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 McDOWALL and GAIL DONNELLY
ALISON KEMPER and JOYCE BARNETT

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

FACTUM OF THE APPLICANT COUPLES, RESPONDENTS (APPELLANTS BY CROSS-APPEAL)

EPSTEIN COLE LLP
Barristers
401 Bay Street, 32nd floor
Toronto, ON M5H 2Y4

Martha A. McCarthy
Joanna L. Radbord

Tel: 416-862-9888
Fax: 416-862-2142

Solicitors for the Applicant Couples

TO:
Department of Justice Canada
Ontario Regional Office
The Exchange Tower

130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6
Ms. Levine Tel: 416-973-9201
Ms. Sinclair Tel: 416-954-8109
Fax: 416-952-0298

Ms. Roslyn Levine/Ms. Gail Sinclair

AND TO:
The Attorney General of Ontario
Constitutional Law Division
7th Floor, 720 Bay Street
Toronto, Ontario M5G 2K1
Tel: 416-326-4460
Fax: 416-326-4015

Mr. Robert Charney/Ms. Lisa Solmon

AND TO:
City of Toronto
Legal Department
13th Floor, West Tower
100 Queen Street West
Toronto, Ontario M5H 2N2
Tel: 416-392-7246 / 392-7244
Fax: 416-392-1199

Ms. Leslie Mendelson/Mr. Roberto Zuech
Solicitors for Clerk of the City of Toronto

AND TO:
McGowan, Elliott & Kim
Barristers & Solicitors
1400 - 10 Bay Street
Toronto, Ontario M5J 2R8
Tel: 416-362-1989
Fax: 416-362-6204

Mr. Douglas Elliott/Ms. Victoria Paris
Solicitors for the Metropolitan Community Church of Toronto

AND TO:
Lerner & Associates
Barristers & Solicitors
130 Adelaide Street West, Suite 2400
Toronto, Ontario M5H 3P5
Tel: 416-867-3076
Fax: 416-867-9192

Mr. Peter Jervis/Ms. Jasmine Akbarali
Solicitors for the Interfaith Coalition on Marriage & Family

AND TO:
Sack, Goldblatt, Mitchell
Barristers & Solicitors
1130 - 20 Dundas Street West
Box 180
Toronto, Ontario M5G 2G8
Tel: 416-979-6440
Fax: 416-591-7333

Ms. Cynthia Petersen/Ms. Vanessa Payne
Solicitors for EGALE Canada Inc.

AND TO:
Stikeman Elliott
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9
Tel: 416-869-5602
Fax: 416-947-0866

Mr. David M. Brown
Solicitor for the Association for Marriage and the Family in Ontario

AND TO:
Canadian Human Rights Commission
Canada Place
344 Slater Street, 8th Floor
Ottawa, Ontario K1A 1E1
Tel: 613-943-9159
Fax: 613-993-3089

Ms. Leslie Reaume/Ms. Andrea Wright
Solicitors for the Canadian Human Rights Commission

AND TO:
Faculty of Law
University of Toronto
84 Queen's Park
Toronto, Ontario M5S 2C5
Tel: 416-946-4028
Fax: 416-946-5069

Professor Edward Morgan
Solicitor for Canadian Coalition of Liberal Rabbis for Same Sex Marriage

TABLE OF CONTENTS

PART I –OVERVIEW

1. The Attorney General of Canada ("AGC") appeals the unanimous ruling of the Divisional Court that the denial of civil marriage to gays and lesbians is contrary to the *Charter*.

2. Three features of this case must be stressed at the outset. First, this is not a case about legislation. It addresses the constitutionality of a judge-made rule. The AGC asserts that there is a common law rule, traceable to two British decisions from the 1800s, which provides that a marriage between persons of the same sex is void. The Divisional Court agreed, but found the rule to be unconstitutional. It is crucial to remember, at every step of the *Charter* analysis, that this case is about judge-made law, not legislation.

3. Second, this is a case about liberty. The freedom to marry is a well-recognized, fundamental right enshrined in international human rights treaties. As the Supreme Court recently affirmed, our notion of liberty includes the freedom to marry. The Supreme Court has described marriage as being "as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion." The Law Commission of Canada has concluded that marriage engages "the fundamental values of equality, choice and freedom of conscience and religion". The freedom to marry is so connected to an individual's humanity that a bar to the marriages of an entire class of people implicates numerous *Charter* rights, including equality, liberty, and security, and it infringes the freedoms of expression, conscience, and association.

4. Finally, this case is about the guarantee of substantive equality. The AGC's entire case rests on a single assertion: marriage "just is" heterosexual. This definitional "truth" is thrown down at each step of the factual and legal argument. While the device may assist the AGC in avoiding the required *Charter* analysis, it is tautological and legally wrong. The same "definitional boundaries" arguments have been made throughout history in an attempt to limit the humanity of oppressed peoples. This case is no different than the anti-miscegenation, or

"wrong race," cases, ultimately rejected in *Loving v. Virginia*. Substantive equality requires that the result should be the same: a striking down of the bar to marriage of a person of the "wrong sex".

5. The Applicant Couples cross-appeal on the issue of remedy. A theoretical right without any practical remedy is meaningless. The Applicant Couples, and other same-sex couples, must be issued marriage licences if the promise of the *Charter* is to be realized.

PART II - CONCISE SUMMARY OF RELEVANT FACTS

A. THE ADJUDICATIVE FACTS

6. This case began when eight same-sex couples applied for civil marriage licences from the Clerk of the City of Toronto. The Clerk did not deny the licences, but instead indicated that she would apply to the Court for directions and hold the licences "in abeyance" in the meantime. The Applicant Couples commenced their own application, and by order their case was transferred to the Divisional Court and the Clerk's case was stayed on consent.

> Endorsement of Lang J., dated Aug. 22, 2000, Appeal Book, Tab 11, at page 198; Affidavit of W.J.P. Jones, Toronto City Clerk Record at page 3; Notice of Application of the Applicant Couples, Appeal Book, Tab 9, page 171.

7. About six months after the proceeding commenced, the Reverend Dr. Brent Hawkes of Metropolitan Community Church of Toronto ("MCCT") solemnized two marriages between persons of the same sex by publication of banns under the Ontario *Marriage Act*. When Ontario refused the usual formality of registering these marriages, the MCCT commenced a separate application, which was heard together with that of the Applicant Couples.

> Consent Endorsement of Lang J., dated Jan. 25, 2001, Appeal Book, Tab 16, at page 256-258; Notice of Application of the MCCT, Appeal Book, Tab 15, page 233.

8. The Divisional Court panel, Smith A.C.J.S.C., Blair R.S.J. and LaForme J., unanimously ruled that the common law rule defining marriage as, "the lawful and voluntary union of one man and one woman to the exclusion of all others," is contrary to s. 15 of the *Charter* and cannot be demonstrably justified. The Court divided on remedy, with a majority supporting the creation of a new common law definition of marriage, replacing the words "one man and one woman" with "two persons", subject to a two-year suspension.

> Judgment of the Divisional Court in the Halpern Application, dated July 12, 2002, Appeal Book, Tab 6, at page 33-35; Judgment of the Divisional Court in the MCCT Application, dated July 12, 2002, Appeal Book, Tab 7, at page 37-39.

The Applicant Couples

9. The seven Applicant Couples are Hedy and Colleen, Mike and Michael, Dawn and Julie, Al and Tom, C.J. and Carolyn, Barb and Gail, and Alison and Joyce. They are all ordinary men and women who simply want to celebrate their love for their partner in civil marriage. They include a nurse, a psychotherapist, a Crown Attorney, and a church deacon. Some are Jewish, some Christian. A few have lived together a short time; others have already shared their lives more than 25 years. They hail from across Canada – from Adeytown and Marystown in Newfoundland, from Ile du Grand Calumet, from Kingston, from Fredericton, from Saskatoon. Four of the couples parent children together, and three more hope to rear children together in the coming years. All have a very ordinary, usually taken-for-granted wish: to marry the person they love.

> People with a long-lasting commitment and love get married. The only substantive difference in our relationship is not in our aspirations to get married, but in the discrimination we have faced in sustaining our family. / Instead of being recognized as an equal family, we are considered to have an “alternative lifestyle.” We’re not very alternative. We’re very ordinary. We’d like to be married because it’s the ordinary thing to do with the feelings and commitments we share./... Our children want us to be married. .../ We are simply people determined to build a family. This is our task in life. .../ We love each other and wish to legally marry.
>
> Affidavit of Alison Kemper, Application Record, Vol. 1, Tab 16, at page 89-90.
>
> My brothers and my sister have all been legally married. We have the same parents and upbringing; we all work and pay taxes; and we have all fallen in love and settled down with our partners. Although my relationship is longer than that of any of my siblings, I find myself deposing my first affidavit, and commencing a court proceeding, to seek a marriage licence - simply because I am gay.
>
> Affidavit of Mike Stark, Application Record, Vol. 1, Tab 6,at page 41.

B. THE LEGISLATIVE FACTS

The Constitutional and Legislative Context

10. The federal government is granted exclusive jurisdiction with respect to "marriage and divorce" under section 91(26) of the *Constitution Act*. The federal government has never exercised its power to legislate capacity to marry in relation to sex. In fact, the only federal Act that explicitly addresses the capacity to marry is the *Marriage (Prohibited Degrees) Act*, which forbids marriage within certain degrees of consanguinity.

> *Constitution Act, 1867 (U.K.)*, 30 & 31 Victoria, c.3, ss.91 and 92; *Re North et al. and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct) at 282; *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46.

11. The provincial jurisdiction is limited to the "solemnization of the marriage" pursuant to section 92(12). The Ontario *Marriage Act* does not expressly define the sex of the parties to a valid marriage. Despite its professed lack of jurisdiction, and the absence of any statutory provision, the Ontario government has directed issuers not to grant marriage licences to same-sex couples, and refuses to register the MCCT marriages.

> Affidavit of W.J. P. Jones, Toronto City Clerk Record, Tab A, para. 15-16; Affidavit of Rev. Dr. Brent Hawkes, MCCT Application Record, Tab 3, page 76.

12. Beginning in the late 1970s, gays and lesbians began challenging sexual orientation discrimination in the courts. While claims for equal relationship recognition were initially unsuccessful, by the early 1990s same-sex couples began to secure spousal status in employer benefits, conjugal visits, and family adoption. The incremental progress achieved through decades of litigation culminated in 1999 with the Supreme Court ruling in *M. v. H.,* which requires that government remove discriminatory distinctions in spousal recognition from their books. A review of the history illuminates that virtually all equality gains for gays and lesbians have been accomplished through the courts. As former Chief Justice Lamer has said, "the truth is that many of the toughest issues we have had to deal with have been left to us by the democratic process. The legislature can duck them. We can't. … We do our duty and decide."

> Affidavit of David Rayside, Application Record, Vol. 3, Tab 7; *Veysey v. Correctional Service of Canada* (1990), 109 N.R. (F.C.A.), aff'g on different grounds (1989), 29 F.T.R. 74 (F.C.T.D.*); Haig and Birch v. Canada* (1992) 9 O.R. (3d) 495 (C.A.); *Leshner v. Ontario* (No. 2) (1992), 12 C.H.R.D/184 (Ont. Bd. of Inq.(H.R.C.*)); Canada v. Ward,* [1993] 1 S.C.R. 554.; *Re Bell Canada and Canadian Telephone Employees Association* (1994), 43 L.A.C. (4th) 172; *Canadian Broadcasting Corp. v. Canadian Media Guild (Local 213 of the Newspaper Guild)* (1995), 45 L.A.C. (4th) 353, confirmed in (1995), 52 L.A.C. (4th) 350 (Can.); *Newfoundland (Human Rights Commission) v. Newfoundland* (1995), 127 D.L.R. (4th) 694 (Nfld. T.D.); *Re K.* (1995), 23 O.R. (3d) 679; *Moore and Akerstrom v. The Queen*, [1996] C.H.R.D. No. 8 (Can. Human Rts. Trib.).;

Dwyer v. Toronto [1996] O.H.R.B.I.D. No. 4 (H.R.C.); *Egan v. Canada*, [1995] 2 S.C.R. 513; *M. v. H.* [1999] 2 S.C.R. 3.; Speech of Chief Justice Lamer to the Empire Club, 1995, cited in *M v H* (1996), 17 R.F.L. (4th) 365 (Gen. Div.), para 124, per Epstein J.

13. In response to *M. v. H.,* the federal government enacted the *Modernization of Benefits and Obligations Act ("MBOA")* amending sixty-eight statutes to include same-sex spouses in the definition of "common law partners". "Common law partners" now have almost all the same rights and obligations as married spouses in federal law. The "interpretation clause" of the MBOA states, "For greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage', that is, the lawful union of one man and one woman to the exclusion of all others". It is clear from the plain language of the section, as well as the comments of the Minister of Justice when the bill was introduced, that this is a statement of the government's view of the common law, rather than legislation regulating capacity to marry or evidence of legislative intent. Of course, whether that view of the common law is correct, or whether any existing common law rule should continue, are the issues in this case.

Modernization of Benefits and Obligations Act, S.C. 2000, c.12, s.1.1; Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations, 2nd sess., 36th Parl. (Minutes and Evidence, 10 May 2000, 11 May 2000, 17 May 2000, 18 May 2000, Standing Senate Committee on Legal and Constitutional Affairs), AGC Record, Vol. 9, Tab 28, at page 3062.

The Common Law

14. The Divisional Court held that same-sex couples are denied the right to marry by a common law rule. The rule is derived from *Hyde* and *Corbett*, and affirmed in *Re North*, *Layland* and the *EGALE* trial decision.[1]

Hyde v. Hyde & Woodmansee (1866), L.R. 1 P&D 130; *Corbett v. Corbett (Ashley),* [1970] 2 All E.R. 33; *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct.)*; Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.); *EGALE Canada Inc. v. Canada (Attorney General)* [2001], 88 C.R.R. (2d) 322 (B.C.S.C.).

15. The Couples submit that there is no common law rule as these cases are not binding decisions, but foreign judgments or cases from courts of inferior jurisdiction; they rely on faulty principles and discriminatory thinking; and the cases have been impliedly overruled by subsequent decisions, most notably *M. v. H.*. The Applicant Couples therefore submit that there is no common law bar to the marriages of same-sex couples, and repeat and rely upon

[1] The Appeal of this decision was argued February 10-11, 2003 and is under reserve.

the submissions of the MCCT and EGALE. If this argument is adopted, there is no need to consider s. 52 of the *Constitution Act*. The Court could simply adopt the dissenting judgment of Greer J. in *Layland*, and conclude that there is no common law bar to the marriages of same-sex couples in Canada.

M. v. H., [1999] 2 S.C.R. 3; *Layland v. Ontario* (1993), 14 O.R. (3d) 658 at 668 (Div. Ct.)

16. Notwithstanding that this is the Applicant Couples' position on the common law, the balance of this factum assumes that there is a common law rule that has been established by the judiciary, and which can be summarized as a rule that the marriage of two persons of the same sex is void.

The Expert Evidence

17. The Supreme Court has emphasized the need for evidence in constitutional cases, and regularly considers a very broad range of legislative facts. Such evidence allows the court to fully consider the effects of differential treatment from the reasonable perspective of the rights-holder. As such, social science evidence is an important safeguard when rights claimants are members of a vulnerable minority group, since their experiences are unlikely to be represented in mainstream understandings.

Danson v. Ontario (A.G.), [1990] 2 S.C.R. 1086; *Mackay v. Manitoba*, [1989] 2 S.C.R. 357.

18. In this case, the expert evidence filed by the Applicant Couples reveals the generalizations and stereotypes behind the AGC's claims to "universal" truths, and gives voice to the realities of lesbians and gays. The fact is that we live in a culture rife with homophobia and heterosexism. Social science evidence is often a necessary antidote to the deeply-ingrained prejudices with which we are all ingrained.

19. The Applicant Couples have canvassed the relevant social science literature and tendered the evidence of 19 expert witnesses. All are highly regarded scholars with unassailable credentials. They include Dr. Rosemary Barnes, psychologist; Dr. Margrit Eichler, noted University of Toronto sociologist; Dr. William N. Eskridge, Professor of Jurisprudence at Yale Law School; Dr. Jerry Bigner, Professor of Child and Family Development; Dr. Ellen Lewin, Professor of Anthropology and Women's Studies; Drs. Judith Stacey, Timothy Biblarz, and

Barry Adam, sociologists; Dr. Andrew Koppelman, Dr. Robert Wintemute, and Professor Evan Wolfson, foreign law experts; Drs. Bettina Bradbury and Randolph Trumbach, historians; Dr. Katherine Arnup, a Professor of Canadian Studies; Drs. Cheshire Calhoun and Adele Mercier, philosophers; and Dr. David Rayside, University of Toronto Professor of Political Science.

> Application Record of the Applicant Couples, Vol. 2 and 3, and Reply Evidence of Applicant Couples.

20. The AGC responded with an array of academic treatises, and the Applicant Couples moved to strike most of the material. This inspired the AGC to suggest that it might attempt to strike some of the Applicant Couples' affidavits, but the issue was settled, with the parties agreeing to minimize cross-examinations. The Applicant Couples did not cross-examine. The AGC cross-examined four deponents: Dr. Eskridge on the history of marriages between persons of the same sex and equality rights litigation; Dr. Calhoun on why equal marriage is essential to gays and lesbians achieving full status as citizens; Dr. Stacey on outcomes for children of same-sex couples; and Mr. Fisher, Executive Director of EGALE, on the views of the gay and lesbian community.

> Summary of Case Management Results for Divisional Court Panel, dated October 2, 2001, Appeal Book, Tab 19, at page 280; AGC Supplementary Record, Vol. 3, Tabs K, L, M, N, pp. 588-988.

