Court File No.: C39172
Court File No.: C39174

ONTARIO COURT OF APPEAL

B E T W E E N :

**HEDY HALPERN and COLEEN 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 MCDOWALL and GAIL DONNELLY and
ALISON KEMPER and JOYCE BARNETT**

Applicants
(Respondents in Appeal)

and

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

REPLY FACTUM OF THE METROPOLITAN COMMUNITY CHURCH OF TORONTO

- and -

B E T W E E N :

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant
(Respondent in Appeal)

and

ATTORNEY GENERAL OF CANADA and
THE ATTORNEY GENERAL OF ONTARIO

Respondents
(Appellant)

and

HEDY HALPERN and COLEEN ROGERS,
MICHAEL LESHNER and MICHAEL STARK,
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EGALE CANADA INC.,
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY AND
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Interveners

April 7, 2003

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1. This factum replies to the arguments of the Attorney General of Canada ("AGC") in response to the cross-appeal of the Metropolitan Community Church of Toronto ("MCCT").

2. With respect to the arguments made by the AGC regarding the freedom to marry at paragraphs 8 - 11 of its Factum in Reply and Response to Cross-Appeals ("AGC Response Factum"), MCCT replies as follows. The recognition of a freedom to marry does not answer the question, but neither does it beg the question. It is difficult to reconcile the numerous statements made by the Supreme Court of Canada about the *Charter*'s protection for a person's right to make fundamental personal choices with the argument advanced by the AGC that a decision to marry is not such a fundamental personal choice.

3. It is not true that no American Court has ever made a finding supporting the right of same sex couples to marry. Such a decision was made in Hawaii many years ago, but was overruled by a subsequent constitutional amendment via referendum.[1]

4. The UNHRC decision cited by the AGC is not binding on this Honourable Court.[2] However, the Supreme Court of Canada has made it clear that the Courts of Canada are to make rulings that are consistent with Canada's international treaty obligations.[3] This suggests a finding that there is a freedom to marry enjoyed by Canadians since such a right is found expressly in a number of instruments to which Canada is a signatory.

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[1] *Baehr* v. *Miike*, [1996] HI-QL 13 (Hawaii Supreme Court). See also Wolfson, "The US Freedom-to-Marry Movement for Equality", in Wintemute and Andenaes, eds. *Legal Recognition of Same-Sex Partnerships*, (Oregon: Hart Publishing, 2001) at 174-175.

[2] *Communication No. 902/1999, Joslin et al. v. New Zealand* (views adopted 30 July 2002, 75th Sess.), Report of the Human Rights Committee, 75th Sess., U.N. Doc. No. CCPR/C/75/D/902/1999 (Jurisprudence)

[3] *Baker* v. *Canada* (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817

Canada's laws should not be interpreted in a manner that negates such a right, as this would be inconsistent with international law. Whether that right is restricted in Canada to the right to marry an opposite sex partner or is more expansive must be determined under Canada's domestic law.

5. If Canadians enjoy a right to work, as asserted by the AGC,[4] they most certainly must enjoy a right to marry.

6. With respect to the arguments made regarding section 2(a), MCCT replies as follows.

7. MCCT has not failed to apprehend the distinction between the right to freedom from interference in section 2(a) and the right to freedom from discrimination under section 15. The arguments made by the AGC imply that a law or government action must be one or the other but cannot be both. In fact, a common law bar to same-sex marriage is an example of a law that violates both section 2 (a) and section 15(1).

8. The AGC misconstrues the *Trinity Western* case.[5] The passage cited at paragraph 25 of the AGC's response factum discusses the rights of individuals to hold discriminatory religious beliefs versus their right to act on discriminatory religious beliefs. In fact, this is precisely what the Coalition and the Association are seeking to enlist the state in doing in this case: to legally enforce their religious beliefs about the exclusion of gays and lesbians from marriage. While they are entitled to those beliefs, they are not entitled to state enforcement of those beliefs.

9. MCCT does not seek to "exact concessions of recognition or endorsement of its religious beliefs". It asserts that the religious beliefs of others are

[4] Factum of the AGC in Reply and Response to Cross-Appeals ("AGC Response Factum") at para. 32
[5] *Trinity Western University* v. *B.C. College of Teachers*, [2001] 1 S.C.R. 772

being imposed on it by limiting its ability to marry in accordance with its own dogma. MCCT insists that it be allowed the dignity of and freedom of offering marriage in accordance with its teachings, and that it not be subjected to the religiously grounded limitations that the state imposes on it.

