Court File No. C39172
Court File No. C39174

COURT OF APPEAL FOR ONTARIO

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The Applicant Couples
(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

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TABLE OF CONTENTS

REPLY IN THE CROSS-APPEAL

PART I –OVERVIEW

1. The Applicant Couples reply on the issue of remedy.

PART II - CONCISE SUMMARY OF RELEVANT FACTS

2. Unchallenged evidence establishes that the only remedy that vindicates the *Charter* rights of the Applicant Couples is equal access to marriage.

> Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 134-135.

3. All of the Applicant Couples' experts, including Dr. William Eskridge, agree that materially "equivalent" options deny substantive equality. Dr. Eskridge establishes that full civil marriage is the next logical step on the continuum of rights recognition in Canada, and the only means to grant same-sex couples equal dignity and respect.

> Cross-Examination of Dr. Eskridge, Aug. 2, 2001, AGC Supp. Record at 704-707, Q. 153-156, 206-209.

4. The Applicant Couples also adduced expert evidence to show that the government could not be expected to respond to a finding of unconstitutionality in a rights-respecting manner. This evidence was apparently unnecessary, because the government admits that, if given the option, it is interested in maintaining its discriminatory exclusion of same-sex couples from marriage.

> Affidavit of Dr. Rayside, Application Record, Vol. 3, Tab 7, at page 551-559; Attorney General of Canada ("AGC") Factum in Reply in the Appeals and Response to Cross-Appeals, at para 68.

PART III –ARGUMENT

The Applicant Couples Seek Substantive Equality, not Formal Equivalence

5. The government's lengthy description of the array of legislative approaches internationally and provincially is irrelevant to determining the appropriate remedy in this case. The Applicant Couples challenge their exclusion from civil marriage, a specific, special form of legal recognition of a relationship. While the government argues that it should be free to provide "alternatives" to marriage for same-sex couples,[1] if this Court has concluded that exclusion from marriage is discrimination that cannot be demonstrably justified, a *Charter*-respecting remedy cannot maintain the rights violation found to be unconstitutional -- the Applicant Couples' exclusion from marriage.

6. As long as same-sex couples are denied the right to marry, the law fails to fully respect the dignity of gays and lesbians and so fails to achieve the *Charter*'s promise of substantive equality. As Alistair Nicholson, the Chief Justice of the Family Court of Australia, has written, equality will only be achieved if we allow for an inclusive vision of family:

> ... laws outlawing discrimination should serve as more than a source of enforceable rights and protections; they should also provide a basis for shifting prejudicial community attitudes. These only change when a society truly recognizes the humanity of the group who have been enduring discrimination and, to my mind, nothing can be more central to a definition of humanity than respect for the importance each of us places upon enduring relationships.
>
> Nicholson, A. (The Honourable Chief Justice of the Family Court of Australia), "The Changing Concept of Family: The Significance of Recognition and Protection" (Conference Paper from "Sexual Orientation and the Law" presented September 1996) (1997) 6 Australasian Gay and Lesbian Law Journal 13 at 13.

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[1] Once again, the government misrepresents dissenting opinions as majorities to support its arguments; the Supreme Court has not defined marriage as an opposite-sex union that excludes same-sex couples, contrary to the government's assertion in its Factum in Reply in the Appeals and Response to the Cross-Appeals at para. 66.

7. Until the law recognizes the marriages of same-sex couples, affirming that their relationships are as valuable as those of heterosexuals, our society will not appreciate the humanity, and thus the human rights, of gays and lesbians.

General Principles of Remedy

8. The government encourages the Court to abdicate its responsibility to grant an effective remedy, instead emphasizing non-interference with the legislative domain (although the rights violation results from a rule crafted by judges) and suggesting that the *Charter* should only be applied with caution to the common law. This is an error: the primary remedial consideration is to respect the rights and freedoms guaranteed by the *Charter,* not to defer to government attempts to thwart equality.

> In selecting an appropriate remedy under the *Charter* the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from the court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of Canada. The court is given an express mandate to declare invalid a law which, by virtue of s. 52 of the *Constitution Act, 1982*, is of no force or effect to the extent of its inconsistency with the *Charter*.
>
> *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at 281, para.110, citing *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104 [emphasis added].

9. The government cannot insulate its discrimination from *Charter* review and correction by failing to legislate and instead relying on a common law rule. The absence of legislation logically compels less deference to the legislature, not more. If a common law rule is unconstitutional, the judges who crafted the rule must correct it.

This is a Charter Rights Case, Not a Charter Values Case

10. The government misstates the law with respect to the remedial distinction between *Charter* rights and *Charter* values cases. The AGC claims that the Applicant Couples incorrectly create a distinction at the stage of remedy, and incorrectly rely on *Salituro* as an example of a *Charter* values case. The AGC is wrong.

> AGC Factum in Reply in the Appeals and Response to Cross-Appeals, at para 57, 58.