21. A note of caution is warranted: the AGC factum routinely refers to the "record" and the "evidence", as though the Applicant Couples filed none. In fact, the AGC evidence, even without considering any of the Applicant Couples' evidence, is extremely weak. Most of the affidavits are "pure editorial commentary." The following general comments may be made about the AGC evidence:

a) Deponent Suzanne Scorsone is the spokesperson of the Catholic Archdiocese of Toronto. She is neither impartial nor a qualified expert.

b) Katherine Young's opinion goes well beyond the scope of her expertise in comparative religion, particularly Hinduism, instead venturing into sociology, anthropology, socio-biology and psychology; much of her evidence is essentially speculation.

c) Margaret Somerville's expertise is not engaged in this litigation. Her affidavit, a series of questions, is irrelevant and unnecessary. Expert opinion about legal analysis is inappropriate.

d) Edward Shorter, expert in the history of medicine, is not qualified to give evidence in sociology of the family or social psychology. Much of his evidence is speculative.

e) Robert Stainton's Affidavit so overstated his position that an Agreed Statement of Facts was required. This clarified that his linguistic analysis addressed only one sense of marriage, that of a unified religious and legal meaning. He did not address or consider civil marriage.

f) Douglas Allen's affidavit on no-fault divorce is irrelevant, personal opinion or speculation.

g) Ernest Caparros offers argument on s. 15. This is improper.

h) Daniel Cere goes beyond his expertise in comparative religious ethics and outside the parameters of the permitted scope of evidence for the religious intervener. He instead offers a treatise on social constructionist philosophy and other disciplines.

i) Craig Hart relies on irrelevant research and discredited research literature, including work by an author expelled from the American Psychological Association and censored by the American Sociological Association for disreputable practices.

22. These are many of the Appellants' so-called "experts". The Applicant Couples submit that their evidence should be considered with great caution and ultimately rejected.

> *Ontario Association of Fishers and Hunters v. Ontario* (2001), 143 O.A.C. 103 (Div. Ct.) (re "pure editorial commentary"); Affidavit of S. Scorsone, AGC Record, Vol. 2A, Tabs E, pp. 620-683; Affidavit of K. Young, AGC Record, Vol. 2A, Tab F, pp. 684-774; Affidavit of M. Somerville, AGC Record, Vol. 4, Tab J, pp. 1331 – 1473; Affidavit of E. Shorter, AGC Record, Vol. 2, Tabs C-1, C-2, pp. 393 – 468-7; Affidavit of the R. Stainton, AGC Record, Vol. 5, Tab K, pp. 1474-1507; Affidavit D. Allen, AGC Record, Vol. 4, Tabs I, pp. 1270-1330; Affidavit of E. Caparros, Record of the Intervener, The Interfaith Coalition on Marriage and Family, Tab 2, pp. 40-83; Affidavit of D. Cere, Record of the Intervener, The Interfaith Coalition on Marriage and Family, Tabs 1, pp. 1-39, Affidavit of C. Hart, Record of the Intervener, The Association for Marriage and The Family in Ontario, Tab 2.

23. There are a number of helpful conclusions that may be drawn from the evidence as a whole. The following statements are uncontroversial: lesbians and gays experience continuing stigma and discrimination in Canadian society; a majority of marriages have been and continue to be between persons of the opposite-sex; there have been and are currently marriages between persons of the same sex; married relationships last longer, on average, than unmarried relationships; marriage is a privileged marker in Canadian society and under the law; and marriage is an important, valuable institution in which many people, straight or gay, want to participate.

24. The Court may also draw conclusions from the compelling expert evidence unchallenged by cross-examination or responding affidavit material. The AGC offers no psychological evidence to challenge the conclusions of Dr. Rosemary Barnes and chose not to cross-examine

her. Dr. Barnes is a frequent expert in equality cases, and has been described by one Ontario judge as having "credentials nothing short of staggering." Court has noted that the dignity interest is essentially a psychological concept, and Dr. Barnes deposes that the denial of equal marriage causes harms to the psychological integrity of lesbians and gay men. This constitutes objective proof of the s. 15 violation *unchallenged* in the evidentiary record.

> *Law v. Canada,* [1999] 1 S.C.R. 497 at 530, para. 53; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab B, at page 132-142; *Re K.* [1993] 23 O.R. (3d) 679 at para. 34, 35, 37 and 39, per Nevins J.

25. Sociological evidence is also crucial in equality cases. The Applicant Couples filed the report of Dr. Eichler, the leading expert on the sociology of the family in Canada. Her work has been cited in six Supreme Court judgments about equality and family forms: *Mossop, Walsh, Moge, Thibaudeau, Symes* and *Egan*. Dr. Eichler deposes that "the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals." The AGC proffers no evidence concerning the sociology of the family from anyone qualified in that discipline. Dr. Eichler's evidence is unchallenged.

> Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 3, at page 226-227; *Canada (Attorney General) v. Mossop,* [1993] 1 S.C.R. 554 at 572, 625, 636-7, 639, 642; *Moge v. Moge,* [1992] 3 S.C.R. 813; *Thibaudeau v. Canada,* [1995] 2 S.C.R. 627 at 723 at 732; *Symes v. Canada*, [1993] 4 S.C.R. 695 at 818-819; *Egan v. Canada,* [1995] 2 S.C.R. 513 at 616; *Nova Scotia (Attorney General) v. Walsh,* [2002] SCC 83 at para. 43, 54

26. The Applicant Couples' expert evidence may be categorized in four main themes: the history of marriage, reasons couples wish to marry, the effects of the denial of equal marriage on same-sex couples, and the importance of equal marriage recognition to gays and lesbians.

1) THE HISTORY OF MARRIAGE: A HISTORY OF CHANGE

i) Marriage is not an Unchanging Institution with a Singular, Universal Meaning

27. The AGC argues that marriage is a pre-political institution that exists in an essential form across all times and all cultures. This assertion is not supported by even the government's own evidence. Rather than being an unchanging, monolithic entity, marriage has been a dramatically variable institution since ancient times.

> Over the course of the centuries from the ancient to the modern world, the nature of marriage in western societies has changed again and again in its most fundamental features. The means by which individuals chose their partners, whether by arrangement or by love, the relatives whom they might or might not marry, the percentage of the population who entered into marriage, the number of spouses an individual might have, the nature of the relationship whether formal or affectionate between spouses after marriage, the number of children and the necessity or not of having children, whether the widowed might remarry, whether a marriage might be ended by divorce, the role of religion in the celebration of marriage, the means by which the marriage contract had been established in private or in public, and the sexual identity of those who have entered into marriage, all these have changed so repeatedly in the ancient, medieval, and modern societies of the western world that it becomes impossible to say that marriage has had a single enduring meaning.
>
> Affidavit of Dr. Trumbach, Application Record, Vol. 3, Tab 2, particularly at page 439; Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1; Reply affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4; Reply affidavit of Dr. Trumbach, Reply Evidence of Applicant Couples, Tab 5.

ii) Not All Marriages Are or Have Been Between Different-Sex Couples

28. Historically, the union of different-sex spouses is a common, but not essential, feature of marriage. "Same-sex unions have been culturally and legally recognized as marriages in dozens, and probably hundreds, of societies in human history." The government's own evidence acknowledges their existence, in many cultures and at many times in history.

> Reply Affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4, at page 170 - 173; Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1, particularly at page 372, 404.

29. Today, the marriages of same-sex couples are legally recognized in Belgium and the Netherlands. Denmark, Sweden, Hungary, Germany, Norway, France, Portugal, Iceland, Spain, the State of Vermont and Canada currently provide same-sex couples with many of the same rights and obligations as married couples. The Applicants' foreign law scholars anticipate that equal marriage will be adopted in many of these jurisdictions in the coming years.

> Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1, at page 402-404; Reply Affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4; Affidavit of Prof. Wolfson, Reply Evidence of Applicant Couples, Tab 8, at page 252-253; Reply affidavit of Dr. Wintemute, Reply Evidence of Applicant Couples, Tab 7, at page 227-228; Affidavit of Prof. Verschraegan, AGC Record, Vol. 3, Tab G at page 823-882.

iii) Contemporary History of Marriage in Canadian Society

30. Marriage for same-sex couples is part of the historical evolution of marriage in contemporary Canada. Since the 18th century, marriage has changed from an arranged institution rooted in obligation, property exchange and male control to a chosen institution based on companionship, love and equal partnership.

> Affidavit of Dr. Bradbury, Application Record, Vol. 3, Tab 5, particularly at page 504-b; Affidavit of Dr. Arnup, Application Record, Vol. 3, Tab 3. Affidavit of Dr. Trumbach, Application Record, Vol. 3, Tab 2; Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1, at page 406-407; Affidavit of Dr. Bradbury, Application Record, Vol. 3, Tab 5.

31. As a result of hard-fought equality litigation, same-sex couples now enjoy extensive relationship recognition at the federal level and in several provinces. Viewed from a historical and comparative legal perspective, the next logical step on the continuum of rights recognition in Canada is full civil marriage.

> Cross-Examination of Dr. Eskridge, Aug. 2, 2001, at Q. 153-156, 206, 207; Affidavit of Dr. Arnup, Application Record, Vol. 3, Tab 3, at page 450.

2) REASONS COUPLES WISH TO MARRY

32. Dr. Margrit Eichler describes many of the reasons modern couples wish to marry:

> There is considerable diversity in the reasons that stimulate heterosexual couples to marry. These reasons include adherence to tradition; mutual support and economic cooperation; spiritual or religious reasons; emotional reasons; family reasons; practical reasons; and the social legitimacy and acceptance accorded to being married. Few question the “couplehood” of married couples. Same-sex couples, like different-sex couples, may want to marry for a variety of these same reasons. / An important aspect of marriage that cannot be accomplished through a common law relationship is the public affirmation and state support for the relationship.
>
> Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 225.

i) Marriage Communicates Love and Commitment

33. Marriage communicates meaning at a personal level to one’s spouse and at a public level to the community: it expresses commitment and mutual responsibility, and lets others know that one is living specifically as a married person. It makes a statement to the loved one, and to everyone, about the nature of the relationship.

Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156, 182; Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, at page 520; D. Cruz, ""Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource", 74 So. Cal. Law Rev. 925 at 928 (2001); Kenneth L. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624, 636 (1980); Affidavit of Alison Kemper, Application Record, Vol. 1, Tab 16, at page 89-90; Affidavit of Thomas George Allworth, Application Record, Vol. 1, Tab 19, at page 93-g-h; Affidavit of John Fisher, EGALE Record, Tab 1, at para. 50; Affidavit of Dawn M. Onishenko, Application Record, Vol. 1, Tab 10, at page 56; Affidavit of Julie Erbland, Application Record, Vol. 1, Tab 11, at page 61.

ii) Marriage is a Life-Passage

34. Marriage represents a significant milestone in people's lives: the start of a new family. It is often considered a symbolic rite of passage into adulthood. Exclusion from marriage denies lesbians and gay men full and equal participation in the ritualistic passages of the family life cycle, which bind extended kin and the community together.

> We use ceremony and process for all of the rites of passage in our lives. Marriage is perhaps the most important and most celebrated of these occasions. ... It is a monumental step. ... It is a step I want to take with Julie. I want to tell all of society, my family and my friends that Julie and I are ready to embark on a new stage in our individual lives – we are ready to proceed through life as a family. I want to make this commitment through the age-old ritual of marriage.

Affidavit of Dawn M. Onishenko, Application Record, Vol. 1, Tab 10, at page 56; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 117-120, 143.

iii) Religious, Spiritual and Ethical Considerations

35. For many of the Applicant Couples, and as demonstrated by the MCCT's application, the choice whether or not to marry has spiritual and ethical dimensions. Exclusion from civil marriage denies freedom of conscience and religion by limiting the ethics and spiritual practice of gays and lesbians.

Affidavit of Thomas Allworth, Application Record, Vol. 1, Tab 19, at page 93-g, 93-h; Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 82-84; Affidavit of Barb McDowall, Application Record, Vol. 1, Tab 14, at page 72-76; Affidavit of Hedy Halpern, Application Record, Vol. 1, Tab 3, at page 32-34; Affidavit of Julie Erbland, Application Record, Vol. 1, Tab 11, at page 60-62; Affidavit of Dawn Onishenko, Application Record, Vol. 1, Tab 10, at page 56; *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336-337, 347 and 350; D.A.J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (Chicago: University of Chicago Press, 1999) chap. 3; D.A.J. Richards, *Women, Gays, and the Constitution: the Grounds for Feminism and Gay Rights in Culture and Law* (Chicago: University of Chicago Press, 1998) at 234, 383-385.

iv) A Meaningful Human Ritual

36. Marriage is the traditional, well-accepted and understood means to promise love and commitment. It has a deep cultural resonance in our society as the manner in which we mark and celebrate a permanent intimate union.

> I was raised in a family where marriage was understood as a life commitment to be entered into when you love someone. I grew up reading books about people who, when they fell in love, they got married. The television shows that I watched had people who, when they wanted to make a life commitment to each other, they got married. I understand marriage as a defining moment for people choosing to make a life commitment to each other.

Affidavit of Julie Erbland, Application Record, Vol. 1, Tab 11, at page 61-62; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157, 182, 186-187, 197-198; Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 85; Affidavit of Alison Kemper, Application Record, Vol. 1, Tab 16, at page 90; Affidavit of Joyce Barnett, Application Record, Vol. 1, Tab 17, at page 92; Affidavit of Carolyn (C.J.) Rowe, Application Record, Vol. 1, Tab 12, at page 65; Affidavit of Marg Nosworthy, Application Record, Vol. 2, Tab 4, at page 270; Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, at page 520; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157.

v) Social Respect and Legitimacy

37. Marriage remains a privileged institution in our society. Indeed, it is often considered the authentic marker of a mature, serious and committed relationship. Couples receive social disapproval for failing to marry, and persistent encouragement and questions about when they might be "tying the knot." Marriage allows couples to secure increased social respect and enhances the legitimacy of their relationship in the eyes of the community.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 469-470, 498; Affidavit of Dr. Margrit Eichler, Application Record, Vol. 2, Tab 2, at page 225-226; Affidavit of Dr. Rosemary, Application Record, Vol. 2, Tab 1B, at page 117-121, 124-125, 131, 134-136, 141, 147; Affidavit of Marg Nosworthy, Application Record, Vol. 2, Tab 4, at page 270, 272; Affidavit of Dr. Adam, Application Record, Vol. 3, Tab 4, at page 494-497; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157, 179, 182, 206; Affidavit of Dr. Ehrlich, EGALE Record, Tab 2, at page 101-105; B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235.

vi) Marriage Provides a Secure, Supported Environment for the Care of Children

38. Six of the seven Applicant Couples are or plan to be parents. They, like many other same-sex couples, believe that marriage will benefit their children: offering protections at law, community support, an expectation of permanence, a sense of security and continuity, and a feeling of equal dignity and acceptance in our community.

> I am engaged in this struggle to achieve the freedom to marry as part of our continuing effort to keep our kids safe - not just our kids but all kids./ [Our child] Hannah is very

> excited about our marriage. We told her that it may be years away, but she is still happy and greatly looking forward to it.
>
> Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 109, 142-146; Affidavit of Joyce Barnett, Application Record, Vol. 1, Tab 17, at page 92-93; Affidavit of Alison Kemper, Application Record, Vol. 1, Tab 16, at page 89; Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1, at page 407; *Baehr v. Miike*, 1996 WL 694235 (Hawaii Cir. Ct., Dec. 3, 1996).

39. While it is reasonable to expect underreporting, studies indicate that about 33% of lesbians and 10% of gay men are parents. Increasing numbers of same-sex couples are choosing to give birth, adopt or parent children in the context of their relationships. The notion that gays and lesbians do not produce and do not rear children is not only inaccurate – it is the very kind of stereotype anti-discrimination law is meant to prevent.

> Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 276-277; Affidavit of Dr. Arnup, Application Record, Vol. 3, Tab 3, at page 451, 484; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 142; *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999) at 881-882.

40. In this litigation, and the larger culture, gays and lesbians face discriminatory myths about the quality of their parenting. The fact is that over two decades of reliable social scientific evidence demonstrates that the children of same-sex parents experience outcomes at least equal to the children raised by comparable heterosexual parents.

> Research in the most rigorously peer-reviewed journals in child development and sociology provide generally accepted social scientific evidence that lesbian and gay parents are as fit, effective and successful as similar heterosexual parents. Likewise these studies find that children of same-sex couples are at least as emotionally healthy, socially adjusted, and cognitively successful as children raised by heterosexual parents. Research even provides some suggestive evidence that there may be certain hidden advantages that lesbian parents and their children seem to enjoy. There is neither theory nor evidence that leads in the opposite direction.
>
> Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at para. 4, 36, 68; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 143; Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 277-279; *Re K.* (1995), 15 R.F.L. (4^{th}) 129.

41. The community and social supports accompanying civil marriage can only promote even better parenting.

> ... [S]ocial science research supports the conclusion that legal recognition of marriages between same-sex couples would benefit the children of gay and lesbian parents. ... Children are generally better off, both emotionally and materially, when their parents stay together in a healthy relationship, and recognizing marriages of same-sex parents would promote the goal of protecting and supporting children. In any event, these children

> deserve the same security and protections that flow from legal recognition of their parents' relationships as children of different-sex parents.
>
> Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 279-280; Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 50, 68-70; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 142-146.

42. Same-sex couples will continue to parent regardless of the outcome of this litigation. The question is whether such children will be denied the benefits and protections that civil marriage would afford both them and their families.

> Is it preferable for [same-sex couples] to parent under conditions of invisibility, conditions of discrimination, or conditions of equality? It is difficult to imagine how anyone could argue in good faith that it is preferable to parent without access to equal recognition, social and legal resources, and benefits that other parents and their children enjoy.
>
> Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 50, 75-76; Affidavit of Dr. Rosemary Barnes, Application Record, Vol. 2, Tab 1, at page 144-146.

43. Marriage would give the children of same-sex spouses a better sense of legitimacy and belonging. It would have a positive impact on self-worth and reduce the stigmatization and violence directed against their families. "[G]ranting same-sex parents the freedom to marry would likely result in positive outcomes for such parents, their children, gay and lesbian people, and society as a whole."

> Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 50; Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 278-280; Affidavit of Joyce Barnett, Application Record, Vol. 1, Tab 17, at page 92-93; Affidavit of Dr. Kaufman, Application Record, Vol. 2, Tab 6, at page 333-338; Affidavit of Barbara McDowall, Application Record, Vol. 1, Tab 14, at page 73-74.

vii) Marriage is a Public, Legally Binding Promise

44. Marriage creates a public, legally binding promise. The seriousness of the pledge, the presence of the witnesses and its contractual effect create stability for the union and a disincentive to its termination. Civil marriage serves to recognize, facilitate and encourage the commitment of the couple by providing them with unique legal and institutional supports.

> Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 117-120; *Divorce Act*, R.S.C. 1990, c. E.21, s.9.

viii) Marriage as a Unifying Event

45. In addition to joining the couple together, marriage brings together the families of each spouse, creating supportive inter-family ties. Marriage also functions to affirm bonds with one's birth family. The continuity of tradition, the guests' memories of their own weddings, the variety of time-consuming tasks associated with the event and the excitement of the occasion, all create opportunities for familial interaction and closeness. Marriage is an emotional, life-altering stepping-stone that brings people together.

> Affidavit of Julie Erbland, Application Record, Vol. 1, Tab 11, at page 61-62; Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 85; Affidavit of Alison Kemper, Application Record, Vol. 1, Tab 16, at page 90; Affidavit of Joyce Barnett, Application Record, Vol. 1, Tab 17, at page 92; Affidavit of Carolyn (C.J.) Rowe, Application Record, Vol. 1, Tab 12, at page 65; Affidavit of Hedy Halpern, Application Record, Vol. 1, Tab 16, at page 33-34; Affidavit of Margaret Nosworthy, Application Record, Vol. 2, Tab 4, at page 270; Affidavit of Dr. Rosemary Barnes, Application Record, Vol. 2, Tab 1, at page 117-120; ; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157, 186-187, 197-198.

46. By sharing in the ritual of marriage, a gap may be bridged between heterosexual friends and family, and the same-sex couple. Distanced parents, friends and relatives will be reminded of how much they have in common with their gay or lesbian kin by their participation in this basic human event.

> Although Esther Gould and her partner Susan had not expected their families to be understanding or accepting of their commitment ceremony, the ceremony in fact led Susan to be significantly more accepted by Esther's family …
>
> My mother didn't get how important the ceremony was until it happened. But she came. After the ceremony and at the party that followed it, she went up to Susan and held her. There are a million photographs of this long period in which she cried and held Susan and said to her, "I didn't understand before, I understand now." She said to Susan that she's glad that I chose her to be with. That if she had a choice of my being with a man or with Susan, that she was glad I chose Susan. She was just completely transformed by the ceremony. For Susan, it really did mean some new level of acceptance by my family, especially my mother.
>
> Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 117-18, 134; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 157.

3) EFFECTS OF THE DENIAL OF EQUAL MARRIAGE

47. Just as participation in civil marriage would communicate a powerful message of inclusion in civil society, so the denial of the freedom to marry causes serious harms. Exclusion

threatens the well-being and psychological integrity of all gays and lesbians, their children and society at large. Since the central question in equality cases is the effect of the differential treatment from the reasonable perspective of a person in the situation of the claimant, the evidence on the effects of exclusion is summarized as part of the s. 15 analysis, at paragraphs 85-100.

4) THERE IS NO ALTERNATIVE TO EQUAL MARRIAGE

48. All of the Applicant Couples and their experts agree: civil marriage is required to respect and promote the equality of lesbians and gays. If the Applicant Couples succeed merely in securing equivalent rights and obligations that pertain to marriage, but are denied the status of civil marriage itself, the case will have been lost. Until same-sex couples can indicate that they are married without putting the term in quotations, the reality of their equal love and commitment will not be respected and acknowledged by the state or the community.

> "Marriage" is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals.
>
> Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 226-227; Affidavit of Dr. Ehrlich, EGALE Record, Tab 2, at page 104; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 134-135; Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 26; Affidavit of John Fisher, EGALE Record, at page 27; Affidavit of Colleen Rogers, Application Record, Vol. 1, Tab 4, at page 36.

49. Gay and lesbian couples love each other as much as heterosexual couples do. Same-sex couples simply wish to communicate and celebrate the realness, or authenticity, of their love by entering into a "real" marriage. This personal quest for authenticity, a value at the core of the dignity interest, cannot be realized until equal civil marriage is achieved. Any “alternative” scheme denies the choice to participate in the fundamental social institution of marriage and sends a meta-message of exclusion.

> [D]espite the failure of legal recognition, many lesbian and gay couples stage commitment ceremonies because of the tremendous symbolic significance these ceremonies hold for them. The ceremonies attempt to confirm the authenticity of the couples' relationships and help them to overcome their status as outsiders within their families, churches and the community at large. While these ceremonies are important, nothing short of legal marriage will serve to fully authenticate same-sex relationships, for the couple and the wider community.

Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 157, 204-206; Affidavit of Marg Nosworthy, Application Record, Vol. 2, Tab 4, at page 272; Affidavit of Aloysis Edmund Pittman, Application Record, Vol. 1, Tab 18, at page 93-b; Affidavit of John Fisher, EGALE Record, Tab 1, at page 27.

50. There are many parallels between the government's "remedial options" arguments and those that supported racial segregation. Just as that system was separate and unequal, refusing access to marriage, even while creating a new, materially equivalent scheme, cannot produce substantive equality. LaForme J. recognized that reserving marriage to "heterosexuals-only" is a replication of the discredited "separate but equal" doctrine. As Dr. Koppelman, an American legal scholar, notes in his expert report:

> Suppose that, before the Court's decision in *Loving*, Virginia had created an alternative regime for interracial couples, which gave them the legal rights and obligations of marriage, but expressly denied them the status of being "married". In my opinion, the imposition of such a "civil union" registry would have been recognized by American courts (both in 1967 and now) as discriminatory and would have been rejected, just as the "separate but equal" doctrine was rejected in other race discrimination contexts, such as school segregation.

Affidavit of Dr. Koppelman, Reply Evidence of Applicant Couples, Tab 6, at page 193-196; Affidavit of Dr. Adam, Application Record, Vol. 3, Tab 4, at page 496-497; *Brown et al. v. Board of Education of Topeka et al*., 347 U.S. 483 (1954); Reply Affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4, at page 175-176; Cross-Examination of Dr. Eskridge, Aug. 2, 2001, Q. 208, 209, at page 93-96; Affidavit of Prof. Wolfson, Reply Evidence of Applicant Couples, Tab 8, at page 249-251.

PART III -RESPONSE TO ISSUES RAISED BY THE APPELLANTS

51. The Respondent submits, in response to the issues raised by the Appellants:

a. The standard of review of the Divisional Court's rulings on ss. 15 and 1 is palpable and overriding error, not correctness;

b. The AGC's entire case rests on one assertion: marriage is, by definition, the union of one man and one woman. This is legally unsupportable, intellectually empty, and discriminatory;

c. The unanimous Divisional Court correctly recognized that, on the evidence and at law, the denial of the fundamental right to marry discriminates contrary to section 15; and

d. The unanimous Divisional Court correctly held that the violation of the *Charter* guarantee of equality is not demonstrably justified under section 1.

A. STANDARD OF REVIEW

52. The AGC claims that the alleged errors of the Divisional Court are all subject to the same standard of review – correctness. In fact, an appellate court is free to invoke this standard only on a pure question of law. As a general rule, courts of appeal decline to interfere with findings of fact unless they are unsupported by the evidence or based on clear error. Even in cases without testimony at trial, "deference is still called for on appeal from an entirely written record." While findings of social science evidence require less deference, even in constitutional cases, deference is required, since "the scope of appellate review does not change because of the type of case on appeal."

> *Housen v. Nikolaisan*, [2002] S.C.C. 33 at para. 8; *Gottardo Properties (Dome) Inc. v. Toronto (City),* (1998) 162 D.L.R. (4th) 574 (Ont. C.A.) at para. 48; *Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014 at para.14; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 139-141

53. The decision of the Divisional Court on ss. 15 and 1, questions of mixed fact and law, stems from its global review of the evidence. The Divisional Court committed no palpable and overriding error in its assessment of the evidence and application of sections 15 and 1. In any case, these decisions withstand the threshold of correctness. The unanimous judgment of the court on these issues should stand.

> *Housen v. Nikolaisan*, [2002] S.C.C. 33 at para. 36.

B. DECONSTRUCTING THE AGC'S ARGUMENT

54. The AGC's entire case is built on one assertion: "Marriage is the union of one man and one woman." This is said to be a "universal" definition across religions and cultures, because the raison d'Λtre of marriage is, at root, the rational possibility of natural procreation. If this meaning is altered, then the AGC says that society can expect a myriad of unforeseeable, but necessarily destructive, social consequences. This theory, which we call "Definitional Preclusion," is used at every stage of the analysis in order to avoid the requirements of constitutional scrutiny. Since this is the intellectual core of AGC argument, the Applicant Couples will deconstruct it in detail; once this is done, there will be nothing left of the AGC's case.

55. The Definitional Preclusion approach is legally unsupportable, but it has a long pedigree; the exclusion of classes of people by the creation of "definitional boundaries" is the intellectual foundation of oppression in all of the significant social struggles of our time. Legal definitions of "person", "citizen", and "marriage" have served to maintain discrimination against various groups. But whatever power law brings to bear in its defining, it does not change what is real. Slaves were always persons, even when centuries of law and universal social practice said they were not and condemned them to treatment as property. Women were always persons, despite centuries of court rulings and social practice, "since time immemorial", defining them as chattel. This case challenges the Court to recognize that gays and lesbians are fully *persons* in Canadian law.

> *Scott v. Sandford,* 60 U.S 393 (1856); Reply Affidavit of Dr. Trumbach, Reply Evidence of Applicant Couples, Tab 5, at page 183; *Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act*, 1867, [1928] S.C.R. 276 at 283-6, 287, 292; *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872); *In Re Mabel P. French* (1905), 37 N.B.R 359; *Edwards v. Attorney General for Canada,* [1930] A.C. 124 at 134; *Loving v. Virginia*, 388 U.S.1 (1967); Affidavit of Evan Wolfson, Reply Evidence of the Applicant Couples, Tab 8; Affidavit of Dr. Andrew Koppelman, Reply Evidence of Applicant Couples, Tab 6; Kathleen Lahey, "Are We Persons Yet? Law and Sexuality at the Cusp of the Millennium C.E.," in *Are We Persons Yet* (Toronto: Law Society of Upper Canada, 1999).

56. This historical background reveals that the essence of the AGC argument is discrimination. It may use polite language and "expert" evidence, but as much as the white supremacist defence of anti-miscegenation law was bigotry, the core of the AGC's case is equally discriminatory. This is readily apparent by considering the nature of the arguments in *Loving v. Virginia*, arguments that are indistinguishable from those in the case at bar. When LaForme J. found that the exclusion of same-sex couples had been, at times, motivated by discrimination, this was not unfounded speculation. The AGC's argument openly seeks to privilege opposite-sex relationships as normal, natural, fundamental, and normatively superior. In a human rights context, the discriminatory thinking underlying the AGC's factum is all too familiar: gay and lesbian people are "essentially different" – their so-called "marriages" do not and cannot exist, and they are irrational to complain of discrimination.

> *Loving v. Virginia*, 388 U.S. 1 (1967); Supplemental Affidavit of Dr. Eskridge, Reply Evidence of the Applicant Couples, Tab 4, page 176-177; Affidavit of Prof. Wolfson, Reply Evidence of the Applicant Couples, Tab 8, page 237-241; Affidavit of Dr. Koppelman, Reply Evidence of the Applicant Couples, Tab 6, page 190-193; *Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Div. Ct.) at page 441, para. 410.

The Definitional Preclusion Argument is Circular

57. The AGC baldly and repeatedly states that "marriage is ... heterosexual." As recognized by the courts of Alaska, Hawaii and Vermont, such reasoning is "circular and unpersuasive".

> *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993) at 61, 63; *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Superior Ct. Feb. 1998)

58. Dr. Adele Mercier demonstrates that the Definitional Preclusion argument proves nothing.

> An argument *begs the question* when the conclusion it purports to *derive* from the premises is itself one of the premises. Question-begging arguments establish nothing at all. *Of course* if you assume that the moon is made of green cheese, you can prove that the moon is made of green cheese. P *always* entails P. [The AGC] arguments are question-begging. Most implicitly have the form: If a marriage is only between a man and a woman (plus some other considerations), then a marriage is only between a man and a woman.
>
> Reply Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 4.

59. Definitional Preclusion confuses meaning with reference. What a word may have been applied to in the past does not determine what a word means.

> The *meanings* of all words of all languages ... *always* stretch beyond their current *reference*. ... Since before Emancipation, the word 'citizen' had never been applied to Blacks in the US, it would follow from [AGC's] claim that, as a matter of necessity, Blacks cannot be citizens. [The AGC's Definitional Preclusion argument] commits [it] to the view that Emancipation, by extending its reference, *changed the very meaning of the word 'citizen'*. That is, [it] is committed to the view that, after Emancipation, even whites were no longer citizens according to the usual meaning of that term in the language.
>
> Reply Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 6.

Definitional Preclusion is Contrary to Section 15 of the Charter

60. The Supreme Court has repeatedly rejected the reasoning of Definitional Preclusion. In *Egan,* both the trial judge and a majority on appeal relied on circular reasoning to find that there was no discrimination, ruling that "the plaintiffs fall into the general group of non-spouses and do not benefit because of their non-spousal status rather than because of their sexual orientation." In contrast, Justice Linden of the Federal Court of Appeal, like a majority of the Supreme Court, recognized that:

> [This analysis] is circular, returning us to the original issue without satisfactorily resolving it. ... [The] issue cannot be resolved simply by stating that the distinction drawn by the Act is based on the definition of "spouse" rather than on sexual orientation. It is, after all, the definition of "spouse" that is being attacked as discriminatory.
>
> *Egan v. Canada* (1991), 38 R.F.L. (3rd) 294 at 308-9 (F.C. T.D.); (1993), 103 D.L.R. (4th) 336 at 346, 366 (F.C.A.); [1995] 2 S.C.R. 513 at 594, para. 161.

61. The Supreme Court heard a similar argument in *M. v. H.* The Court soundly rejected the assertion of definitional imperatives, "natural biological differences" and universal traditions. In his lone dissent, Gonthier J. adopted the Definitional Preclusion approach and concluded that same-sex couples could not be spouses since "...[t]he concept of "spouse", while a social construct, is one with deep roots in our history..." An overwhelming majority of the Supreme Court rejected the very arguments advanced by the AGC and ruled that same-sex relationships are entitled to equal respect and recognition. This surely includes the fundamental right to marry. Indeed, Gonthier J., expressed concern that *M. v. H*. was indistinguishable from gays and lesbians seeking equal marriage. The AGC's arguments in this case are all culled directly from his dissent.[2]

> *M. v. H*., [1999] 2 S.C.R. 3 at 127, 130, para. 227, 231, per Gonthier J., dissenting at 57-58, para. 73.

62. The Supreme Court has cautioned that circular reasoning threatens the integrity of the discrimination analysis. In *Miron v. Trudel*, the majority rejected the approach of Gonthier J., in the following terms:

> [Gonthier J.] asserts, however, that [marital status] is not used in a discriminatory manner in this case because ... the Legislature's intention was to assist those couples who are married. He concludes that distinguishing on the basis of marital status is relevant to this purpose and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. ... The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. This, as I understand it, is the lesson of the early decisions of this Court under s. 15(1). The focus of the s. 15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom.
>
> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-491, para. 134-137 [*emphasis added*];

---

[2] The AGC refers to dissenting judgments in its factum as if they are the view of the Court, and without acknowledging that they are dissents. See, e.g., AGC Factum, at para. 133, 93.

Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 4; *Baehr v. Lewin* 852 P.2d 44, 61, 63 (Hawaii 1993); *Brause and Dugan v. Bureau of Vital Statistics*, Case No. 3AN-95-0562 CI (Alaska Superior Ct., Feb. 27, 1998).

63. Deference to "traditional" definitions cannot substitute for judicial scrutiny. To conclude that same-sex couples simply "fall outside the definition of [spouse or] marriage," which "is now, and has traditionally been, defined as a union between the sexes," is to avoid the question of whether the "traditional" definition offends the dignity of lesbians and gay men contrary to the *Charter*.

M. v. H., [1999] 2 S.C.R. 3 at 127, para. 2276, per Gonthier J., dissenting.

Definitional Preclusion is Empirically Inaccurate

64. The notion that marriage "just is" heterosexual is empirically false. There is widespread cultural, social and historical recognition of marriages between persons of the same sex in our culture and others. Dawn and Julie would be free to marry if they lived in Belgium or the Netherlands. The Clerk of the City of Toronto, with the assistance of the City's legal department, was unsure whether marriage licenses should be issued to the Couples and so brought an application for directions. The editorial boards of *The Globe & Mail* and *The Toronto Star,* the Canadian Human Rights Commission, the United Church, the Ontario Association for Marriage and Family Therapists, the Ontario Bar Association, the half-million member strong Canadian Union of Public Employees and numerous other mainstream institutions have called on the government to accord equal marriage recognition to same-sex couples. The marriage of Barb and Gail is not an "oxymoron," as alleged by the AGC. The marriages of persons of the same sex are fully part of modern consciousness.

Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2; Affidavit of John Fisher, Exhibit E, page 85-89; Affidavit of W.J.P. Jones, Toronto City Clerk Record 17-20, at para 10-18; Editorial, "Gays and Marriage," *The Globe and Mail*, October 5, 2001, at page A16; Ontario Association for Marriage and Family Therapy <http://www.oamft.on.ca/mcsanesex.htm>; The United Church of Canada <http://www.united-church.ca/justice/news/canada/030226.shtm>; CUPE <http://www.cupe.ca/issues/equality/showitem.asp?id+8669>

65. Just as many people recognized Jewish marriages or slave marriages while these were denied legal recognition, many Canadians recognize the reality of lesbian and gay marriages. The most recent poll shows that 65% of Canadians support equal marriage for same-sex couples. Among those under age 35, there is 80% support. There is strong social, cultural and historical acceptance of marriage as an institution not exclusively devoted to sexual orientation

and sex discrimination. Marriage for same-sex couples does not represent a definitional impossibility. Rather, it is a social and cultural reality, which is simply being denied legal recognition by the State.

