous ground. In finding that non-citizens did indeed "fall into an analogous category", she expressly iterated that such a determination was to be made "*...in the context of the place of the group in the entire social, political and legal fabric of our society*." In other words, the Supreme Court in *Andrews* did not extend its proposal to use contextual factors in a s. 15(1) analysis so far as to allow for justifications of the impugned exclusionary rule. It expressly rejected such extension.
Andrews, supra para. 5 and 6

B: *Law* and the emergence of the 'contextual' test

22. In *Law,* a unanimous Supreme Court affirmed at length the role of context in the s. 15(1) analysis, adopting Wilson J's language but broadening the role of context beyond the analogous grounds analysis. That is, rather than affirm that "the context *of the place of the group in the entire social, political and legal fabric of our society*"(*Andrews, supra* at para. 5) was to be examined in order to determine whether the claimant group *constituted an analogous ground* (*Andrews, supra* at paras. 5, 43), the Supreme Court in *Law* stated that the determination of whether there was a violation of s. 15(1) should "tak(e) into account the *full social, political, and legal context* of the claim." (*Law, supra* at para. 30.) (Emphasis added throughout.)

23. This final dictum would appear to significantly expand the role of context in a section 15(1) analysis, and it is unclear whether this was intended or not, particularly since the Court in *Law* at paras. 43ff appeared to discuss the "social, political and legal context" language in a manner loyal to what Wilson J. intended. However, the Court then iterated the following as potential section 15(1) considerations: "...the larger context *of the legislation in question*..." (para. 59); "an analysis of the *full context* surrounding the claim and the claimant" (para. 88); "an examination of the *subject-matter of the legislation and its effects, as well as a full appreciation of context*" (para. 88); and the "purpose", "function" and "aim" of the impugned legislative provisions (paras. 99, 100, 102).

24. These considerations, which were all formulated and applied under s. 15(1) in *Law*, appear to undermine the express prohibition in *Andrews* that "any justification, any consideration of the reasonableness of the enactment...any consideration of factors which could justify the discrimination

and support the constitutionality of the impugned enactment" should enter into a s. 15(1) analysis (paras. 46, 47).

25. However, the importance of the analytical distinction between s. 15(1) and s. 1 was recently reiterated by Bastarache J., writing for three concurring Justices in the recent Supreme Court decision of *Lavoie*, in his discussion of the appropriate application of *Law*'s contextual approach. He stated:

> "...the exigencies of public policy do not undermine the prima facie legitimacy of an equality claim. A law is not 'non-discriminatory' simply because it pursues a pressing objective or impairs equality rights as little as possible. Much less is it 'non-discriminatory' because it reflects an international consensus as to the appropriate limits on equality rights. *While these are highly relevant considerations at the s. 1 stage, the suggestion that governments should be encouraged if not required to counter the claimant's s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other Charter rights*." (Para. 48.)(Emphasis added.)

He continued:

> "It is not, as my colleague Arbour J. suggests at para. 86, an 'eagerness to extend equality rights as widely as possible' that informs the distinction between s. 15(1) and s. 1. *It is the very structure of the Charter that mandates this distinction, as well as the methodology adopted by this Court since Andrews*." (Para. 49.)(Emphasis added.)[2]

26. Bastarache J. has also pointed out (*Gosselin* at para. 242) that any finding under s. 15(1) of non-discriminatory impact by virtue of the *purpose* of the legislation is improper if Canada is to maintain a "unified approach to discrimination for claims under both the *Charter* and human rights statutes". He cited the following passage from *McLachlin J.* (as she then was) in *B.C.(Public*

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[2]Three justices concurred with this dicta by Bastarache J., although Arbour J. disagreed at length (*Lavoie*, paras. 75ff). However, insomuch as McLachlin C.J., L'Heureux-Dubé J. and Binnie J. concurred with Bastarache J. et al. in their finding of a violation of s. 15 and insomuch as they *reserved any consideration of legislative objective to their s. 1 analysis* (*Lavoie*, paras. 1-20), three other justices can be said to have reinforced the analytical distinction between s. 15 and s. 1

Bastarache J. could be argued to be contradictory in his analytical methodology however, since in *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84 he considered the objectives of the impugned legislation in his s. 15(1) analysis (without addressing the issue of conflation of s. 15(1) and s. 1 inquiries)(paras. 45ff); but in *Lavoie*, he expressly rejected such analysis; and in *Gosselin*, he again noted the risks and reality of jurisprudential conflation, citing academic commentators in this conclusion (at para. 244), but did allow that "a positive legislative intention might make some difference" in a s. 15(1) analysis (at para. 243).