11. In *Salituro*, a husband was convicted of forgery because his estranged wife testified that she did not consent to his signing her name on a cheque. The husband, not the Crown, wished to rely on the common law rule that a spouse was not a competent witness for the prosecution. Since the old rule did not accord with *Charter* values and the rule's rationale of nurturing marital harmony was not invoked in circumstances of spousal separation, the Supreme Court of Canada created an exception to the common law rule for cases in which the spouses are separated.

> *R. v. Salituro,* [1991] 3 S.C.R. 654.

12. By claiming at paragraph 57 of its factum that *Salituro* involves government action, the AGC attempts to erase the distinction between *Charter* values cases (concerning the development of the common law) and *Charter* rights cases (concerning actual *Charter* breach). This is misleading. As shown, *Salituro* is <u>not</u> a *Charter* rights case. It involves no *Charter* violation through government action in reliance on an unconstitutional common law rule. When the accused tried to rely on an established common law rule, the Court crafted an exception to the rule in light of *Charter* values, without any government breach of *Charter* rights.

> *R. v. Salituro,* [1991] 3 S.C.R. 654, at para 38, 48; AGC Factum in Reply in the Appeals and Response to Cross-Appeals, at para 57, 58.

13. *Hill v. Church of Scientology* summarizes the important distinction between *Charter* rights cases and *Charter* values cases. In that decision, Cory J. reviewed the two lines of decision and characterized *Salituro* as a *Charter* values case, writing "the common law rule in *Salituro* was not alleged to infringe a specific *Charter* right. Rather, it was alleged to be inconsistent with those fundamental <u>values</u> that provide the foundation for the *Charter*." The Court held:

> When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. … The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values.
>
> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para 86, 93, 95 [emphasis added].

14. Even in purely private disputes, a court may revise a common law rule to accord with changing social norms and the values underlying the *Charter*. The court will scrutinize an outdated rule closely, while keeping an eye on the proper balance between judicial and legislative action. Where government reliance on a common law rule results in an unjustifiable breach of a *Charter* right, however, the *Constitution* demands that the common law is, to the extent of its inconsistency, of no force or effect. The Supreme Court has held, in every case involving the breach of a *Charter* right in reliance on a common law rule, that the court must then create a new expression of the common law that meets the requirements of the *Charter*.

> *R. v. Swain*, [1991] 1 S.C.R. 933; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Daviault*, [1994] 3 S.C.R. 63; *Halpern v. Canada (Attorney General),* [2002] 60 O.R. (3d) 321 (Div. Ct.), at 454, para 303, per LaForme J. dissenting on remedy.

15. The government wrongly relies on cases that involve no *Charter* considerations whatsoever (like *Watkins* and *Friedmann*) and those that include no breach of *Charter* rights (like *Salituro* or *Pepsi-Cola*), ignoring the clear jurisprudence established in the relevant *Swain-Daviault-Dagenais* line of cases. The government thereby pleads for deference and complains that equality in marriage is more than an incremental change. These arguments are without merit in the context of a constitutional violation. Where there is a breach of *Charter* rights, there is no room for deference or hesitation. The Court must craft a new expression of the common law, and cannot refuse to "comment in advance".

> *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Friedmann Equity Developments Inc. v, Final Note Ltd.*, [2000] 1 S.C.R. 842; *R. v. Salituro,* [1991] 3 S.C.R. 654; *RWDSU Local 558 v. Pepsi Cola Canada Beverages,* [2002] 1 S.C.R. 156; *R. v. Swain,* [1991] 1 S.C.R. 933 at 978; *R. v. Daviault*, [1994] 3 S.C.R. 63 at 93; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

No Suspension is Warranted

16. Under s. 1 of the *Charter*, the government has failed to demonstrate any benefit to the exclusion of same-sex couples from marriage, but nevertheless attempts to reinforce discrimination at the remedial stage of the analysis. The government argues that recognizing the marriages of same-sex couples threatens to "insert [ ] players into legal

marriage whose own values may be at odds with one of its core missions [which] may undermine that sense of mission for all, and end up undermining and diminishing the institution of marriage." A suspension cannot be justified by discriminatory ideas that same-sex couples are a dangerous threat to marriage, have less valuable relationships and so diminish the institution, or that their morals are contrary to the goods of marriage. The government's claims of *potential* harm are entirely speculative and demean the dignity of lesbians and gay men. The sky will not fall, or civilization collapse, when the Michaels celebrate their decades-long relationship in marriage.

AGC Factum in Reply in the Appeals and Response to Cross-Appeals, at para 73.

17. It is only a small administrative change for the Registrar General to mail marriage certificates after a wedding is performed by publication of banns, or for the Clerk to grant a civil marriage licence at City Hall. The achievement of equal marriage will, however, represent a profound change in the lives of gays and lesbians and their children. Our nation will be one step closer to achieving our elusive dream of equality.