10. MCCT does not conflate s. 15 and s. 2(a). Rev. Dr. Hawkes is constrained because a "marriage" is not a "marriage" unless the state makes it so: "marriage" entails all of the social benefits and obligations that go along with that institution. Rev. Dr. Hawkes is forced to perform something that is less than a marriage. The couples are forced to enter into a cohabitation agreement, sign a will, adopt a child. They have to take extra steps that married couples do not have to take.

11. This subtle coercion is apparent in the AGC's factum, which discusses the right of MCCT to perform "same sex unions", (see, for example, paragraph 31); this is not what MCCT seeks to do. It also asserts in that paragraph that MCCT may *call* such ceremonies "marriages", which is not the same as the ceremonies *being* "marriages." This is government action based on a common law rule. Moreover, the assertion that there is no coercion is somewhat at odds with sections 294 and 295 of the *Criminal Code*,[6] although there is no suggestion that any prosecution against MCCT has been threatened.

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[6] *Criminal Code of Canada,* R.S.C. 1985, c. C-46.
s. 294 provides: Every one who (a) solemnizes or pretends to solemnize a marriage without lawful authority, the proof of which lies upon him, or (b) procures a person to solemnize a marriage knowing that he is not lawfully authorized to solemnize the marriage, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

s.295 provides: Every one who, being lawfully authorized to solemnize marriage, knowingly and wilfully solemnizes a marriage in contravention of the laws of the province in which the marriage is solemnized is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

12. The question to ask is, if there were no common law rule, would the state be entitled to impose such a barrier. The state should not be entitled to benefit from a pre-existing barrier that is contrary to *Charter* principles. To suggest that the state could benefit from a different or more lenient *Charter* analysis merely because of a pre-existing common law rule that infringes the *Charter* or its values, is offensive. This is particularly so in circumstances where the state now asserts that the common law rule is "infused with legislative intention".[7] The common law must conform to the *Charter*. The state action at issue is not simply the registration of the marriages or the issuance of licences. The existence and enforcement of the common law rule is the coercive state action complained of. MCCT is asking that the state refrain from enforcing a particular religious view of marriage to MCCT's detriment.

13. The *Adler* case importantly involved questions of state funding with which the Courts are always loathe to interfere.[8] MCCT does not request any funding from the state in this case. To quote with added emphasis the passage cited by the AGC:

> The fact that no **funding** is provided for private religious education cannot be considered to infringe the appellants' freedom…It does not follow that the government must **pay** for the religious dimensions…

14. The AGC mischaracterizes the importance of section 93(1) in *Adler.*[9] Just as the state was free to fund all religious schools in that case, the state is free to recognize same sex marriage in addition to opposite sex marriage in this case. The important distinction is this: section 93(1) insulated the decision of Ontario in *Adler* to fund only Catholic schools because the

[7] AGC Response Factum, at para. 14.
[8] *Adler v. Ontario*, [1996] 3 S.C.R. 609
[9] AGC Response Factum, at para. 29.

state was required by the Constitution to provide financial support to only such religious schools. In this case, unlike in *Adler*, there is no constitutionally enshrined provision protecting the state from discriminatory favouritism. The decision to recognize only those marriages which conform to the Christian definition of marriage in *Hyde* v. *Hyde and Woodmansee*[10] thus is not, and cannot be, insulated from *Charter* scrutiny.

15. Most importantly, the AGC ignores the history that it has in part cited in its own earlier factum. The analysis called for by the Court in *R.* v. *Big M Drug Mart* is first to examine whether the law in question has historic roots in the enforcement of a particular religious dogma.[11] That history cannot be fairly denied in this case. MCCT does not suggest that this concludes the analysis, for it is true as asserted by the AGC in its factum that a law with such roots may nonetheless have a modern justification. A simple example of this is the prohibition on murder found in the Ten Commandments. However, no such modern justification has been nor can be successfully asserted in respect of the heterosexual restriction in issue which is both rooted in and infused with traditional Christian religious dogma.