> Leger Marketing Poll, June 22, 2001, AGC Supplementary Record at 992, 994; Cross-Examination of J. Fisher, June 19, 2001, Exhibit 3; Angus Reid Group Survey, June 23, 1999, AGC Supplementary Record at 964.

At Root, Definitional Preclusion is Based on Faulty Assumptions

66. Underlying the assertion that "marriage just is the union of one man and one woman," the AGC factum proposes three rationales for exclusion: religion, biology and history. First, the AGC evidence relies heavily on Christian theological treatises on marriage and the religious history of marriage. Second, it appeals to biology, arguing that because gays and lesbians cannot "naturally" procreate, they simply do not fit the definition. Third, the AGC appeals to history, tradition and the "universal", stating that human societies, "since time immemorial", have understood marriage to be exclusively heterosexual, and that this must continue, since the definition is "pre-legal" and "pre-political," having been fixed by God, nature or culture. All three rationales for Definitional Preclusion are wrong in fact and law.

i) Religious Explanations for Definitional Preclusion Must be Rejected

67. The AGC centres much of its evidence on religious tradition. The AGC relies on a definition of marriage as rooted in "Christendom," provides evidence on the teachings of Thomas Aquinas and St. Augustine, and offers "expert" opinion from the official spokesperson of the Catholic Archdiocese of Toronto. Canadian society and the recognition of civil marriage are not governed by religious law, but by the Constitution and its values of religious freedom, liberty, and equality. Our Constitution demands rational justification, not reliance on majoritarian religious belief.

> *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295; *Hyde v. Hyde and Woodmansee* (1866), L.R.1 P&D 130 at page 133; Affidavit of John Witte Jr., AGC Record, Vol 1, Tab B, at page 180-182; Affidavit of Suzanne Scorsone, AGC Record, Vol. 2A, Tab E.

68. In any case, the MCCT application reveals that the AGC cannot rely on religious definitions as a justification for continuing exclusion. There are religious communities that solemnize marriages between persons of the same sex as a sacrament. Unless the Court is to prefer majoritarian faith traditions to others, the Court cannot deny recognition to the marriages of same-sex couples.

ii) Biological Explanations for Definitional Preclusion Must be Rejected

69. The Respondents argue that marriage is by definition heterosexual, because they have the "rational *possibility* of children". This argument is legally and factually untenable. The nullity cases (which form part of the common law of marriage) demonstrate that procreation is not the purpose of marriage. A marriage by a heterosexual couple over age 60 offers no "rational possibility" of childbearing. If the central purpose of marriage were procreation, surely this would be reflected in the law of divorce and annulment. It is not. The House of Lords, the United States Supreme Court, and our Supreme Court have all recognized that procreation is not the essential purpose of marriage.

> AGC Factum, at para 155; *L. v. L.* (1922), 38 T.L.R. 697; *Hale v. Hale*, [1927] 2 D.L.R. 1137 at 1138-1139 (Alta S.C.), aff'd [1927] 3 D.L.R. 481 (C.A.) at 482; *Tice v. Tice*, [1937] O.R. 233 (H.C.) at 239, aff'd [1937] 2 D.L.R. 591 (C.A.); *Heil v. Heil*, [1942] S.C.R. 160; *W. v. W.*, [1950] 1 W.W.R. 981 (B.C.C.A.) at 985-986; *D. v. D*. (1973), 3 O.R. 82 (H.C.J.); *Norman v. Norman* (1979), 9 R.F.L. (2d) 345 (Ont. U.F.C); *Foster v. Foster*, [1953] 2 D.L.R. 318 (B.C.S.C.) *Baxter v. Baxter,* [1948] A.C. 274 at 286 (H.L.); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965); *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Briese v. Briese* (1977), 82 D.L.R. 91 (Man Q.B.).

70. The Law Commission of Canada has recognized the weakness of relying on biological explanations for exclusion from marriage:

> [The state does not reserve] marriage to procreation and the raising of children. People may marry even if they cannot or do not intend to have children.... [T]he argument that marriage should be reserved to heterosexual couples cannot be sustained in a context where the state's objectives underlying contemporary state regulation of marriage are essentially contractual ones, relating to the facilitation of private ordering. There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in light of current understandings of the state's interests in marriage.
>
> Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4, at page 16-17.

71. If procreation were the purpose of marriage, many of the Applicant Couples have been wrongfully refused licenses. Six of the seven Couples have or wish to rear children. Access to marriage is denied on the basis of sexual orientation, not capacity or desire to procreate, since of course many heterosexual married couples do not or cannot have children. Sadly, the AGC assumes that words like "society", "procreation," and "children" do not include same-sex families. Entirely missing from the discussion are the hundreds of thousands of children currently being raised by same-sex parents, and who live every day in the shadow of the

government's message that their parents are "fundamentally different." These children continue to be told that their parents are unworthy of marriage, an institution the AGC's expert states "is good, does good, and has goods for the couple and their children". As the Divisional Court held "Same-sex couples who form family units with children are no less parents and are no less entitled to the same concerns by our courts".

Halpern v. Canada (Attorney General), [2002] 60 O.R. (3d) 321 (Div. Ct.), at paras. 88-91 per Blair, at para. 372 per LaForme.; AGC Factum, at para. 9; Affidavit of John Witte Jr., Respondent's Record, Vol. 1, Tab B, p. 202, para. 69.

iii) Historical Explanations for Definitional Preclusion Must be Rejected

72. The claim that "marriage is heterosexual" because this represents a "universal norm" "across times and across cultures" is also deeply flawed. First, it flies in the face of the AGC's own expert evidence acknowledging that many societies have recognized marriages between persons of the same sex. Hundreds of cultures have celebrated same-sex marriages over the course of history. There is current legal recognition of equal marriage in the Netherlands and Belgium. Yet, the AGC insists that a different-sex requirement is "universal".

See *supra*, paras. 27–29.

73. Second, even if marriage had been heterosexual-only "since time immemorial", this does not determine the constitutionality of exclusion. The mandate of human rights jurisprudence is its mandate to critically evaluate and challenge long-standing, often commonly accepted historical practices. In the words of political philosopher J.S. Mill, "[w]as there ever any dominion which did not appear natural to those who possessed it?" Since discrimination is itself traditional, there is a grave danger in perpetuating an unconstitutional law by relying on historical precedent. Indeed, there is a long and shameful history of denying marriage on the basis that the parties were of the wrong race. In *Loving v. Virginia*, the trial court held that a marriage between two persons of different races was, by definition, not a true marriage. The AGC's assertion that the Applicant Couples are of the wrong sex is a parallel, equally discriminatory argument that should be rejected.

Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955); *Loving v. Virginia*, 388 U.S. 1 (1967) at 3; Affidavit of Prof. Wolfson, Reply Evidence of the Applicant Couples, Tab 8, at page 252-252; Affidavit of Dr. Koppelman, Reply Evidence of Applicant Couples, Tab 6, at page 190-199; Reply Affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4, at page 177; *Law v. Canada*, [1999] 1 S.C.R. 497 at 539, para. 72; J.S. Mill & Harriet T. Mill, "The Subjection of Women", in *Essays on Sex Equality*, Alice S. Rossi, ed. (Chicago University of Chicago Press, 1970).

74. In the *Person's Case*, the Supreme Court found that women were not "persons" on the basis of the history of the common law. The Privy Council recognized women as "persons" permitting women to serve as senators and wrote:

> The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.
>
> *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 134; Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1.

75. History is not static. Society evolves. It is therefore not sufficient to state that, because same-sex couples have not historically been allowed to marry (at least in contemporary Canada) then marriage is justifiably restricted to different-sex couples. The issue is not how "marriage" has historically been defined, no more than the *Persons Case* could have been correctly resolved by the fact the term "person" had been historically defined to exclude women. The issue is whether the exclusion of a historically disadvantaged group is discriminatory and, if so, whether that discrimination is justified. The *Charter* aims to protect the traditionally disadvantaged from discrimination, however deeply ingrained, seemingly natural, and longstanding.

Conclusion regarding Definitional Preclusion

76. Definitional Preclusion is no answer to the claim of discrimination. Under the equality guarantee of the *Charter*, the government cannot rely on a history of discrimination, majoritarian religious views, or so-called natural imperatives to explain or justify its continuing discrimination.

77. In relying on the definitional argument, the government ultimately seeks to classify gay and lesbian relationships as "other", fundamentally outside the realm of civic and linguistic intelligibility. In a symbolic sense, the definitional argument declares same-sex unions to be meaningless and incomprehensible. Whatever the arguments advanced by the government, the marriage of two persons of the same sex is not an expression of unintelligible nonsense. There are *marriages* between same-sex couples in the Netherlands, and in June, in Belgium. Some of the Applicant Couples consider themselves married. It is the government that fails to recognize their marriages and their humanity. They are nevertheless real.

Affidavit of Dawn M. Onishenko, Application Record, Vol. 1, Tab 10, at page 57.

C. SECTION 15

78. The Supreme Court has decided four cases in which differential treatment of gays and lesbians has been found to breach s. 15. The Divisional Court unanimously reached the same conclusion, that the denial of equal marriage violates s. 15.

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 524, 547-552, para. 39, 88; *M. v. H.*, [1999] 2 S.C.R. 3 at 46-47, para. 48; *Egan v. Canada,* [1995] 2 S.C.R. 513; *Vriend v. Alberta,* [1998] 1 S.C.R. 493; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* [2000] 2 S.C.R. 1120

The Applicant Couples are Subjected to Differential Treatment

79. Differential treatment exists if the impugned law draws a formal distinction between the claimant and others on the basis of one or more personal characteristics.

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 524, para. 39; *M. v. H.*, [1999] 2 S.C.R. 3 at 46-47, para. 48.

80. The denial of marriage licences draws a distinction on the basis of sex and sexual orientation. If the Halpern and Rogers application for a marriage licence said Colin Rogers instead of Colleen Rogers, Hedy Halpern would today be legally married. Instead, Hedy has chosen Colleen, and the AGC declares that their marriage is a “nullity”. The State therefore denies Hedy the mate of her choice. In doing so, the law draws a distinction between the applicants and others, based on the personal characteristics of sex and sexual orientation.

The Differential Treatment is on the Protected Grounds of Sex and/or Sexual Orientation

81. The bar to marriage between persons of the same sex is most obviously sexual orientation discrimination. Lesbian and gay persons are those who choose a spouse of the same sex, and who experience the discriminatory effects of the current exclusion.

> *M. v. H.*, [1999] 2 S.C.R. 3 at 52, para. 62; *Egan v. Canada,* [1995] 2 S.C.R. 513 at 601, para. 175.

82. Denial of equal marriage is also sex discrimination. It rests, in large measure, on sex-role stereotypes about the "essential nature" of men and women. This is made obvious by the AGC's reliance on the suggestion that there is no discrimination because of the "complementarity of the two human sexes." The idea of that men and women have complementary essential natures was traditionally invoked to justify the exclusion of women

from the public sphere (ie. women are naturally suited to domestic tasks and are passive; men are naturally public actors and aggressive). Now, we recognize that individual men and women possess a wide range of qualities, characteristics, and "essential natures." The government's argument is based on undefined, antiquated generalizations about the natures of the sexes - basically, sexist stereotype.

> Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, at page 526; Affidavit of Dr. Koppelman, Reply Evidence of Applicant Couples, Tab 6, at para 10, 13, ftnt. 12; Affidavit of Prof. Wolfson, Reply Evidence of the Applicant Couples, Tab 8,at para. 22-24; *Baehr v. Lewin*, 852 P.2d 44 (Hawaii, 1993); *Baehr v. Miike*, 80 Haw. 341, 910 P 2d. 112 (1996); AGC Factum, at para. 5, 136, 152.

The Differential Treatment Discriminates in a Substantive Sense

83. Whether on the basis of sex or sexual orientation, or both, the denial of the right to marry is imposed on the basis of an enumerated or analogous ground of discrimination. This differential treatment discriminates in a substantive sense, because it is inconsistent with the purpose of s. 15 of the *Charter*:

> It may be said that the purpose of s. 15(1) 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.
>
> *Law v. Canada*, [1999] 1 S.C.R. 497 at 524, 529, para. 39, 51; *M v H*, [1999] 2 S.C.R. 3 at 53, para. 65.

84. In determining whether the differential treatment discriminates in a substantive sense, the question is whether the differential treatment:

(i) imposes a burden upon or withholds a benefit from the Applicant Couples
(ii) in a manner that reflects the stereotypical application of presumed group or personal characteristics, or otherwise perpetuates or promotes the view that the Applicant Couples (and other lesbians and gays) are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

The Applicants are Denied Equal Benefit of the Law

85. Exclusion from civil marriage withholds the equal benefit of the law from the Applicant Couples. Contrary to the assertion of the AGC, the Divisional Court did not identify the benefit that flows from civil marriage as nothing more than a “social stamp of approval”. LaForme J. acknowledged marriage to be “…legal, religious, social, vocational, and personal…”[para. 189];

a defining element of every person [para. 189]; a “significant choice” [para. 190], a “status” recognized by the state [para. 190]; an aspect of full participation in society [para. 199]; a “fundamental right” [para. 199]; and a “basic social and cultural institution” [para. 208]. These findings are well supported by the jurisprudence and the evidence. While the AGC argues that there is no evidence of harm to lesbians and gay men in the record, the following demonstrate that exclusion from marriage is a denial of the equal benefit of the law:

1. It denies equal respect to same-sex relationships;
2. It withholds personal benefits associated uniquely with marriage;
3. It denies same-sex relationships community supports and security;
4. It withholds access to family law rights, obligations and protections;
5. It causes confusion and unfairness;
6. It withholds opportunities for familial bonds;
7. It denies gays and lesbians status as full citizens;
8. It promotes harms of social stigma, prejudice and violence;
9. It withholds an important personal choice; and
10. It denies a fundamental human right.

1) Denies Equal Respect to Same-Sex Relationships

86. The refusal to recognize the marriages of persons of the same sex withholds from the Applicant Couples, and all gays and lesbians, the equal benefit of the law. It denies the state celebration, recognition and acceptance of their unions as marriages, a status available to all heterosexuals. “...[M]arriage...is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value.” The denial of marriage sanction marks gays and lesbians, and their relationships, as inferior. It trivializes the love and commitment that gay and lesbian people feel for their chosen partners, treating it as second-class to the love and commitment felt by non-gay people. It fosters social stigma, promoting the idea that same-sex relationships lack “natural complementarity,” and are thus unnatural and disgusting. “Legal marriage ... is not only a list of rights and obligations, a “piece of paper”; it amounts to a kind of verification that the couple is what it represents itself to be – as worthy of respect as any other couple.”

> The government has relegated us to the status of “pretend couple” by not recognizing our marriage exactly as it would for a heterosexual couple.

Affidavit of Colleen Rogers, Application Record, Vol. 1, Tab 4, at page 36; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 225-226; B. MacDougall, “The Celebration of Same-Sex Marriage” (2000) 32:2 Ottawa Law Rev. 235 at 242; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, particularly at page 179, 182, 206; see *supra*, para. 36-37; Affidavit of Carolyn Moffatt, Application Record, Vol. 1, Tab 13, at page 69.

87. The Supreme Court of Canada has specifically recognized the status of being unmarried – of not having contracted a marriage in a manner recognized by the state – as a ground of discrimination. In so doing, the Court acknowledged that unmarried relationships have been and continue to be treated with social disadvantage and prejudice. "The sanction of the union by the state through civil marriage" is obviously a benefit of the law, quite apart from whether the same cluster of material benefits and obligations otherwise applies to a couple. If heterosexuals who *choose* not to marry are subject to stigmatizing treatment, the discriminatory impact of an *absolute* marriage bar to gays and lesbians, and their "illegitimate" children, should be obvious. Gay and lesbian people are marked as individuals *forbidden to marry* in a society that celebrates marriage as a fundamental good.

> *Miron v. Trudel,* [1995] 2 S.C.R. 467, 469, 470, 474, 475, 498; *Tighe v. McGillivray Estate* (1994) 112 D.L.R. (4th) 201 (N.S.C.A.); *Surrette v. Harris Estate* (1989) 91 N.S.R. (2d) 418.

2) Withholds Personal Benefits Associated Uniquely with Marriage

88. Same-sex couples and their children are denied access to significant personal benefits associated uniquely with the institution of marriage. Marriage promotes emotional well-being, greater maturity, and better psychological adjustment. For many individuals, marriage is a central goal in life and an essential component of identity, personal dignity, self-worth and emotional well-being.

> [R]esearchers find that marriage serves to stabilize couple relationships, attracts social recognition of and investment in the continuity of the relationship, contributes to financial well-being, individual happiness, improved levels of physical and mental health, job satisfaction and achievement, to higher rates of involvement with extended family members, and lower rates of domestic violence than are found in cohabiting partnerships.

> Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 108, 117, 120, 136; Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 67-68; see *supra*, para 36-50.

3) Denies Same-sex Relationships Community Supports and Security

89. Dr. Barnes deposes that access to legal marriage would promote stability and security in same-sex relationships, just as it fosters those benefits in different-sex relationships. As the AGC proclaims, "marriage remains the most stable unit for family formation." By denying the legal framework of marriage, the state contributes to the lack of support for same-sex relationships.

Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 117; Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 278-280; see *supra,* para. 37-44; *Divorce Act,* R.S.C. 1985, c. D.3.4, s.9; AGC Factum, at para 20.

4) Withholds Access to Family Law Rights, Obligations and Protections

90. The current legal context in Ontario is that unmarried couples have many of the same rights and obligations, whether they are different or same-sex couples. Of course, different-sex couples can choose to marry, and if they do, they have access to important expanded rights and responsibilities. As the AGC states, marriage "is supported by the highest and most attractive incentives possible." The most notable of these legal benefits are protections on separation or death (such as equalization of net family property, matrimonial home protections and intestacy rights). If gays and lesbians cannot choose civil marriage, they are denied access to legal protections in the same way as "M" was denied access to the court-enforced system of spousal support.

Nova Scotia (Attorney General) v. Walsh, [2002] SCC 83; *M. v. H.*, [1999] 2 S.C.R. 3 at 53, para. 66; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 593-594, para. 158-61, *Vriend v. Alberta,* [1998] 1 S.C.R. 493 at 544-5, para. 87; AGC Factum, at para 10.