Similarly, insomuch as McLachlin C.J. in *Lavoie* reserved any consideration of legislative objective to s. 1, it could be argued that her decision contradicts the analytical methodology she applied in her majority s. 15(1) decision in *Gosselin*. In this latter case, the s. 15(1) analysis considered legislative justification at length.

Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 at paras. 47 and 48 in which discrimination under a provincial human rights statute was at issue:

> "In the Charter context...the principal concern is the effect of the impugned law....As Iacobucci J. noted at para. 80 of *Law*: '...proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews, supra* at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect."

In other words, a discriminatory *effect* is sufficient in the human rights code jurisprudence to show discrimination.

C: The contextual approach applied to this case

27. The Commission submits that to the extent that there is any case law confusion about the role that contextual factors should play in a section 15(1) analysis, it should be resolved in favour of an approach which maintains the "analytical distinction" which McIntyre J. first emphasized in *Andrews*, and which Bastarache J. has since reiterated; and more concretely, in favour of a focus on the contextual experience of gay, lesbian and bisexual Canadians, rather than on justifications of the impugned rule and a defence of heterosexual marriage. This approach, in the Commission's respectful submission, best adheres to the original intent of section 15(1), and to the "contextual factors" which were introduced in *Law,* not to merge section 15(1) and section 1, but to provide a broader context for the assessment of the *impact* of the impugned rule in light of the purpose of section 15(1). *Andrews, supra*;
Law, supra.

28. The Commission submits that such an approach in this Court's application of part 3 of the *Law* test, including the non-exhaustive list of four contextual factors intended to assist in determining whether differential treatment amounts to substantive discrimination, will clearly lead to a finding of substantive discrimination in this case.

29. In making this submission, the Commission focuses on the contextual experience of gay, lesbian and bisexual Canadians and the *effect* of the common law bar on their inability to obtain marriage licences and to have their marriages registered. The focus by the AGC on the context of marriage threatens to obscure the effect of the exclusion on the claimants. The focus on the defence of marriage threatens to undermine the connection between the denial of licences and registration from the myriad indignities that the claimants have suffered in their daily lives which have required redress through litigation under the *Charter* and other human rights instruments. That equality litigation has involved some of the most basic elements of civic life: recognition of sexual orientation as a prohibited ground of discrimination in provincial and federal human rights legislation; healthcare benefits for their partners and children; bereavement leave; hate messages on

the internet and through telecommunications; civic proclamations; photocopying services; advertisements exposing them to hatred and ridicule; harassment at school; losing their jobs; pension benefits; spousal support; artificial insemination services; adoption; discharge from the Canadian Armed Forces; spousal exemptions from fees in vehicle transfers; visiting privileges at a correctional facility; processing of name changes.