16. It is not true that all forms of religious marriage would have to be recognized by the state if the position of MCCT is accepted. However, restrictions that stem from traditional Christian dogma and have no other purpose would be subject to the same type of analysis, but on different evidence. MCCT submits that many such restrictions could be supported on non-religious grounds. The example of incestuous marriages is inapt, since the boundaries of incest have already been changed by Parliament, but the Court may take judicial notice of the scientific and genetic issues

[10] *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130 (Ct. Div. & Matr.) [hereinafter *Hyde*].
[11] *R*. v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 322-3 [hereinafter *Big M*].

underlying the consanguinity rules. The law's concerns around polygamy are reflected in a criminal offence that would have to be challenged, but issues arise in that context both about the free will of the participants and the adequacy of our current legal framework for regulating such relationships. This type of "floodgates" argument is commonly made and commonly rejected, as it should be in this case.

17. The fact that this restriction has the same impact on all is no defence at all. If this proposition is sustained, it will revive the *Robertson and Rossetani* "general application" defence many years after its well-deserved death in the *Big M* case.[12]

18. Canada's arguments on this point might make sense if the state were not in the business of legally recognizing religious marriages at all and MCCT sought to compel the state to recognize its marriages.

19. Even if the common law definition of marriage no longer has as its purpose the protection of one religion over another, this is its clear effect.

20. MCCT does not claim the right to a positive state act to endorse its religious practice.

> [A]part from any consideration of a claimant's dignity interest, exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right; it has been held in the s. 2(a) context, for example, that 'protection of one religion and the concomitant

[12] *Robertson and Rossetani* v. *Canada*, [1963] S.C.R. 651[hereinafter *Robertson*].

> non-protection of others imports disparate impact destructive of the religious freedom of the collectivity' (see Big M at 337). This does not mean that there is a constitutional right to protective legislation per se; it means legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom.[13]

21. The opposite-sex nature of marriage may today be widely held view, but it is far from universal. It should and must be subject to *Charter* scrutiny.

22. Although a case involving legislation, there is nothing inconsistent between the approach argued by MCCT and the approach taken by the Supreme Court in *Osborne*. Justice Sopinka, writing for the majority, held that:

> The policy of restraint reflected in the presumption of constitutionality arose out of the traditional respect by the judicial branch for the supremacy of the legislative branch. Interpreting a statute by reading it in accordance with the presumed intention of the legislators was regarded as less of an invasion of their domain by the court. 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

[13] *Dunmore* v. *Ontario (Attorney General)* [2001] 3 S.C.R. 1016 at 1045-46, para. 22.

> Constitution Act, 1982, is of no force or effect to the extent of its inconsistency with the *Charter*. There is no reason for the court to disguise the exercise of this power in the traditional garb of interpretation. At the same time, the court must be sensitive to its proper role in the constitutional framework and refrain from intruding into the legislative sphere beyond what is necessary to give full effect to the provisions of the *Charter*.[14]
>
> Therefore, where opposing values call for a restriction on the freedom of speech, and apart from exceptional cases, the limits on that freedom are to be dealt with under the balancing test in s. 1, rather than circumscribing the scope of the guarantee at the outset.[15]

23. As it did in the Divisional Court, the AGC makes a bald assertion of "repercussions" on other laws. This in contrast to *M.* v. *H.*, where only one section in the statute was in issue and there were clear possible ramifications elsewhere in the statute.[16] For example, there was a risk that same sex couples might not be able to contract out of the support application. In its reasons, the Supreme Court urged legislatures to equalize rights and obligations with opposite sex couples, which Canada has largely done through Bill C-23.[17] The legislation largely equalized married, opposite sex and same sex couples. To the extent that governments have failed to react or have reacted imperfectly to the Supreme Court's admonition, same sex couples will be able to overcome this legislative inertia through the option of marriage. There are no major changes required at all. The significant nature of a decision in favour of inclusion for Canadian society should not be confused with legal

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[14] *Osborne* v. *Canada (Treasury Board),* [1991] 2 S.C.R. 69 at para. 70 [hereinafter *Osborne*]
[15] *Osborne*, *supra*, at para. 45.
[16] *M.* v. *H.*, [1999] 2 S.C.R. 3
[17] *Modernization of Benefits and Obligations Act*, S.C. 2000, c.12, s.1.1

repercussions. The social repercussions of the legal recognition of same sex marriage have largely already been absorbed as a result of the Divisional Court's ruling.