5) Causes Confusion and Unfairness

91. Marriage, uniquely, creates a status that is well understood and portable across the country. Unlike ascribed spousal status, marriage makes absolutely clear the relationship of the parties – to the couple, the state and the community at large.

Affidavit of John Fisher, EGALE Record, Tab 1, at page 10-11; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 134-135; Affidavit of Hedy Halpern, Application Record, Vol. 1, Tab 16, at page 31; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 565, para. 86.

92. Notwithstanding the Supreme Court decision in *M. v. H.*, there is no *overarching* scheme of regulation to govern same-sex spouses as they interact with society and the law. Some provinces and territories offer no recognition; others provide limited, divergent benefits and obligations, flowing from differing periods of cohabitation. For the Applicant Couples, for example, Julie would be able to adopt a child born to Dawn if they continue to reside in Ontario, but not if they move to New Brunswick. Barb and Gail qualify for most of the same rights and obligations as married spouses in Ontario, but are not entitled to protections in the event of intestacy. Tom and Al would lose all the rights they now have if they moved to Prince Edward

Island. Piecemeal provincial protections cannot have the same effect practically or psychologically.

> Affidavit of John Fisher, EGALE Record, Tab 1, page 10-12.

93. Moreover, unlike different-sex couples, same-sex couples cannot immediately access the benefits and protections accorded to spousal relationships, but must cohabit for varying periods of time to qualify for ascribed spousal status. This is an intractable problem for those forced to live apart or those who have an immediate need for recognition of their spousal status.

> *M. v. H.*, [1995] 2 S.C.R. 3 at 50-51, para. 59-61.

6) Withholds Opportunities for Familial Bonds

94. Equal marriage recognition would send the vital message that same-sex relationships are not unworthy of state sanction. It would allow families and friends to come together to celebrate an event that has equal status and meaning to any other marriage. Civil marriage would make the couples' relationships visible and authentic in a manner that would enhance the comprehension and acceptance of many heterosexuals.

> Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 84-85; Affidavit of Marg Nosworthy, Application Record, Vol. 2, Tab 4, at page 270; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2 at page 157; see *supra*, at para 45-46; *M. v. H.*, [1999] 2 S.C.R. 3 at 57-58, para. 73.

7) Denies Gays and Lesbians Status as Full Citizens

95. Marriage and citizenship are such intertwined notions, that you cannot bar a group of people from marriage without undermining their status as citizens. Because marriage is considered the bedrock on which social and political life is built, same-sex couples are being told that their unions do not contribute in the same manner to Canadian society, and that they are therefore inessential citizens.

> Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, at page 526.

96. Contrary to the AGC's claims, private commitment ceremonies are no answer to the government's discrimination. As long as the state denies civil marriage recognition, gay and lesbian Canadians are not treated as "equally worthy of full participation in Canadian society."

> Citizenship rights are *not* just about *not* being excluded from the public sphere, but [are] more positively about being able to participate fully in civil society. ... Being permitted to

> speak one's own language only at home but not in public, or being prevented from building community institutions, such as community centres, newspapers, or archives, scarcely qualifies as equal participation in civil society. Similarly being restricted from affirming relationships and domestic life in the public sphere through the virtually universal currency of marriage constitutes a curb on public recognition as a valid actor in civil society.
>
> Affidavit of Dr. Adam, Application Record, Vol. 3, Tab 4, at page 496; *Gosselin v. Quebec (Attorney Gener*al), [2002] S.C.C. 84 at para. 22,25.

8) Promotes Harms of Social Stigma, Prejudice and Violence

97. Exclusion from marriage causes real pain and tragic harms. Dr. Rosemary Barnes establishes that denying equal marriage contributes to social stigma, prejudice and violence against gays and lesbians. The child of same-sex parents cannot help but wonder what is wrong with her family since her parents are denied the social good of marriage that other children's parents enjoy. Gay and lesbian youth who have grown up with the same hopes and dreams to go to school, get a good job, get married and have kids, kill themselves precisely because they feel like they will never have a "normal" life. In the face of all this, the AGC factum denies these serious harms as entirely subjective, "unreasonable," "irrational" and in any case trivial compared to the other sources of discrimination against lesbians and gays.

> Making marriage available to same-sex couples would send a powerful and much-needed message to those struggling with "coming out" issues: it's okay if you're gay or lesbian. You will still be a member of society. You can lead a normal life. Given the statistics on suicide among gay and lesbian teens, this is perhaps the most compelling reason to recognize same-sex marriage.
>
> Affidavit of Dr. Kaufman, Application Record, Vol. 2, Tab 6, at page 333-338; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 125-135; Affidavit of Dr. Stacey and Timothy Biblarz, Reply Evidence of Applicant Couples, Tab 2 at page 68–69, 75; Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, at page 278-280; Affidavit of Dr. Ehrlich, EGALE Record, Tab 2, at page 101, 104; AGC Factum, paras. 69, 70, 73, 120, 164.

9) Withholds an Important Personal Choice

98. The decision whether to marry is an intensely private one, but this choice is denied to lesbians and gay men. "In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance." Whether or not to marry must be an individual decision for gays and lesbians, as it is an individual decision for heterosexuals. The denial of such a significant choice withholds the equal benefit of the law, and infringes personal autonomy, privacy and human dignity contrary to s. 7 of the *Charter*.

Nova Scotia (Attorney General) v. Walsh, [2002] S.C.C. 83 at para. 43, 50; *Egan v. Canada,* [1995] 2 S.C.R. 513 at 593, para. 159-161; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 227; Affidavit of Dr. Rayside, Application Record, Vol. 3, Tab 7, at page 558; Affidavit of Dr. Kaufman, Application Record, Vol. 2, Tab 6, at page 332; Affidavit of John Fisher, EGALE Record, Tab 1, para 36-39; *Godbout v. Longueuil* (City), [1997] 3 S.C.R. 844 at 893, para. 66; *Blencoe v. British Columbia (Human Rights Commission),* [2000] S.C.R. 307 at 340, para. 49; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 163–172; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368, para. 80.

99. The Supreme Court recently affirmed "the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state." The Court acknowledged the primary value of "autonomy and self-determination" and appreciated the need to allow individuals the "ability to live in relationships of their own design." These are the key factors in determining whether there is an offence to dignity. If gay and lesbian individuals share the liberty to structure their personal relationships, they must be free to choose whether they wish to marry. As the Supreme Court declared in *Walsh,* "limitations ... that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty."

Nova Scotia (Attorney General) v. Walsh, [2002] S.C.C. 83 at para. 43, 50, 63.

10) Denies a Fundamental Human Right

100. There is a fundamental right to marry. It has been acknowledged by the Divisional Court decision, the Supreme Courts of the U.S. and Canada, and in international law. "It appears to be universally accepted that the freedom to marry the person of one's choice and the right to have that relationship recognized by society is of fundamental importance in our society." The withholding of a fundamental right and personal choice is a denial of the equal benefit of the law.

> [T]he decision of whether or not to marry can, indeed, be one of the most personal decisions an individual will ever make over the course of his or her lifetime. It can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 471, para. 95; *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.C. 83 at para 63; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 169 citing with approval *Loving v. Virginia*, 388 U.S. 1 (1967) at 12; *M. v.H.*, [1999] 2 S.C.R. at 128, para. 228; Affidavit of Professor Wolfson, Reply Evidence of Applicant Couples, Tab 8, at page 239-240; Article 16(1) of the Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810, Art. 16, at 71; Article 23 of the International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368; *Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Div. Ct.), at para. 199, per LaForme J.

The Denial of Equal Marriage Demeans the Dignity of Gays and Lesbians

i A Purposive and Contextual Approach

101. Although the AGC uses the phrase "contextual approach", it urges that the equality claim be situated within a historical, anthropological and legal narrative that excludes the lived experience of gay and lesbian people. In so doing, the AGC reinforces the traditional and continuing erasure of the experiences of same-sex families. By conducting its s. 15 analysis from a majoritarian perspective, within the very terms of the discriminatory law under attack, the AGC attempts to defeat the purpose of the equality guarantee.

> *R. v. Turpin,* [1989] 1 S.C.R. 1296 at 1332; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 488-491, para. 134-137.

102. The Divisional Court rightly rejected the AGC's approach. Instead, it correctly analyzed the Applicant Couples' s. 15 claim "in a purposive and contextualized manner, taking into account the "large remedial component" of s. 15(1), and the purpose of the provision in fighting the evil of discrimination."

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 516, 524-53, para. 23, 40-55; *Lovelace v. Ontario,* [2000] 1 S.C.R. 950 at para. 59.

103. The discriminatory impact of exclusion from marriage is clearly revealed "in the context of the place of the group in the entire social, political and legal fabric of our society." This framework makes visible the historic and current denigration of lesbians, gays, and their relationships; the corresponding celebration of heterosexuality as a normative ideal; the relative political powerlessness of gay and lesbian people; the changes to marriage over time; and the continuing cultural significance and privileged status of marriage. In this context, it is clear that the exclusion of same-sex couples from the institution of marriage denies "equal membership and full participation in Canadian society." It harms self-respect and self-worth, psychological integrity and empowerment.

> *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 152, 164; *Gosselin v. Quebec (Attorney General),* [2002] S.C.C. 84 at para. 23, 121-124; *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331-32; *Law v. Canada*, [1999] 1 S.C.R. 497 at 517, para. 25, 41, 53.

ii. The Correct Subjective-Objective Perspective

104. To prevent and remedy historical disadvantage, and appreciate the depth of the human dignity interest affected, the main consideration "must be the *impact* of the law" examined from the perspective of a reasonable person in the circumstances of the claimant. This reveals that the denial of equal marriage perpetuates and promotes the view that same-sex couples are less capable, less worthy of recognition, and less valuable members of Canadian society.

> *Andrews v. Law Society of B.C.,* [1989] 1 S.C.R. 143 at 165; *Law v. Canada*, [1999] 1 S.C.R. 497 at 517, 524, 530, 532, 547-552, para. 25, 51, 53, 59, 88.

105. The AGC argues that the Divisional Court erred in considering the Applicant Couples' perspective, because their feelings are unreasonable and illegitimate. According to the AGC, rational gay and lesbian people simply accept that they cannot marry; alternately, perhaps the suggestion is that gay and lesbian people are simply irrational. This approach attempts to subvert the purpose of s. 15, by using a "reasonable person" standard as a "vehicle for the imposition of community prejudices". While the AGC extols the history of exclusion of gays and lesbians from a fundamental social institution and calls it a necessary reality, the reasonable gay or lesbian person sees a history of discrimination in violation of the *Charter*'s promise of equality.

> [The] focus of the inquiry must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity.
>
> *Law v. Canada*, [1999] 1 S.C.R. 497 at 529, para. 61; *Egan v. Canada*, [1995] 2 S.C.R.513 at 552-553, para. 56; *Miron v. Trudel* [1995] 2 S.C.R. 418 at 488, para. 133.

106. Although their perspective is the central consideration, even without the evidence of the Applicant Couples, the offence to dignity is clearly demonstrated by logical reasoning. "The government's plea of no demonstrated harm… rings hollow when what is at stake is the denial of [a] fundamental right…." The offence to dignity also logically follows from the Supreme Court precedent of *M. v. H*. If more is required, it is also firmly established by extensive expert evidence. As noted, the opinion of Dr. Barnes, psychologist, is unchallenged in the record. Almost the entirety of her affidavit deals with the harms to psychological integrity and emotional well being caused by the denial of equal marriage. Drs. Eichler, Lewin, Kaufman, Bigner, Stacey, Biblarz, Adam, Ehrlich and Mercier, and Mr. Fisher are among the other experts who depose that the denial of equal marriage demeans the dignity of lesbians and gays and their

families. While the AGC accuses the Applicant Couples of proffering illegitimate complaints from the Applicant Couples and otherwise lacking objective evidence of the offence to dignity, the fact is that it is the AGC that adduced *no evidence* as to the perspectives and lived realities of Canada's gay and lesbian citizens.

> Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 119, 132-135, 141-142; Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 68; Affidavit of Dr. Adam, Application Record, Vol. 3, Tab 4, at page 497-501. Affidavit of John Fisher, EGALE Record, Tab 1, at page 20-21; Affidavit of Dr. Kaufman, Application Record, Vol. 2, Tab 6, at page 337-338; Affidavit of Dr. Ehrlich, EGALE Record, Tab 2, at page 101-102, 104; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 156-157; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 225-226; Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 24-28; Affidavit of Dr. Bigner, Application Record, Vol. 2, Tab 5, page 7-8; *Sauvé v. Canada (Chief Electoral Officer*), [2002] S.C.C. 68 at para. 59; *M. v. H.* [1999] 2 S.C.R. 3.

iii. The Correct Approach to Assessing the Impact on Dignity

107. There are four contextual factors that assist in determining that the exclusion from marriage demeans dignity: the pre-existing disadvantage of lesbians and gays, the failure to recognize the actual circumstances of same-sex families, the lack of ameliorative purpose to the exclusion, and the fundamental nature of the interest at stake.

1) Pre-existing Disadvantage

108. A key marker demonstrating that the exclusion from marriage has the effect of demeaning dignity is the existence of "pre-existing disadvantage, vulnerability, stereotyping, or prejudice" experienced by gay and lesbian people, and exacerbated by the denial of civil marriage. The Supreme Court of Canada has recognized that same-sex relationships "have often not been given equal concern, respect, and consideration." It should be obvious to anyone in our society – from the simplest of comments in the workplace or jokes at cocktail parties – that gays and lesbians have been, and continue to be, marginalized in Canadian society. If evidence is required, the Applicant Couples have filed expert evidence establishing that exclusion from marriage reflects and reinforces existing, inaccurate understandings of the merits, capabilities and worth of lesbian and gay relationships within Canadian society, resulting in further stigmatization.

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 534-535, para. 63-64; *M. v. H.,* [1999] 2 S.C.R. 3 at 27,54-55, para. 3, 68-69, 73; *Egan v. Canada,* [1995] 2 S.C.R. 513 at 600-602; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 551, para 102; B. MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa Law Rev. 235; D. Cruz, ""Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource", 74 So. Cal. Law Rev. 925 at 942 (2001).

109. The evidence demonstrates that symbolic exclusion by government has concrete, material effects, as well as causing psychological harms. Law that declares same-sex couples to be less worthy of recognition and respect – like the denial of equal marriage – promotes stereotype, stigma, harassment and violence against lesbians and gays. In a society that has historically demeaned and excluded gays and lesbians, exclusion from marriage is an affront to essential human dignity.

> See *supra*, para. 97.

2) Relationship Between Grounds and Claimant's Characteristics or Circumstances

110. A second contextual factor is whether the impugned law takes into account the claimant's actual situation. Again, the evaluation of this, like the other, contextual factors "must be conducted from the perspective of the claimant." The Supreme Court has observed that "this factor has meant that a disadvantaged class might deserve special accommodation on account of being differently situated or, conversely, that groups who are "more advantaged in a relative sense" may be denied benefits that correspond with the "different circumstances experienced by the more disadvantaged group being targeted by the legislation."

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 532, para. 59; *Lavoie v. Canada*, [2002] S.C.C. 23 at para. 43.

111. Once again, at this stage of the analysis, the AGC calls on Definitional Preclusion as its answer: "marriage is, uniquely, the descriptor of that institution through which a man and a woman relate to each other, their children and society." "Marriage [therefore] relates [only] to the capacities, needs and circumstances of opposite-sex couples".

> AGC Factum, at para 132, 126.

112. The Supreme Court rejected the same argument in the recent case of *Lavoie,* in which the government argued that the differential treatment of non-citizens did not amount to discrimination. The Court held:

> To the extent non-citizens are "differently situated" than citizens, it is only because the legislature has accorded them a unique legal status. In all relevant respects ... non-citizens are equally vital members of Canadian society and deserve tantamount concern and respect.

Lavoie v. Canada, [2002] S.C.C. 23 at para. 44.

113. The government's error is easily corrected by approaching the s. 15 analysis from the requisite subjective-objective perspective. In the case at bar, from the reasonable perspective of persons in the circumstances of the rights claimants, the denial of equal marriage fails to take into account the capacities, needs, and circumstances of the Applicant Couples. The Applicant Couples reasonably do not consider the circumstances of their families as essentially different from those of their heterosexual neighbours. When Alison and Joyce turn to each other in moments of crisis and despair, or joy and celebration, and find the enduring love to which they have committed themselves and shared with their children, they know that they are human beings equally capable of the love and commitment of marriage.

> Excluding gays and lesbians from marriage declares an entire class of persons unworthy of the recognition and support of state sanction for their marriages and disregards the needs, capacities, and circumstances of same-sex spouses and their children.
>
> *Halpern v. Canada (Attorney General)* [2002] 60 O.R. (3d) 321 (Div. Ct.) at page 431; *Baehr v. Miike* 65 USLW 2399, 1996 WL 694235 (Ha. Cir. Ct. 1996); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Superior Ct. Feb. 1998); Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab1; Affidavit of Dr. Eskridge, Application Record, Vol. 3, Tab 1, at page 407; Affidavit of Dr. Kaufman, Application Record, Vol. 2, Tab 6, at page 332; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 3, at page 224-226.

114. As outlined at paragraphs 32-50, the Applicant Couples have the same desire to marry, in the same manner and for the same reasons as their heterosexual friends and family members. They also have the same needs to the myriad of benefits that flow from participation in the institution.

> Like heterosexual men and women, lesbians and gay men value and commit themselves to enduring intimate relationships characterized by emotional, social and material interdependence. Involvement in a loving, committed relationship is central to the personal lives of many lesbians and gay men in the same way that marriage is central to the personal lives of many heterosexual men and women. Insofar as possible given the current social and legal context, loving, committed same-sex relationships are psychologically and practically equivalent to heterosexual marriages.
>
> Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 84; *Law v. Canada*, [1999] 1 S.C.R. 497 at 532, 538, para. 59, 70; Affidavit of Aloysius Edmund Pittman, Application Record, Vol. 1, Tab 18, at page 93-b; Affidavit of Barbara McDowall, Application Record, Vol. 1, Tab 14, at page 74; Affidavit of Dawn M. Onishenko, Application Record, Vol. 1, Tab 10, at page 57- 58; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 109; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 224 - 226; Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, at page 526.