Vriend v. Alberta, [1998] 1 S.C.R. 493; *Haig v. Canada* (1992), 9 O.R. (3d) 495 (C.A.); *Anderson v. Alberta (Health and Wellness)* (2002), C.H.R.R. Doc. 02-227; *Canada (Attorney General) v. Moore,* [1998] 4 F.C. 585 (T.D.); *Nielsen v. Canada,* [1997] 3 F.C. 920 (C.A.); *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72 (Man. C.A.); *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (S.C.); *Andrews v. Ontario (Ministry of Health)* (1988), 64 O.R. (2d) 258 (H.C.); *Canada v. Mossop*, [1993] 1 S.C.R. 554; *Schnell v. Machiavelli and Associates* (2002), 43 C.H.R.R. D/453 (C.H.R.T.); *McAleer v. Canada (Human Rights Commission)*, [1996] 2 F.C. 345 (T.D.); *Rainbow Committee of Terrace v. Terrace (City)*, [2002] B.C.H.R.T. 26; *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N. B. Bd. Inq.); *Hudler v. London (City)* (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.);*Oliver v. Hamilton (City)* (1995), 24 C.H.R.R. D/298 (Ont. Bd. Inq.);*Geller v. Reimer* (1994), 21 C.H.R.R. D/156 (Sask. Bd. Inq.); *Ontario (Human Rights Commission) v. Brillinger,* [2002] O.J. No. 2375 (Div. Ct.); *Owens v. Hellquist et al.,* [2002] S.K.Q.B. 506; *Jubran v. North Vancouver School Dist. No. 44*, [2002] B.C.H.R.T 10; *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A); *Dwyer v. Toronto (Metro)* (1996), 27 C.H.R.R. D/108 (Ont Bd. Inq.); *Leshner v. Ontario* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.); *OPSEU v. Ontario (Management Board of Cabinet)*, [1998] O.J. No. 5075 (Ont Crt of Justice, General Division); *M. v. H.,* [1999] 2 S.C.R. 3; *Anderson v. Luoma*, [1986] B.C.J. no 3000 (S.C.); *Korn v. Potter* (1996), 134 D.L.R. (4th) 437 (B.C.S.C.); *K. (Re)* (1995), 23 O.R. (3d) 679 (Prov. Div.); *Douglas v. Canada* (1992), 98 D.L.R. (4th) 129 (T.D.); *O'Neil v. Ontario (Ministry of Transportation)* (1994), 27 C.H.R.R. D/405 (Ont. Bd. Inq.); *Veysey v. Canada (Commissioner of the Correctional Service)*, [1990] 1 F.C. 321 (T.D.); *Bewley v. Ontario*, [1997] O.H.R.B.I.D. No. 24 (Bd. Inq.)

Issue III: Building on *Law:* Creating a Broader Context for Interpreting section 15(1)

30. In this section the Commission raises certain other contextual factors and analytical principles which are offered to assist the Court in its determination of the appeal and cross-appeals. In general, these factors buttress the argument that the subjective view of the claimants that their dignity is impaired by their exclusion from marriage, is objectively rational. The Commission respectfully submits that the following three contextual factors will be of assistance to this Court in deciding the issues engaged by the appeals and cross-appeals.

A: Canada's legislative commitment to equality;
B: Reliance on the inherent "normality" of opposite-sex marriage is expressly discriminatory and undermines the dignity of all Canadians;
C: The rigorous application of equality principles to the issue of marriage benefits all Canadians in the struggle against all prohibited forms of discrimination.

A: Canada's Legislative Commitment to Equality

31. The Government of Canada's commitment to equality for all Canadian citizens is reflected in the language of section 15(1) of the *Charter* and also in the purpose of the *Canadian Human Rights Act ("Act"):*

> The purpose of this *Act* is to extend the laws in Canada to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able to and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2.

32. The *Act* does not apply to the issuance of marriage licences and the registration of marriages in the Province of Ontario. However, the *Act* does reflect Parliament's commitment to eradicating discrimination on the prohibited grounds engaged by the appeal and cross-appeals, namely, sex, sexual orientation, marital status, family status and religion. As is pointed out in the submissions of the AGC, "a fundamental principle of a democratic society is that its values and priorities are mirrored by the legislative actions of its elected officials".

> Factum of the AGC at para. 145.

33. In that sense, the *Act* forms part of the context in which the Canadian government recognized and attempted to remedy historic disadvantage for those individuals now seeking access to marriage. The *Act*, therefore forms part of the context within which the arguments of the parties can legitimately be assessed in this case.