24. There is an extremely important distinction between common law rules that are found to be inconsistent with *Charter* values and common law rules which violate *Charter* rights. In the former case, there is no mandate, as was set out in *Osborne*, to do what is necessary to give full effect to the provisions of the *Charter.* This is a case where the common law rule violates *Charter* rights.

25. In *Schachter*, at paragraph 37, quoting *Rogerson* dealing with reading in, the Court said "[c]ourts should certainly go as far as is required to protect rights, but no further."[18] The Court must go as far as is necessary to bring the common law in step with the *Charter*.[19]

26. MCCT agrees that the appropriate balance between judicial and legislative action should not be upset and that Courts should go no further than necessary. However, the Court must go as far as is necessary. The fact that the bar in question is a judge made bar decided in Victorian England suggests that "deference" is inappropriate. A bar based on the state enforcement of traditional Christian dogma is entitled to no deference at all.

27. In this case, the spectre of unforeseen consequences should not be used to hold back equality. Canada has had no adverse consequences, only positive ones, from the legal recognition of same sex couples. There is no evidence from the Netherlands experience suggesting negative consequences flowing from same sex marriage. Moreover, the fact that

[18] *Schachter* v. *Canada*, [1992] 2 S.C.R. 679
[19] *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130 at 1170-1171

Belgium, their nearest neighbour, with whom they have extensive ties linguistically and otherwise, has chosen to follow their path, suggests that there are no such harmful consequences.

28. With the greatest respect to Mr. Justice Blair, far more obvious cases that might trigger concerns about deference can be readily conceived. Examples can be found set out at paragraph 104 of the dissent of Madam Justice L'Heureux-Dubé in *Adler* including competing *Charter* rights, a threat to the protection of a socially vulnerable group, competing interests of various social groups, and conflicting social science evidence as to the cause of the problem. [20]

29. While the majority of the Court did find that a number of policy options existed, they did not pronounce any of them to be constitutionally valid. The Vermont Supreme Court considered only the question of rights and obligations. What resulted from *Baker* was a form of civil union that has recognition only within Vermont and under Vermont law. Such a solution may have complied with the requirements of Vermont law, but it would not meet the requirements of the *Charter.*[21]

30. Any alternatives to marriage are doomed to fail a s. 1 analysis. Among other impediments, they could not pass the minimum impairment test. The Court has yet to be shown any pressing and substantial objective or rational connection. Canada seeks an opportunity to delay the recognition of same-sex marriages while it searches in vain for a constitutionally acceptable alternative. It would be inconceivable that the Lovings would have been forced to endure hearings into the views of Virginians about

[20] *Adler* v. *Ontario*, [1996] 3 S.C.R. 609
[21] *Baker* v. *State of Vermont,* [1999] 744 A. 2d 864 (Vt. 2000)

inter-racial marriage rather than being granted the obvious, clear and constitutionally valid remedy.[22]

31. The so-called evidence cited at paragraph 73 of the AGC Response Factum consists of nothing more than rank speculation and is deeply offensive to MCCT. It is not grounded in the experience of the only jurisdiction to embrace same sex marriage to date, and ignores the substantial impact of the extensive legal recognition of same sex relationships in Canada that has already taken place. It is reminiscent of the remarks of the U.S. courts prior to *Loving* who supported the right to protect traditional discriminatory rules about marriage when they said,

> The institution of marriage has from time immemorial been considered a proper subject for State regulation. In the interest of the public health, morals and welfare, to the end that family life, a relation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture, and in furtherance of the physical, moral and spiritual well-being of its citizens.
>
> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State **from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it may not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy**

[22] *Loving* v. *Virginia*, 388 U.S. 1 (1967)

> **the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own particular genius.[23]**

32. There are good traditions and bad traditions. Marriage is a good tradition. The exclusion of same sex couples from marriage is a bad tradition. This common law restriction should be rejected by this Honourable Court in keeping with its own tradition of protecting the equality interests of gays and lesbians.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th Day of April, 2003

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R. Douglas Elliott

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R. Trent Morris

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Victoria Paris

[23] *Naim* v. *Naim*, 197 Va. 80; 87 S.E. 2d 749; 1955 Va. Lexis 198 (Supreme Court of Virginia)