3) Ameliorative Purpose or Effects

115. Another contextual factor that assists in the identification of discrimination is whether the denial has an ameliorative purpose or effect for an historically disadvantaged group. In this case, the denial of marriage to gays and lesbians has no ameliorative purpose whatsoever, but instead causes serious harms as outlined at paragraphs 85 to 100. The Supreme Court has held that an underinclusive law, like civil marriage recognition, that "excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination".

> *Law v. Canada*, [1999] 1 S.C.R. 497 at 539, para. 72; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 547-552, para. 94-104; *M. v. H.*, [1999] 2 S.C.R. 3 at 56-57, para. 71

4) Nature of the Interest Affected

116. The fourth contextual factor is the nature of the interest affected by the impugned law. "[T]he more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction with the meaning of s.15." Recognizing the constitutional and fundamental nature of the interest is integral to the equality analysis, not a conflation with other *Charter* guarantees, as alleged by the AGC. "All *Charter* rights strengthen and support each other and s.15 plays a particularly important role in that process."

> [T]he discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the *constitutional* and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a *fundamental* social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".
>
> *Law v. Canada*, [1999] 1 S.C.R. at 540, para. 74 [emphasis added]; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 556, para. 64; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, para 112; *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at 185.

117. The freedom to marry is so central to our understanding of humanity that a marriage ban against an entire class of people necessarily implicates numerous *Charter* rights and freedoms. It offends human dignity by withholding liberty and security, and infringes the freedoms of expression, conscience, and association.

> See *supra,* para. 33, 35, 98-100. See also: *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at para. 81, 87, 143, 174, 176 per Dickson C.J. and Wilson J., para. 173 per McIntyre J.; Kenneth L. Karst, "The Freedom of Intimate Association", 89 Yale L.J. 624 (1980); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at

343- 344, 349-351, 356, para. 55-57, 68-73, 82; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 56, 173; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 59-61; Affidavit of Mike Stark, Application Record, Vol. 1, Tab 6, at page 41.

118. Perhaps few things are more important than the freedom to choose the spouse of one's choice and to have that relationship celebrated as marriage. At this stage of the analysis in *M. v. H.*, Justice Cory recognized both the tangible and symbolic impact of the denial of access to the protections of the spousal support scheme:

> The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the FLA promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.
>
> *M. v. H.*, [1999] 2 S.C.R. 3 at 57-58, para. 73.

119. Surely, access to equal marriage is even more fundamental and important than access to spousal support. The Supreme Court of Canada has affirmed the fundamental nature of the right to marry, writing that the decision "touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice [and] … is a matter of defining importance to individuals." The Court has also described the importance of the institution as follows:

> Many believe that marriage and the family provide for the emotional, economic, and social well-being of its members. It may be the location of safety and comfort, and may be the place where its members have their most intimate human contact. Marriage and the family act as an emotional and economic support system as well as a forum for intimacy. In this regard, it serves vital personal interests, and may be linked to building a "comprehensive sense of personhood". Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.
>
> *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 450, 471, 497, para. 45, 95, 150.

120. According to the United States Supreme Court, marriage is "essential to the orderly pursuit of happiness by free men"; the "most important relationship in life"; "an association that promotes "a bilateral loyalty", and "among the personal decisions protected by the right to

privacy". Marriage is an "expression of emotional support and public commitment", and "for some, ... the commitment of marriage may be an exercise of religious faith."

> *Zablocki v. Redhail*, 434 U.S. 374 (1978) at 383-86; *Turner v. Safley,* 482 U.S. 78 (1987) at 95-96.

121. In conclusion, the denial of equal marriage clearly violates s. 15 of the *Charter*. It draws a distinction on the basis of sex and sexual orientation that withholds the equal benefit of the law in a manner that offends the human dignity of gays and lesbians. It exacerbates pre-existing disadvantage by deeming same-sex relationships less worthy of respect and recognition, fails to recognize the lived realities of gay and lesbian commitments, and completely denies a fundamental constitutional and societal interest. The law has the power to send a meta-message of full inclusion in society or to perpetuate discrimination against gay men and lesbians. Same-sex couples must be free to marry if the promise of substantive equality is to have meaning.

> I believe equality is powerful. It gives each individual the opportunity to feel like they belong in all aspects of life. I am no different than anyone else. I have a right to be here, to live, to explore, to learn, to love, to cherish, and to participate in life fully. I ask myself why does the fact that I am in love with a woman make me unequal?
>
> Affidavit of Gail Donnelly, Application Record, Vol. 1, Tab 15, at page 83; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 567, para. 90.

D. THE INFRINGEMENT IS NOT DEMONSTRABLY JUSTIFIED

i. The Analytical Framework for Section 1 of the *Charter*

122. The AGC devotes significant attention at the beginning of the s. 1 analysis to whether the denial of marriage is prescribed by law. The Applicant Couples agree that the impugned common law bar is prescribed by law. No party to this proceeding has argued otherwise.

123. Since this case concerns a challenge to judge-made law, rather than a legislative provision, it is not strictly necessary for the court to conduct the s.1 analysis. The court may simply proceed to cure the infringement by fashioning a new principle that complies with constitutional requirements. In *R. v. Swain*, in the context of a common law rule that was found to violate *Charter* rights, Chief Justice Lamer (as he then was) held that:

> [B]ecause this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. ... [I]t could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.
>
> ... I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, *judicial deference to elected bodies is not an issue.*
>
> *R. v. Swain*, [1991] 1 S.C.R. 933 at 978; *R. v. Daviault*, [1994] 3 S.C.R. 63 at 93.

124. Even if this Court proceeds with the s.1 analysis, as the Divisional Court did, there is no requirement of judicial deference because no legislation has been impugned. The AGC misleadingly cites *R. v. Robinson* for the principle that a "strict application" of the *Oakes* test is required. In fact, the language of “strict application”, in *Robinson* was used by the Supreme Court to establish that it is more difficult to justify the violation under s. 1 when a common law principle is impugned, as in this case. As then Chief Justice Lamer stated, “while decisions of our legislatures may be entitled to judicial deference under s.1 as a matter of policy, such deference is not required where we are being asked to review a law that we as judges have established.”

> *R. v. Robinson*, [1996] 1 S.C.R. 683 at 708-709 [emphasis added]; *Halpern v. Canada (Attorney General)*, [2002] 60 O.R. (3d) 321 (Div. Ct.), per Blair R.S.J. at para. 85-86; per LaForme J., at para. 227-228.

125. The onus of justifying a limitation on *Charter* rights and freedoms rests with the party seeking to uphold the limitation, in this case, the AGC. There are two broad criteria to determine whether a rights violation is demonstrably justified in a free and democratic society:

> [T]he government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified. This two-part inquiry… ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted – that is, that it is rationally connected, causes minimal impairment and is proportionate to the benefit achieved.

Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.C. 68 at para. 7*; RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 60; *M. v. H.,* [1999] 2 S.C.R. 3 at para. 80; *R. v. Oakes,* [1986] 1 S.C.R. 103 at 138-9.

126. In *Sauvé*, the Supreme Court recently struck down a provision denying the right to vote to all inmates serving sentences of two years or more. The Court criticized the government's vague, symbolic statements of the objective and concluded that the rights violation was unwarranted. The Court applied a stringent justification standard, given the constitutional nature of the interest at stake. Similarly, given the fundamental nature right to marry, it should be more difficult for the government to justify its violation of the right. "Limits on [fundamental rights] require not deference, but careful examination." Justice Iacobucci continued,

> Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights
>
> *Sauvé v. Canada (Chief Electoral Officer*), [2002] S.C.C. 68 at para. 9, 13

ii. Objective of the Infringing Measure

1) A Discriminatory Objective cannot be Pressing and Substantial

127. The first step in analyzing an infringement under s. 1 is enunciating the objective. In order to be sufficiently pressing and substantial to justify overriding constitutionally protected rights and freedoms, the objective of the rights limitation must be consistent with the values of a free and democratic society.

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136.

128. A pressing and substantial objective cannot be based on discriminatory rationales. This means that courts cannot require that the group seeking equality lose the identity for which it

claims protection, or require that same-sex relationships be "just like" different-sex relationships. Privileging heterosexuality is not a justification for discrimination; it is the antithesis of equality.

> *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136; *R v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 336, 352; *R v. Morgentaler*, [1988] 1 S.C.R. 30 at 16, 164-167; *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 171; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 736, 756; *M. v. H.*, [1999] 2 S.C.R. 3 at 67-70

129. The courts have refused to tolerate rights limitations founded on discriminatory objectives. In *R. v. Big M Drug Mart*, the Court held that the purpose of the mandatory Sunday-closing law was "to compel observance of the Christian Sabbath." The purpose directly contradicted the *Charter* guarantee of freedom of religion. Similarly, in *Vriend,* the Supreme Court remarked that the "legislative omission is on its face the very antithesis of the principles involved in the legislation as a whole". In *Rosenberg,* this Court held the object of excluding same-sex couples from the definition of "spouse" was to favour heterosexual unions. The Court held that this objective was "discriminatory and cannot be viewed as justification for a constitutional violation."

> *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 at 351; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; *Rosenberg v. Canada (A.G.)* (1998), 38 O.R. (3rd) 577 (C.A.) at 586.

2) The Courts' Statement of the Objective

130. Since the impugned law exists at common law, the task of this Court is to discern the rationale of courts that created the rights limitation. As Lamer J. wrote in *Swain*, "Given that this appeal involves a common law, judge-made rule, the task of the Court under this part of the *Oakes* test is not to construe the objective of Parliament or of the legislature, but rather to construe the overall objective of the common law rule which has been enunciated by the courts."

> *R. v. Swain*, [1991] 1 S.C.R. 933 at 981 [emphasis added].

131. A review of the cases relied on to support the claim of an exclusionary common law rule does not reveal a single pressing and substantial objective behind its creation. Reliance on circular reasoning has allowed the courts to avoid articulating any rational purpose for denying equal marriage to same-sex couples. In *Layland*, the Divisional Court concluded that unions of persons of the same sex were not properly considered marriages because of the definition of marriage. The decision in *North* also held that "the meaning of marriage is universally accepted

by society in the same sense." In the *EGALE* decision, Pitfield J. did not identify a pressing and substantial objective to the rights violation. He held that marriage is "a construct that is, by its nature, not inclusive of everyone." In the alternative, Pitfield J. suggested that the purpose of exclusion is "preserving the fundamental importance of marriage to the community", suggesting marriage will be demeaned, rendered less important or meaningful, if gays and lesbians obtain recognition. This analysis is not an acceptable justification for an equality rights violation. As discussed at paragraphs 54-77, the Definitional Preclusion argument is intellectually empty, legally and factually wrong, and discriminatory. It cannot serve as a pressing and substantial justification to the rights infringement. Accordingly, there is no rational justification for the courts' denial of marriage to same-sex couples.

> *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.); *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 at 285 (Man. Co. Ct.); *EGALE Canada Inc. v. Canada (A.G.)* 2001 B.C.S.C. 1365 at para, 211.

3) The Government's Statement of the Objective

132. The decision in *Swain* specifically states that, "when assessing the constitutionality of a common law rule," the court is "not to construe the objective of Parliament or of the legislature." Nevertheless, even if the Court wishes to consider the government's statement of the objective, there is no justification for the rights violation.

> *R. v. Swain*, [1991] 1 S.C.R. 933 at 981.

133. Contrary to the Supreme Court's direction that the purpose of the rights limitation must be identified with precision, the AGC has *not* offered any rational articulation of an objective for the exclusion of same-sex spouses. The AGC simply repeats its Definitional Preclusion argument that marriage has always been "the relationship that brings together the two human sexes." The rigours of constitutional analysis require the Court to extend beyond platitudes of "what has been, must be" to demand a reasoned, evidentiary-based justification for the denial of fundamental rights and freedoms. Vague, philosophically based or symbolic objectives will not suffice. Instead, "to establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right." In the absence of a rational objective to the denial of the right to marry, the government has not met its onus and the law must fail. As Chief Justice McLachlin wrote in *RJR-MacDonald*,

> [T]o meet its burden under s. 1 of the Charter, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process

> is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. …
>
> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.
>
> *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 129, 144; AGC Factum, at para 148; *Sauvé v. Canada (Chief Electoral Officer),* [2002] S.C.C. 68 at para. 24; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 109-111; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 99-100; *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877 at para. 98, 125; P. Hogg, *Constitutional Law of Canada,* (looseleaf) (Toronto: Carswell, 1997) at 35-18.

4) "Procreation" is not the Objective of Exclusion

134. At root, it seems that procreation is the AGC's ultimate explanation for the exclusion of same-sex couples.[6] A brief consideration of reality and law demonstrates that the "raison d'être" of marriage is not procreation. In any case, under s. 1, the central question is whether the limitation of the right serves a pressing and substantial purpose. Adopting procreation as the objective, the AGC would have to argue that withholding equal marriage is necessary because there will otherwise be a sharp and damaging decline in the birth rate in Canada. The AGC does not and cannot argue this absurd proposition. Surely, women will not cease to give birth if gays and lesbians are permitted to legally marry.

5) The True Purpose of the Infringing Measure: Discrimination

135. The federal government's true motivation for exclusion is its clear belief that heterosexual relationships are uniquely worthy of participation in a foundational social institution. The AGC claims that heterosexual relationships are "essentially different", and

---

6 At the Divisional Court, the AGC Factum stated: "the raison-d'etre of marriage is procreation". Now, the AGC attempts to conceal this flimsy argument behind more convoluted language: "the raison d'être of marriage has been to complement nature with culture for the sake of the intergenerational cycle" or the "fundamental purpose [is] a man and a woman united with a view to the possibility of producing and raising children." [AGC Factum para 10-11] The language is different but the argument is ultimately the same.

because of their specialness, uniquely entitled to participate in an institution that "is good, does good". Equal marriage for same-sex couples, it is claimed, would "undermine" or "diminish" the institution, rendering it meaningless. This suggests that the value of the marital bond rests on the ability to privilege, support and affirm heterosexuality, a discriminatory purpose. In fact, seen in this light, the purpose of the exclusion is, quite baldly, *to discriminate*.

> Affidavit of John Witte Jr., Respondent's Record, Vol. 1, Tab B, p. 202, para. 69; AGC Factum, para. 158; Affidavit of Katharine Young, Respondent's Record, Vol. 2A, Tab F, pp. 737, 743, paras, 102 and 114; Affidavit of Edward Shorter, Respondent's Record, Vol. 2, Tab C-1, pp. 458-9, para. 128

136. The AGC does not attempt to identify the purpose of exclusion in specific and clear terms, because there is no pressing, rational objective to denying same-sex couples the freedom to marry. The cases reveal that any common law bar is an artefact of a time when same-sex relationships were not considered to have equal worth. The AGC's purpose in supporting continued exclusion is to declare that heterosexual relationships are more deserving of state support and sanction, a purpose that is discriminatory. Since a discriminatory objective cannot be pressing and substantial, any common law bar is unconstitutional and must be reformulated.

> *Rosenberg v. Canada (A.G.)* (1998), 38 O.R. (3rd) 577 (C.A.) at 586; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 116; *G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66 at 88.

iii. The Laudatory Purpose of Marriage

1) The Requisite Approach: A Functional Objective

137. As indicated above, the central issue under the first step of the *Oakes* analysis is whether the limit on *Charter* rights and freedoms furthers a pressing and substantial purpose. Since there is a discriminatory rationale for the serious infringement of fundamental rights and freedoms, it should not be necessary to consider the laudatory objective of marriage itself, but it does sharpen the appreciation of the denial of rights and freedoms.

138. If this Court wishes to consider the objective of civil marriage, care must be taken to avoid any circular or discriminatory articulation of the laudatory purpose. The pressing and substantial objective of marriage cannot be to affirm or benefit heterosexuals alone. The Court must instead recognize a functional, non-discriminatory objective, lest the *Oakes* test be

compromised. The proper approach to determining the salutary objective of a law is to consider its underlying purposes or functions, not to define its limits according to those to whom it has traditionally applied. "The task of the court in every case is to identify the functional values underlying the law", not to accept the law's current terms as a static definition.

> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 503, para. 164 [emphasis added].

139. This approach is well illustrated by the decision in *M. v. H.* The overwhelming majority of the Supreme Court determined that the legislation was intended to provide an equitable resolution of economic disputes that arise when intimate relationships involving economic interdependence break down. The Court examined the functional objective of the impugned provision, rather than defining the objective in terms of heterosexuality. The sole dissent, by Justice Gonthier, held that the purpose of the Act was limited to different-sex couples only. His reasons are a direct parallel to AGC's argument in this proceeding: there is no discrimination in recognizing "the biological reality of the opposite-sex relationship and its unique potential for giving birth to children and its being the primary forum for raising them." He claimed, like the AGC, that the word "spouse" - by definition and across times and across cultures - means heterosexuals only. The Supreme Court soundly rejected the very arguments advanced in the AGC factum. It is not proper to attempt to define the purpose of the law by reference to the terms of discrimination itself. Rather, "[w]hen characterizing the objective ... for the purposes of s. 1 analysis, it is important to adopt a functional and pragmatic approach which frames that purpose neither too broadly nor too narrowly."

> *M. v. H.*, [1999] 2 S.C.R. 3 at para. 82-107, 85, 156; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 477, 503, para. 109, 164.

140. The AGC factum does not adopt the requisite functional and pragmatic approach to the articulation of the objective of civil marriage. The AGC suggests that the purpose of marriage is related to heterosexuals-only because the purpose of marriage is related to heterosexuals-only. Attempting to define the purpose of marriage by reference to the discriminatory ground itself, the AGC is forced to argue that the birthing and parenting of children is neither necessary nor sufficient, as same-sex couples are capable of these functions. Instead, the key component of marriage is the "naturalness" and uniqueness of the manner in which children may be produced within heterosexual relationships. Marriage is ultimately distinguished by the procreative potential of some heterosexual spouses through "natural" penile-vaginal intercourse.

> AGC Factum, para. 148, 150.