34. The Commission submits later in its factum, for example, that the arguments of the AGC in defence of opposite-sex marriage as "primordial", a "universal norm" and so fundamental as to require the exclusion of same-sex couples to maintain its inherent character, constitutes an expressly discriminatory justification. It is inconsistent with human rights principles to defend discriminatory conduct with equally discriminatory justifications. That proposition is brought into stark relief in circumstances where the party asserting the discriminatory justification is the Government of Canada, which has committed itself in law to the eradication of discrimination.

Factum of the AGC at paras. 10, 106 and 144.

35. The *Act* also forms part of the context for assessing objectively, the subjective view of the respondents that their dignity is infringed by their exclusion from marriage. The *Act* represents an admission that the dignity of same-sex couples has historically been undermined through discriminatory practices which require an effort by the government to remedy. It is objectively rational, therefore, for gay, lesbian and bisexual citizens, to experience a loss of dignity in the failure of that same government to recognize their right to equal access to marriage.

Law, supra at paras. 60, 61.

36. There is no legislative expression on the exclusion of same-sex couples from marriage which is equivalent to the legislative prohibitions against discrimination. The *Act* enjoys quasi-constitutional status in Canada. Section 1.1 of the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 does not represent a legislative commitment which to opposite-sex marriage that is equivalent to the commitment that Canada has made to the eradication of the discrimination. Gay, lesbian and bisexual citizens therefore have a rational expectation that their government will conduct itself in a manner which is consistent with the values of both the *Charter* and the *Act*.

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in may mind that the people of that jurisdiction have through their legislature clearly indicated that they consider the law, and the values it endeavors to buttress and protect, are, save their constitutional laws, more important than all others.
>
> *Insurance Corporation of B.C. v. Heerspink*, [1982] 2 S.C.R. 145 at 157-158.

37. The existence of this legislative commitment to equality, is at variance with the argument of the AGC that marriage, as a "fundamental social institution" built upon the bedrock of opposite-sex procreation, cannot be transformed by the *Charter.* In fact, the purpose of all human rights legislation, most of which predates the *Charter* in Canada, is to transform relations between individuals, and between individuals and their government, to fulfill the state's responsibility to eliminate discrimination. To suggest that these principles apply to all fundamental social institutions, except marriage, is to deny the promise of equality and to expressly violate Canada's commitment to the values which underlie both the *Charter* and the *Canadian Human Rights Act.*

> The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the Charter is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.
> *Law,* supra, para. 2

B: Reliance on the inherent "normality" of opposite-sex marriage undermines the dignity of all Canadians

38. The argument of the AGC that the very essence of marriage is its opposite-sex "nature" and that this reflects a "universal norm" is expressly discriminatory. It is inconsistent with equality principles to defend discriminatory conduct with an expressly discriminatory justification.

Factum of the AGC at paras 5 and 10, among others

39. The assertion that opposite-sex marriage is and should remain the "norm"and that the needs of same-sex couples can be met through alternatives to marriage pervades the argument of the AGC. Marriage is, in the words of the AGC, simply "nomenclature" a "descriptor". The real inequality, they claim, is in the denial of statutory benefits and obligations to same-sex couples. This inequality can apparently be remedied, not through access to marriage, but through individual challenges to benefits legislation.

Factum of the AGC para. 76.

40. The arguments of the AGC have been described as a version of the "separate but equal" doctrine. The Commission respectfully submits that the argument was actually better characterized by LaForme J. in the decision under appeal as a rule "intended to actually exclude marriage between same-sex couples". The AGC's argument is based on excluding same-sex couples from marriage without offering them any corresponding "nomenclature" or "descriptor" which delivers both the tangible and intangible benefits of the word marriage.

Halpern v. Canada (Attorney General) (2002), 60 O.R.(3d) 321 (S.C.J., Div. Ct.) at paras. 411, 414.
Factum of the AGC para. 76.

41. Shifting the argument from sexual orientation to other prohibited grounds and to other

historical contexts can be helpful in properly construing this argument.[3] The federal government would never conceive of legislating against the marriage of couples who identify with a different ethnic or cultural history nor would the government preclude disabled persons from marrying able-bodied persons, offering them a separate regime of benefits in exchange. Similarly, the federal government would never withhold from women the ability to call themselves "persons", in favour of a statutory regime of benefits that are generally associated with personhood.