Affidavit of Margaret Nosworthy, Application Record, Vol. 2, Tab 1, at page 270-271; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 4, at page 147-148.

18. The government also asks for a suspension with a bald pleading that the "impact on legislation will be substantial and wide-ranging." Although challenged to do so by the Applicant Couples, the AGC fails to specifically identify *any* legislation that would be impacted by the remedy sought by the Applicant Couples. In fact, the lengthy cross-Canada and international survey provided by the government illustrates that provincial and federal legislation has already been significantly amended to accord equivalent rights and obligations to same-sex couples. Striking down the common law bar, and declaring that there is no impediment to marriage solely on the basis that two persons are of the same sex, flows naturally from the jurisprudence of the Supreme Court and the federal and provincial legislative amendments already undertaken.

AGC Factum in Reply in the Appeals and Response to Cross-Appeals, at para 50.

19. The AGC also claims a suspension is required because all Canadians have a stake in marriage, and many do not support equal recognition of the marriages of same-sex couples. Thankfully, the *Charter* is meant to protect the rights of vulnerable minorities against the tyranny of the majority. The government has nonetheless made the rights of lesbians and gays a popularity contest through its Parliamentary Committee hearings. Equal marriage supporters are forced to plead for recognition of basic human dignity – a right supposedly guaranteed to all Canadians by the *Constitution*. The Committee process has also provided a welcoming forum for the homophobia at the root of resistance to legal recognition of the marriages of same-sex couples. As examples, Richard Hudon (Association of Christian Families) opines: "Two men buggering and fellating each other cannot beget any progeny out of their aberrant sexual practices. If we dare to change the institution of matrimony and legally corrupt it, we shall see the further corruption of our society as well." Ms. Jean Ferrari (Canadian Christian Women Organization for Life) states: "[In some countries] homosexuality is considered to be a grave evil. If anyone is caught in the act, body parts are lopped off. It's a pretty powerful inducement to abstain or leave the country if one must have one's kicks. In Canada we've legalized this lifestyle, but thank God, bad laws can be repealed."

> 37th Parliament, 2nd Session, Standing Committee on Justice and Human Rights in Transcript of Evidence (February 6th, 2003) at 0920 (R. Hudon); 37th Parliament, 2nd Session, Standing Committee on Justice and Human Rights in Transcript of Evidence (February 13th, 2003) at 0940 (J. Ferrari).

20. The federal government does not need more time, more “stakeholder” consultations, or any other excuses. Legally speaking, this is an easy case, without drafting complexities or budgetary impacts to the remedy sought. What makes this case difficult -- for those influenced by political considerations -- is that gays and lesbians remain a relatively unpopular minority group in some quarters. This is precisely why the *Charter* guarantee of equality exists.

21. There is no reason that the unconstitutional rights infringement should persist any longer. Equal recognition of the marriages of same-sex couples accords with, and advances, the laudatory purposes of civil marriage. Above all, it represents the only remedy that vindicates the Applicant Couples' *Charter* rights. Just as Martin Luther King wrote in his famous Letter from Birmingham Jail,

> [w]e must use time creatively, in the knowledge that the time is always ripe to do right. ... Now is the time to lift our national policy from the quicksand of injustice to the solid rock of human dignity.
>
> Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963.

PART IV - RELIEF REQUESTED

22. The Applicant Couples, Respondents in Appeal and Appellants in Cross-Appeal, ask this Honourable Court to dismiss the appeal and grant the cross-appeals. The Applicant Couples seek costs on a total indemnity basis regardless of the result, and request to make submissions on costs following this Court's ruling if not awarded at least partial indemnity costs of the Appeal and Cross-Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS DAY OF APRIL, 2003,

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SCHEDULE A

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835

Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842

Halpern v. Canada (Attorney General), [2002] 60 O.R. (3d) 321 (Div. Ct.)

Hill v. Church of Scientology, [1995] 2 S.C.R. 1130

Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69

R. v. Daviault, [1994] 3 S.C.R. 63

R. v. Salituro, [1991] 3 S.C.R. 654

R. v. Swain, [1991] 1 S.C.R. 933

RWDSU, Local 558 v. Pepsi Canada Beverages, [2002] 1 S.C.R. 156

Watkins v. Olafson, [1989] 2 S.C.R. 750

SCHEDULE B

37th Parliament, 2nd Session, Standing Committee on Justice and Human Rights in Transcript of Evidence (February 6th, 2003) at 0920 (R. Hudon)

37th Parliament, 2nd Session, Standing Committee on Justice and Human Rights in Transcript of Evidence (February 13th, 2003) at 0940 (J. Ferrari)

Nicholson, A. (The Honourable Chief Justice of the Family Court of Australia), "The Changing Concept of Family: The Significance of Recognition and Protection" (Conference Paper from "Sexual Orientation and the Law" presented September 1996) (1997) 6 Australian Gay and Lesbian Law Journal 13 at 13.