141. This is both untrue and offensive. It is wrong because it is contrary to the purposes of marriage reflected at law. Intercourse is not an essential marker of a marriage. Married persons are not required to, nor required to intend to, nor required to have the ability to, engage in any sexual relations, including heterosexual intercourse. The AGC's focus on "natural" procreation through penile-vaginal intercourse is merely another attempt to justify discrimination by reinforcing the terms of the discrimination. The view is ultimately reducible to the following assertion: marriage is necessarily heterosexual because only heterosexuals have heterosexual sex. This is not a reasoned demonstration of a valid and compelling governmental purpose.

> See *supra*, para. 69-71.

142. The AGC perhaps implicitly suggests that society must privilege a link between intercourse and children. This view is also unsupportable and discriminatory. The State does not and cannot create classes of "legitimate" and "illegitimate" children to determine which class of parents would have access to marriage. The children of same-sex or opposite-sex couples who are adopted, conceived by donor sperm, or otherwise not biologically related to both parents, are not irrelevant to the social good, nor should they be excluded from public consideration. All children are entitled to the state support and accompanying social benefits that would come from the marriage of their parents.

> *Tighe v. McGillivray Estate* (1994) 112 D.L.R. (4th) 201 (N.S.C.A.); *Surrette v. Harris Estate* (1989) 91 N.S.R. (2d) 418.

143. Finally, the Appellants raise the spectre that same-sex parenting may have "unknown consequences" for children. The experts for the AGC extol the virtues of heterosexual parenting, and although they do not and cannot identify any negative consequences to parenting by same-sex couples, they suggest that risks may exist. There is no evidence or theory that would support this discriminatory suggestion. The AGC seems ashamed of this argument, stating on the one hand, that marriage is the "ideal" context for producing and rearing children ... because marriage ... provides them with parents of both sexes" and at the same time, claiming "the raising of children in same-sex families was not at issue for the AGC..."

> AGC Factum, at para. 10, 18; Affidavit of Drs. Stacey and Biblarz, Reply Evidence of Applicant Couples, Tab 2, at page 50-76; Cross-examination of Dr. Stacey, Aug. 2, 2001, Q. 149-152, at page 32; Cross-examination of Dr. Stacey, Aug 2, 2001, Q. 264, at page 65-64.

144. Despite the AGC's attempts to rely on stigmatizing stereotypes, the fact remains that same-sex couples are parenting children. They will continue to do so with or without the protections and benefits of marriage recognition. The government does not and cannot argue that it is demonstrably justified to withhold marriage recognition to same-sex couples because there is a pressing and substantial objective of protecting children. The real question is whether or not same-sex couples will have to parent in an environment in which the state discriminates against their relationships.

See *supra*, para. 38-43.

2) The True Functional Purpose of Marriage

145. Canadian courts and legislatures have recognized that the central function of marriage and the family is mutual care, support and love. The evidence, and law, reveals that the objective of civil marriage is to recognize the commitment of two persons and provide a framework for public and legal support for the relationship. As the 2000 Law Commission of Canada Report, *Beyond Conjugality*, concluded:

> The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.

Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4, at page 16-17.
Moge v. Moge, [1992] 3 S.C.R. 813 at 848; *Mossop v. Canada*, [1993] 1 S.C.R. 554, per L'Heureux-Dubé dissenting; *Family Law Act*, R.S.O. 1990, c. F.3, Preamble.

As required, this articulation of the objective focuses on the function of the relationship, rather than defining it based on the ground of discrimination.

146. Marriage is recognized as a fundamental right because the profound mutual love, respect, commitment, and intimacy that define that relationship are essential for human dignity and happiness, and are valuable to society as a whole. The AGC acknowledges that marriage is a fundamental institution, a natural drive, and necessary for individual fulfillment, but withholds its value when the chosen spouse is of the same sex. What the AGC fails to recognize, and what the Applicants Couples' ask this Court to acknowledge, is that their relationships serve all the same core values as those of their heterosexual neighbours.

Affidavit of John Witte Jr., Respondent's Record, Vol. 1, Tab B, page 202, para. 69; AGC Factum, para. 15, 157, 165.

iv. The Proportionality Analysis

147. The Applicant Couples have demonstrated that there is no pressing and substantial objective to any common law rule that denies same-sex couples the freedom to marry. There is therefore no need to proceed with the proportionality test. In the alternative, if the objective of the exclusionary rule is consistent with the *Charter's* normative principles and is pressing and substantial, it is necessary to determine whether the means chosen are reasonable and demonstrably justified.

> In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.
>
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 108.

148. As in *M. v. H.,* the exclusion of same-sex couples from marriage fails every step of the proportionality test. The denial of rights and freedoms cannot be justified.

> *M. v. H.,* [1999] 2 S.C.R. 3 at page 73-83, para. 108-135.

1) There is No Rational Connection

149. To justify the rights infringement, the AGC must demonstrate a rational connection between the infringement and the purpose of the benefit. Even if the purpose of marriage were solely related to children, despite the overwhelming evidence to the contrary, the denial of equal marriage is not rationally connected to child-bearing or benefiting children. Recognizing the marriages of persons of the same sex will not diminish the number of children born nor will it reduce the quality of care that children receive. There is no rational connection between the denial of rights and the purpose of marriage recognition.

> *RJR-MacDonald Inc. v. Canada (A.G.),* [1995] 3 S.C.R. 199 at para. 153; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 112-114; *Vriend v. Alberta*, [1998] 2 S.C.R. 493 at para. 118-122.

150. If the purpose of civil marriage were to support parents or encourage procreation, the exclusion of same-sex spouses, but inclusion of different-sex spouses, would be under- and over-inclusive. Many heterosexual married spouses are childless by choice or lack of procreative potential. Many lesbians and gay spouses, like Applicant Couples Alison and Joyce, Barb and Gail, Hedy and Colleen, and Tom and Al, rear children together. As established by the evidence, and as the Supreme Court has recognized, "an increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination". Society's interest in providing a stable and loving environment for children would be promoted by allowing same-sex partners the freedom to marry since all children of same-sex couples are denied the benefits and protections of their parents' marriages.

M. v. H., [1999] 2 S.C.R. 3 at para. 114; see *supra*, para. 38-43.

151. There is no rational connection between the rights limitation and the purpose of the benefit. In fact, if a functional view is taken of marriage, such as that enunciated by the Law Commission, then excluding gays and lesbians frustrates that purpose and including same-sex couples furthers that purpose. The Supreme Court reached the same conclusion in *M. v. H.* Any limitation in marriage recognition to heterosexuals-only is not justified under s.1 of the *Charter*.

M. v. H., [1999] 2 S.C.R. 3 at para. 116; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 119; *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 191.

2) There is No Minimal Impairment

152. Since any bar to marriage between persons of the same sex exists at common law, there is no room for deference. "While decisions of our legislatures may be entitled to judicial deference under s. 1 as a matter of policy, such deference is not required where ...[courts] are being asked to review a law that ... judges have established."

R. v. Robinson, [1996] 1 S.C.R. 683 at para.42; *R. v. Swain*, [1991] 1 S.C.R. 933 at 978, 1033.

153. In its s.15 analysis, the AGC relies on the fact that it has not legislated to say that marriage is a "pre-legal" entity that cannot be changed by law. Under s. 1, though, the government tries to have it both ways, by asserting that it is entitled to deference to its "unequivocal choice" of an "interpretative clause" of a statute. It also relies on a provision which

applies solely in the Province of Quebec, and that was passed after the commencement of this proceeding. The AGC is clearly grasping at straws, and ultimately admits that we are dealing with a common law rule, not legislation.

> AGC Factum, at para 137; *Federal Law – Civil Law Harmonization Act, No. 1*, S.C. 2001, c.4, Respondent's Record, Supplementary Vol. 1, Tab E6.

154. As the Divisional Court concluded, and as discussed at paragraph 13 of this factum, the government cannot rely upon s.1.1 of the *Modernization of Benefits and Obligations Act* – an interpretative clause that purports to recognize the common law definition of marriage – as creating a statutory bar to equal marriage. An interpretation provision that offers the government's view of the common law is not legislation. The section itself expressly states that it does not affect the meaning of marriage, and the Bill was introduced to the House and the Senate in the specific terms that it "is not about marriage and will not, in any way, alter or affect the legal meaning of marriage."

> *Modernization of Benefits and Obligations Act*, S.C. 2000, c.12, s.1.1; Bill C-23, An Act to modernize the Statutes of Canada in relation to benefits and obligations, 2nd sess., 36th Parl. (Minutes and Evidence, 10 May 2000, 11 May 2000, 17 May 2000, 18 May 2000, Standing Senate Committee on Legal and Constitutional Affairs), AGC Record of the Attorney General of Canada, Vol. 9, Tab 28, at page 3062, P 28.

155. Even if there were a legislative bar, the government wrongly asserts that this is a case requiring deference. As the Supreme Court held in *M. v. H.*, granting same-sex couples access to equal recognition will not disadvantage any group, so "the notion of deference to legislative choices in the sense of balancing claims of competing groups has no application to this case." Here, unlike *Irwin Toy* and *Ross*, the government does not seek to protect a vulnerable group but privileges the majority at the expense of the vulnerable. Unlike *Keegstra*, there is no attempt to safeguard a disadvantaged group based on subjective fears and an apprehension of harm. Instead, the government causes harm to disadvantaged gays and lesbians. Unlike *Butler*, the impugned law targets no pressing social problem for which there are some difficulties of scientific proof of harm; rather, it exacerbates the social problem of discrimination, prejudice and violence against lesbians and gay men.

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 123, 124; *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877 at para. 118; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Irwin Toy Ltd. v. Quebec (A.G.),* [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452*; Adler v. Ontario* [1996] 3 S.C.R. 609 at 667, para. 95*; RJR-*

MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at para.136, 138; *M. v. H.* [1999] 2 S.C.R. 3 at page 80, para. 126.

156. Contrary to the assertion of the AGC, same-sex couples have not "achieved virtually all of the benefits that flow from marriage". As described at paragraphs 85-100, access to limited legal benefits and obligations does not relieve the substantial harms that arise from the denial of marriage itself. Marriage provides numerous intangible social and psychological benefits.

> The decision of whether or not to marry ... can be as fundamental, as momentous, and as personal as a choice regarding, for instance, one's citizenship or even one's religion. Although certain rights and obligations flow from each one of these three diverse choices, it does not render any of these choices justice to reduce them to a question of contract. I highly doubt, for instance, that people enter the institution of marriage because it strikes them as offering an attractive package of contractual rights and obligations.

Miron v. Trudel, [1995] 2 S.C.R. 418 at 471; see *also Brown v. Board of Education*, 347 U.S. 483 (1954).

157. The denial of equal marriage does not minimally impair the rights of gay and lesbian people. It completely excludes an entire class from access to a fundamental right on the basis of a protected personal characteristic, for no reason whatsoever. The line of entitlement has been drawn solely on the basis of discriminatory thinking, and this exclusion constitutes total, not minimal, impairment of the *Charter* guarantee of equality.

> The question… is not how many citizens are affected, but whether the right is minimally impaired. Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*…. It is no answer to the overbreadth critique to say that the measure is saved because a limited class of people is affected: the question is why individuals in this class are singled out to have their rights restricted, and how their rights are limited.

Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.C. 68 at para. 55; *R. v. Swain*, [1991] 1 S.C.R. 933 at 983-984; *RJR-MacDonald Inc. v. Canada (A.G.),* [1995] 3 S.C.R. 199 at para. 160, 167; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 167-175; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 127.

3) There is no Proportionality of Salutary and Deleterious Effects

158. The final stage of the *Oakes* analysis considers whether there is proportionality between the deleterious effects of the measures that are responsible for limiting the rights or freedoms in question and the objective, and whether there is proportionality between the deleterious and the

salutary effects of the measures. The question is "whether the consequences of the violation are too great when measured against the benefits that may be achieved."

> *Thomson Newspapers Co. v. Canada (A.G.),* [1998] 1 S.C.R. 877 at para. 125

159. Denying marriage is a serious violation of fundamental rights and freedoms, which causes numerous, damaging effects to an already disadvantaged minority. There is no benefit whatsoever to the exclusion.

160. The government identifies no benefit to its discrimination, but offers only a vague prediction of "unforeseeable" (still somehow definitely negative rather than positive) social consequences. Since the AGC cannot find any rational justification for discrimination in marriage, the AGC affidavits engage in highly imaginative speculation. Section 1 justifications cannot be based on such flimsy footing. There must be clear and cogent evidence. "[I]t would undermine the very purpose of s. 15 to permit the government to justify a violation of s. 15 by relying on assumptions that may, themselves, be stereotypical and discriminatory in nature." There is no sound reason to believe that heterosexual couples will cease marrying, cease having children or become less stable just because the Michaels will receive a marriage licence.

> *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 478, para 112; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 569, para. 94, per L'Heureux-Dubé J.; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para.128-129.

161. As Iacobucci J. wrote in *Egan,* it is inconceivable that the extension of equality to same-sex couples would cause harms to heterosexuals. He wrote:

> On a broader note, it eludes me how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. Where is the threat? In the absence of such a threat, the denial of the s. 15 rights of same-sex couples is anything but proportional to the policy objective of fostering heterosexual relationships.
>
> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 211.

162. It is true that discrimination against same-sex couples is widespread internationally, just as women's legal subordination was once almost universal. Thankfully, the times are changing. The Netherlands and Belgium recognize the marriages of same-sex couples. These countries have not been plagued with social turmoil. Canada has already become more welcoming and

embracing of the dignity of all its citizens since many rights and obligations have been accorded to same-sex couples. Increased public understanding and acceptance have followed every court success. Now, over 65% of Canadians support the recognition of the marriages of same-sex spouses. A principled, *Charter*-respecting result in this case will not cause chaos in the streets and the decline and fall of society. Equal marriage is just the next step in our journey towards full equality for all peoples.

Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.C. 68 at para 41.

PART IV - ISSUES RAISED ON CROSS-APPEAL

163. The following issues are being raised in the cross appeal:

1. Did the Divisional Court err in finding that there is a single phrase that constitutes a "common law definition of marriage by which marriage is defined as "the lawful and voluntary union of one man and one woman to the exclusion of all others?"

2. In the alternative, did a majority of the Divisional Court err in applying section 52(1) of the *Constitution Act, 1982*, to issue a declaration of invalidity?

3. Did the Divisional Court err in suspending the remedy?

4. Did the Divisional Court err in not specifically recognizing the fundamental nature of the right at issue?

5. Did the Divisional Court err in failing to award a personal remedy to the applicant couples and couples in similar circumstances?

A. REMEDY: FORMULATING A CONSTITUTIONAL COMMON LAW RULE

164. The Applicant Couples submit that the Divisional Court erred in law with respect to remedy, in the following respects:

a) The Court applied the wrong remedial considerations, and assessed remedy as if there had not been a *Charter* breach, applying the wrong cases and considerations;

b) The Court erred by misconceiving the nature of the common law rule, and so failed to strike down the impugned law only to the extent of its inconsistency;

c) The Court failed to reformulate a common law rule, and test the constitutionality of the new rule and any other options, as required by the Supreme Court of Canada;

d) The Court misapprehended or failed to consider the evidence on the issue of remedy, and instead relied on speculation and conjecture;

e) The Court erred in suspending the remedy, and in particular erred in showing any legislative deference in this case; and

f) The Court erred in failing to give the Applicants a personal remedy even if suspension was appropriate.

165. The majority failed, by its choice of remedy, 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."

> *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; *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 171.

i. Marriage is not Defined in a Sentence

166. The Divisional Court erred in articulating a single phrase as the common law definition of marriage. Marriage is not simply "the lawful and voluntary union of one man and one woman to the exclusion of all others." Instead, an entire body of case law weaves together numerous themes to create the common law concept of marriage, including restrictions relating to free and informed consent, age, consanguinity and no valid prior marriage. There is no single phrase that provides "the definition of marriage," any more than the common law of "cohabitation" could be summarized in a single sentence. Marriage cannot be correctly "defined" at common law without reference to its many requisite elements.

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

167. The proper way to enunciate the impugned common law principle is that the marriage of persons of the same sex is void. The remaining common law and statutory requirements for a valid marriage are unaffected. These, as a whole, create the common law concept of marriage. As an example, the original language of *Hyde* was: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." Aspects of this statement (such as the requirements that marriage be "Christian" and "for life") have been abandoned over time, as evidenced by the

Divisional Court's language in articulating a definition of marriage. Changing portions of the judicial statement in *Hyde* did not eliminate marriage altogether.

> *Hyde v. Hyde and Woodmansee* (1866), L.R.1 P&D 130 at page 133.

168. There will be no vacuum in legal meaning if the Court strikes down the common law restriction on marriage between persons of the same-sex. Declaring the inconsistent part of the law, and only the inconsistent part of the law, of no force and effect cleanly eliminates the offensive element of the common law, leaving the rest of the requirements of marriage intact. A fully functional common law concept of marriage remains. Such an approach is mandated by s. 52(1) of the *Constitution Act*, which provides:

> ... any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

ii. Distinction between *Charter* Rights and *Charter* Values

169. The Divisional Court erred in law by assessing remedy as though the Court had found no violation of *Charter* rights. There are two distinct lines of decisions involving the *Charter* and the common law: those in which the government acts in reliance on a common law rule to violate *Charter* rights (such as *Dagenais, Swain*, *Robinson, Daviault* and the case at bar), and those in which there is no constitutionally impugned government action but the court considers whether to develop the common law in accordance with *Charter* values (such as *Salituro*, *Hawkins*, and *Hill*). The distinction is explained clearly in the caselaw and perhaps most exhaustively by Cory J. in *Hill v. Scientology.* For simplicity, the two approaches will be referred to, respectively, as the *Charter* Rights approach and the *Charter* Values approach. The case at bar is a *Charter* Rights case. The Divisional Court erred by applying a *Charter* Values approach.

> *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130 at 1164-1170.

170. In *Charter* Rights cases, where the government relies on a common law rule which breaches a *Charter* right, the Supreme Court of Canada has held that the Court is required to strike down the offending common law rule and craft a new rule which is constitutionally compliant. There is no deference accorded to the legislature - since there is no legislature to defer to and no legislation engaged by the question. Responding to any constitutional issue

with respect to the common law is clearly the exclusive province of the judiciary. As Lamer C.J. wrote in *Swain*,

> [B]ecause this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. ... Given that the common law was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate the common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. This then is the approach that should be adopted when a common law principle is found to infringe the *Charter*.