42. One of the arguments put forward by the AGC is that the dignity of same-sex couples is not undermined by the fact that marriage simply reflects the "natural distinctions" between same-sex and opposite-sex couples:

> "the opposite sex nature of marriage does not imply that the human dignity of those in other relationships is diminished"

Again, comparing this argument to those made in a different historical context can be instructive. However, the Commission takes great care here to affirm that the federal government has moved beyond this stage in history with respect to the prohibited ground of race.

Factum of the AGC at para. 6.

43. For example, the language of the government's argument about the "natural distinctions" between same-sex and opposite-sex couples mirrors the language of the *Plessy* case in 1896. In that case the majority of the Supreme Court of the United States upheld the constitutional validity of segregation in railway travel. In that case, the majority concluded that:

> A statute which implies merely a legal distinction between the white and colored races - a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color - has no tendency to destroy the legal equality of the two races...
>
> *Plessy v. Ferguson*, 163 U.S. 537 (1896) at 543.

44. Writing in dissent, Justice Harlan challenged the argument that the statute of Louisiana "does not discriminate against either race, but prescribes a rule applicable alike to white and colored

[3] See for example the manner in which analogies have been used by Abella J.A. in *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R.(3d) 577(C.A.) at 586.

citizens". In the dissent, Justice Harlan exposes the true rationale for this "separate but equal" regime:

> Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons.
>
> The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens.
>
> *Plessy, supra* at 557.

45. In many ways, the juxtaposition of the majority and dissent in the *Plessy* case captures the arguments between the parties in this case. The AGC relies on the "natural" distinctions between same-sex couples and opposite-sex couples and pleads for separation based on those distinctions. The respondents expose that the rationale behind these arguments is not to reinforce the equality and dignity of both opposite-sex and same-sex couples, but to perpetuate the historic exclusion of same-sex couples from marriage.

46. The majority in *Plessy* was eventually overruled in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954), where the majority of the Supreme Court of the United States found that when viewed in the context of the place of education in contemporary American life and the psychological effect of government sanctioned segregation, separate educational facilities are "inherently unequal".

Brown, supra at para. 22 of QL version.

47. The *Brown* decision has long been incorporated into Canadian law and has inspired analogies to racism in the context of a number sexual orientation discrimination cases. The "separate but equal doctrine" has been dismissed by a number of Courts as an "appalling doctrine." The Commission respectfully submits that to the extent that the argument of the AGC bears any relationship to that doctrine, it has been explicitly rejected. The Commission also submits that any doctrine built on simple exclusion has similarly been rejected.

> See for example: *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R.(3d)(C.A.) 577 at 586, per Abella J.A.; *Egan v. Canada*, [1993] 3 F.C. 401 (C.A.) at 442, cited by *Hendricks c. Québec (Procureur général)*, [2002] J.Q. no 3816 at para. 134 and by *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585 (T.D.) at para. 64.

48. The Commission respectfully submits that the reliance by the AGC, the government of all Canadians, on these arguments, which have been the subject of judicial disapproval since at least the dissent in *Plessy* in 1896, undermines the dignity of all Canadians. There are many Canadians who do not share the aspiration to marry. The emphasis by the government on the "normality" of marriage has implications for all Canadians who rely on the federal government's commitment to equality and the prohibitions against discrimination on the basis of marital and family status. The AGC's assertions about the "procreative potential" of opposite-sex couples is also expressly discriminatory and has implications for all couples who are unable or choose not to procreate. Similarly, the assertion by the AGC that there is a need to protect and promote opposite-sex marriage, presumably from incursion by "other" family forms is expressly discriminatory and demeaning to all Canadians.

49. The arguments of the AGC, therefore, reinforce the fact that the disadvantage that same-sex couples experience in Canadian society is not only pre-existing, but present, and the perpetuation of this view by the Canadian government is an important contextual factor in the analysis of the subjective view of same-sex couples that their dignity is undermined by their exclusion from marriage.

C: The rigorous application of equality principles to the issue of marriage, benefits all Canadians in the struggle against all prohibited forms of discrimination

50. The appeals and cross appeals as they have been articulated by the parties and interveners engage this court in a dialogue about a number of prohibited grounds of discrimination. Part of that dialogue involves the expression of concern about the impact of same-sex marriage on other communities of people who have historically found protection under the prohibited grounds of race, national or ethnic origin and religion. That concern is articulated in the appeal as an *interest* which the court must balance in assessing both the equality infringement and the appropriate remedy.

Factum of the Interfaith Coalition at p. 28.

51. The Interfaith Coalition represents members of several religious faith communities in

Canada. Members of the Coalition are concerned that their communities, which have been historically marked by racism and religious intolerance, will be further alienated from Canadian society should the court allow same-sex couples to marry. Their concerns arise out of their strongly held religious beliefs which are, in their view, irreconcilable with same-sex marriage.

Factum of the Interfaith Coalition at p. 8.

52. The interests of the Coalition form part of a broad public dialogue on same-sex marriage, and their right to express those views is confirmed by their participation in this case as an intervener. However the *rights* of the members of the coalition are not engaged by this case. There is no claim against the Coalition, either explicit or implicit, requiring them to defend their religious beliefs against the requirement to conduct same-sex marriages.

53. In the context of human rights jurisprudence, individuals have been challenged to deliver "services" to groups which they claim offend their religious convictions. These cases have represented a true intersection of rights requiring a balance between the prohibitions against religious and sexual orientation discrimination. In each of these cases the balancing has been conducted in *favour* of the prohibition against sexual orientation discrimination. However, in these cases the person asserted freedom of religion in the context of their public responsibilities: a municipal mayor refusing to issue a "gay pride proclamation"; an individual refusing to provide printing services to the Canadian Gay and Lesbian Archives. This is a very different context than the solemnization of marriages by religious organizations.[4]

Hudler v. London (City) (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.);
Ontario (Human Rights Commission) v. Brillinger, [2002] O.J. No. 2375

54. The respondents are seeking access to a civil institution, not religious marriage. Both the applicant couples and the MCCT are seeking to compel the provincial authorities to provide access to the civil recognition of their marriages. Neither group is seeking to compel other religious organizations to endorse their marriages or to conduct same-sex marriages within their own

[4] In *Hudler* the Mayor of the City of London asserted that issuing the proclamation violated her rights under section 2(b) of the *Charter*. However her desire not to "speak" the proclamation in question was based on her Evangelical Christian beliefs.

organizations.

55. In *Vriend*, the Supreme Court of Canada reminded us that all Canadians benefit from the rigorous application of the principles of equality:

> It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. **Yet, if any enumerated or analogous group is denied the equality provided by s. 15(1) then the equality of every other minority group is threatened**. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.
>
> *Vriend, supra* at para. 69.

56. The failure to rigorously apply the principles of equality in this case threatens all equality seeking communities and ultimately all Canadians. The Coalition members themselves would be more vulnerable to discrimination and less equipped to assert their right to freedom from discrimination in a context where equality principles are applied inconsistently.

57. These comments by the Supreme Court of Canada apply equally to the principle that the government should be challenged to defend rights infringements to the same extent no matter which prohibited ground is engaged. The rigour with which this Court applies to the principles of equality is unaffected by the fact that the rights of the respondents have been framed as intersecting with the *interests* of those whose personal views are irreconcilable with same-sex marriage. Extending full equality in the form of marriage to same-sex couples will, in the words of the Supreme Court of Canada, “foster the dignity of every individual”.

Vriend, supra at para. 69.

PART IV - ORDER SOUGHT

For all of the above reasons, the Canadian Human Rights Commission supports the remedy requested by the respondents.

All of which is respectfully submitted this 13th day of March, 2003.

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Leslie Reaume

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Counsel for the Canadian Human Rights Commission

SCHEDULE "A"

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SCHEDULE "B"

Constitutional provisions

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, ss. 15(1) and 1.

Statutory provisions

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 2.

Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 1.1.