R. v. Swain, [1991] 1 S.C.R. 527 at 978; *R. v. Daviault,* [1994] 3 S.C.R. 63 at 93; *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835; *Halpern v. Canada (Attorney General)* (2002), O.R. (3d) 321, at para 297.

171. *Charter* Values cases, on the other hand, involve different considerations since the *Charter* is not directly engaged. As a result, the Supreme Court has enunciated a different test for *Charter* Values cases, that allows for the evolution of the common law in accordance with the values underlying the *Charter*, but with the traditional sensitivity to the principle of precedent. The leading *Charter* Values case is *Salituro*, in which the defence sought to rely on a common law rule of spousal compellability that continued to apply even where the spouses were separated. The *Charter* was not applicable, as there was no government action. However, Justice Iacobucci found the common law rule to be so antiquated and inapplicable in modern times that it should be "changed" in light of modern social values. He enunciated a test for cases involving the common law and *Charter* Values, which includes a requirement that the change be incremental. The rationale for a stricter test to change the common law in the absence of a *Charter* violation is, of course, that such cases require the courts to engage in a process of rejecting an established precedent and reformulating it without being mandated to do so by the Constitution.

R. v. Salituro (1991), 8 C.R.R. (2d) 173 at 666, 670, 675; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 at 1164-1170.

172. The AGC relies on *Salituro* and the line of cases that follow it to argue that this Court should not change the common law. This is an error. The *Salituro* line of cases has no applicability to this case. When this Honourable Court considers remedy after finding that judge-made law breaches one or more guarantees of the *Charter*, it is the *Dagenais-Swain-Daviault* line of cases that governs.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1131 at 1166-9, para 84-92; *R. v. Swain*, [1991] 1 S.C.R. 933 at 978-80; *R. v. Salituro,* [1991] 3 S.C.R. 654; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *R. v. Daviault,* [1994] 3 S.C.R. 63 at 93.

173. The Divisional Court accepted the AGC argument and erroneously applied the *Charter* Values Approach to reach the conclusion that the court should defer to the legislature to remedy the *Charter* violation. This approach has no application to this case. The Court was required to apply the *Charter* Rights analysis and refashion the rule. Where the impugned rule exists at common law, as in this case, deferential considerations are not applicable. The unconstitutional common law rule must be declared invalid. As Lamer C.J. wrote in *Swain*,

> We are dealing here, not with a rule of law developed through the legislative process, but rather a common law rule created by the judiciary. In such circumstances, there is no room for deference to the legislature: the task of making "difficult choices" falls squarely on the Court"...
>
> It is necessary to reformulate the common law rule ... in a manner that reflects the principles of the *Charter*.

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at para. 73; *R. v. Swain*, [1991] 1 S.C.R. 933 at 1033.; *R. v. Daviault,* [1994] 3 S.C.R. 63 at 93*; R. v. Robinson,* [1996] 1 S.C.R. 683 at 708-709, at para. 42.

174. The Applicant Couples submit that a majority of the Divisional Court erroneously relied on the principle of deference articulated in *Watkins* and *Salituro* to reach the conclusion that it is the primary responsibility of Parliament and not the Courts to reformulate the definition of marriage. This misses the crucial fact that the judiciary is the source of the *Charter* violation. As Lamer C.J. wrote in *Robinson*:

> It is our duty as judges to ensure that the common law develops in a manner consistent with the supreme law of our country.

R. v. Robinson, [1996] 1 S.C.R. 683 at 708-709, at para. 47; *Watkins v.Olafson,* [1989] 2 S.C.R. 750; *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130; *R. v. Salituro* (1991), 8 C.R.R. (2d) 173; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 100.

iii. Reformulating the Common Law Rule

175. Once a common law rule is found to be unconstitutional, it is declared to be of no force and effect to the extent of the inconsistency. The Court must then state a new common law rule

that complies with the *Charter*. In *Swain, Dagenais, Robinson* and *Daviault*, the Court's refashioning of the common law rule amounted to the drafting of a new set of guidelines. In *Dagenais,* this involved reformulating a pre-*Charter* common law rule and writing a fresh and detailed set of principles for the issuance of publication bans. In *Swain,* this involved developing a complex set of rules about the Crown's ability to raise a defence of insanity over the accused's wishes. In *Daviault*, it involved reformulating the common law rule that the mental element of general intent cannot be negated by drunkenness.

> *R. v. Swain*, [1991] 1 S.C.R. 933*; Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835; *R. v. Robinson,* [1996] 1 S.C.R. 683; *R. v. Daviault,* [1994] 3 S.C.R. 63.

176. In all of the cases, the new rule was crafted, and then tested in thorough detail, as if the new rule was then subject to *Charter* challenge. This is without any doubt the proper approach to be taken in this case. There are no alternatives and there is no room whatsoever for deference. The Court must reformulate the common law in a constitutional manner.

177. In *Swain,* Lamer C.J., after enunciating what he called "the new common law rule," continued:

> However, given that a new common law rule has been constructed to take the place of the rule which has just been struck down, I believe it is appropriate to consider whether the new rule would offend s. 15 of the *Charter*. The old common law rule was challenged under s. 15, but having found that the old rule violated s. 7 of the *Charter*, could not be upheld as a reasonable limit under s. 1 and was therefore of no force or effect pursuant to s. 52(1), it was unnecessary to consider whether the old rule also violated s. 15 of the *Charter*. The same cannot be said of the new common law rule. As was mentioned above, when the constitutionality of a judge-made rule is in issue, the *Charter* analysis differs from that which is applied to a legislative provision. It is not enough to say that the newly formulated common law rule is less intrusive than the previous rule or even to say that the new common law rule does not limit s. 7 of the *Charter*. If this Court is to enunciate a new common law rule to take the place of the old rule, it is obliged to consider the status of that new rule in relation to all relevant aspects of the *Charter*. In my view, the only other provision of the *Charter* which is directly applicable to the new common law rule is s. 15. ... Accordingly, I will now consider whether the new common law rule limits s. 15 of the *Charter*.
>
> *R. v. Swain*, [1991] 1 S.C.R. 933 at 988-989; *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, para 67-97.

iv. Considering "Alternatives" as Part of the Reformulation

178. Blair R.S.J. felt that he could not consider the "other alternatives" suggested by the AGC since they were not before him, and as a result he refused to formulate a new rule without a lengthy and uncertain period of suspension. With respect, this is an error. The requirement that the Court refashion a common law rule and then test the constitutionality of the new rule necessarily engages the consideration of alternatives.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 133 per LaForme.

179. In this case, if this Honourable Court has concluded that a common law bar on same-sex marriage offends the *Charter*, what new common law principle should be enunciated that would comply with constitutional requirements? What "options" are available that would survive *Charter* scrutiny? The AGC makes repeated vague references to "alternatives" but in the end they are revealed to be, either (1) abolish civil marriage for everyone and leave it to the religions; or (2) create a separate kind of recognition, with a different name and perhaps different requirements, and maintain marriage for heterosexuals only.

180. Since the remedy must vindicate the rights infringed, the issue of alternatives (however many there may be) is not complex. One cannot conclude that the denial of marriage to same-sex couples is constitutionally infirm and then entertain other "alternatives" to marriage, since that would continue to deny marriage to same-sex couples. It is an all-or-nothing proposition. Either the denial of marriage is remedied by granting marriage or it is not. As Justice LaForme concluded, same-sex couples should be free to legally marry, and the declaration requested by the Applicants should issue accordingly.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 294 295, 305 per LaForme.

1) Abolishing Marriage is Not an Option

181. Given the Divisional Court's unanimous and correct finding that there is a fundamental right to marry, there are no "alternative options" which will vindicate the rights of same-sex couples. "Positive rights by their very nature tend to carry with them special considerations in the remedial context." Fundamental rights require implementation and permit no alternative.

Schachter v. Canada, [1992] 2 S.C.R. 679 at 721; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.C. 68.

182. Since there is a fundamental right to marry, the government could not abandon civil marriage altogether, as Blair R.S.J. suggests, permitting only members of religious institutions to marry. Agnostics, atheists and those not connected to an organized religion cannot be forced to pretend religiosity or be denied access to a fundamental social institution. Such a rule would deny the positive right to marry, and would offend as sections 2(a), s. 7 and s. 15 of the *Charter*.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; see supra, para. 100.

183. The Law Commission of Canada has concluded that the notion of abolishing marriage is unrealistic and likely unacceptable to the Canadian public. Indeed, refashioning the common law understanding of marriage by abolishing marriage altogether would take the concept of "equality with a vengeance" to a dramatic extreme. Such an alternative cannot be an acceptable reformulation of the common law rule.

Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa, December 21, 2001), chapter 4, at page 123-124; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 701-702; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 620-621.

2) Any "Alternative Status" Would Also Be Unconstitutional

184. When the Court is considering reformulating the rule, the AGC again asks for deference to the legislative option of creating same-sex unions or partnership registrations; the argument is essentially, you cannot reformulate the rule because there are other constitutional options. This is erroneous. Once the Court has concluded that s. 15 is infringed by a denial of equal marriage, only full and equal marriage can address the equality concerns of the Applicant Couples, as demonstrated at paragraphs 48 to 50.

185. Language is imbued with power. Gays and lesbians are excluded from the term "marriage" because words are more than just labels. Words are embedded with statements of value, with accepted societal significance. Different nomenclature, on the basis of sexual orientation, denies full and equal participation in social meaning and a sense of recognition and acceptance by the wider community. Segregation on the basis of sexual orientation, imposed by the State with an expressly discriminatory purpose and in the larger social context of

widespread homophobia, functions as a powerful symbol of deemed inferiority. This is discrimination in its most fundamental form. Segregated status offends the human dignity of gays and lesbians.

186. The Couples have adduced overwhelming evidence that segregated status, in the context of wider social prejudice, damages the dignity interests of gays and lesbians. The Applicants' experts, including Dr. Eskridge, show unequivocally that materially "equivalent" options deny substantive *equality*.

> Reply Affidavit of Dr. Eskridge, Reply Evidence of Applicant Couples, Tab 4, at 175-176; Cross-Examination of Dr. Eskridge, Aug. 2, 2001, AGC Supp. Record at 704-707, Q. 208, 209; Affidavit of Dr. Eichler, Application Record, Vol. 2, Tab 2, at page 226-227; Affidavit of Dr. Lewin, Application Record, Vol. 2, Tab 2, at page 204-206; Affidavit of Dr. Ehrlich, EGALE Record, Tab 2, at page 104; Affidavit of Dr. Barnes, Application Record, Vol. 2, Tab 1, at page 134-135; Reply Affidavit of Dr. Mercier, Reply Evidence of Applicant Couples, Tab 1, at page 26; Affidavit of John Fisher, EGALE Record, Tab 1, at page 27.

187. Drawing an analogy to the struggles of another disadvantaged group, the AGC's suggestion that there might be "alternatives," or even that what is already available "should be enough," sends the message that gays and lesbians may ride the bus, provided they sit at the back. The lesson of the lie of "separate but equal" is that, even if differential treatment does not result in direct adverse economic consequences, there may still be seriously discriminatory effects. Equality is concerned with dignity, psychological integrity, and empowerment. As the Supreme Court wrote in *M. v. H.*, the discriminatory impact of segregation has "moral and societal implications beyond economic ones."

> *Canada (A.G.) v. Moore*, [1998] 4 F.C. 585 (T.D.) at 619, 621-622; *M. v. H.,* [1999] 2 S.C.R. 3 at para. 73, 124; *Law v. Canada*, [1999] 1 S.C.R. 497 at 530, para. 53; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 594-595, para. 161; *Miron v. Trudel*, [1995] 2 S.C.R. 418 at page 500, para. 157; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

188. The AGC has already been told that "alternative" status is discriminatory. In 1998, the federal government devised a separate term of "same-sex partner" for gays and lesbians after the Canadian Human Rights Tribunal ordered that it apply the definition of "spouse" so as to comply with the *Canadian Human Rights Act* and the *Charter.* The Federal Court ruled that the "same-sex partner" classification imposed a discriminatory regime of "separate but equal."

> Restricting a group's eligibility for equal benefits (merely on the basis of a personal characteristic related to a ground of discrimination) so that those benefits are available only under a separate or different scheme places a limitation of separateness or difference on the promise of equality. Such a compromise is reminiscent of the now-discredited "separate but equal doctrine," developed by the United States Supreme Court in *Plessy…* which supported discrimination against African-Americans and other people of colour. That doctrine was widely condemned and was officially rejected in the landmark case of *Brown v. Board of Education....* In this country, the separate but equal doctrine was rejected by the Supreme Court in *Andrews...* as a loathsome artifact of the similarly situated approach. One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada four decades after its much-heralded death in the United States.
>
> *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education of* Topeka, 347 U.S. 483 (1954); *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143; *Canada (A.G.) v. Moore*, [1998] 4 F.C. 585 (T.D.) at 619, 621-622 citing, in part, *Egan v. Canada* (1993), 103 D.L.R. (4th) 336 (F.C.A.) at 365.

189. Any new common law rule that permitted segregated status would send a clear message. Gays and lesbians will be tolerated but only when branded "separate," and symbolically forced to inhabit the margins of society. Rather than fulfilling the *Charter's* mandate of substantive equality and promoting full inclusion in Canadian society, any such alternative would foster the discriminatory idea that gays and lesbians do not and cannot enjoy real marriages, and do not have just as loving and important relationships, entitled to equal concern and respect. As the United States Supreme Court wrote in *Brown v. Board of Education of Topeka,*

> To separate ... generates a feeling of inferiority as to ... status in the community that may affect ... hearts and minds in a way unlikely ever to be undone.
>
> *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) at 494.

190. Where a declaration of invalidity is temporarily suspended, the underlying purpose of the suspension is, as the Court ruled in *Schachter*, "to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations." In this case, the government is asking for a suspension for the opposite reason – so that it can implement a segregated scheme that falls short of its constitutional obligations. "Given the clear history of legislative avoidance and defiance [on issues of lesbian and gay rights], it appears that the Court cannot rely on the legislature to respond to the question of marriage in a non-discriminatory fashion."

Schachter v. Canada, [1992] 2 S.C.R. 679 at 719; Affidavit of Dr. Rayside, Application Record, Vol. 3, Tab 7, at page 559, para 31.

191. Segregated status in the form of an "alternative" to marriage cannot satisfy *Charter* scrutiny. There is overwhelming evidence that segregated status would deny equal respect and dignity to lesbians and gays, and the purpose of maintaining exclusion from marriage could only be discriminatory. A parallel to the interracial marriage context makes this crystal clear. After *Loving,* sending the issue back to the legislature with permission to create an "alternative" status for interracial marriages (calling these "interracial unions", for example) would only have continued the harms to dignity. It would have been motivated by discriminatory objectives and would have been unconstitutional.

Reply Affidavit of Dr. Koppelman, Reply Evidence of Applicant Couples, Tab 6, at page 193-196; Reply Affidavit of Prof. Wolfson, Reply Evidence of the Applicant Couples, Tab 8, at page 249-251; Affidavit of Dr. Adam, Application Record, Vol. 3, Tab 4, at page 496-497; Affidavit of Dr. Calhoun, Application Record, Vol. 3, Tab 6, Exhibit "B" at page 526, 528; Cross-Examination of Dr. Calhoun, AGC Supplementary Record at Q. 57, page 610-611; *Loving v. Virginia*, 388 U.S. 1(1967).

192. In conclusion, the Applicant Couples submit that when the Court is reformulating the common law rule there is no alternative that would meet the equality guarantee apart from equal marriage. The new rule must therefore be, as requested by the Applicant Couples, that two persons of the same-sex are free to marry.

B. THE DIVISIONAL COURT ERRED IN SUSPENDING THE REMEDY

193. A majority of the Divisional Court erred in law by suspending the remedy. There appears to be no precedent for the suspension of the striking down of a common law rule and the creation of a new common law principle. In the Supreme Court cases involving the creation of a new common law rule, there was an immediate striking down of the old rule, coupled with the enunciation of a new one, without suspension.

R. v. Swain, [1991] 1 S.C.R. 933; *R. v. Daviault*, [1994] 3 S.C.R. 63; . *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835; *R. v. Robinson,* [1996] 1 S.C.R. 683.

i. Deference is Not a Legitimate Reason for Suspending the Remedy

194. Blair R.S.J. and Smith A.C.J.S.C. granted a delayed declaration of invalidity to give Parliament time to assume the task of law reform. This approach was justified by the "deference principle" set out in *Watkins v. Olafson*, and the notion that the Court should only reformulate the common law if the change is an incremental one, based on *Salituro*. As discussed above, reliance on these cases is in error, and the notion of deference to the legislature in a case involving the common law is ill-conceived.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 20 per Smith, 93 per Blair; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro* (1991), 8 C.R. (2d) 173.

195. The majority judgment on remedy fails to appreciate the nature of democratic values. The Court appears to have been unable to accept that the legal issue in this case was within the Court's exclusive purview, and seems to have been preoccupied by an insecurity about its role in the democratic process. In granting a suspension so that the legislature could consider the issue, the Court accepted the fallacy that majoritarian legislatures and constitutional courts are incompatible. In fact, as Dworkin and other constitutional scholars have noted, democracy and equality are aspects of the same ideal, not, as is often supposed, rivals. Bastarache J. has written, "rather than inimical to democracy, the role of the Court is essential to the flourishing of democratic institutions."

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para.130-142, 176; The Honourable Mr. Justice Michel Bastarache, "Experience, Morality, and the Liberty Interest in the *Charter*" Address to The Lawyers Club (5 January 1998, Toronto) at 6 [unpublished]; R. Dworkin, Freedom's Law: The Moral Reading of the American Constitution (Cambridge: Harvard University Press, 1996) at 18

196. The Divisional Court's analysis supposes that the political power of individual citizens is weakened when decisions are taken from the legislature and given to the courts, and that individual freedom is thereby compromised. While democracy puts power in the hands of the people, no democracy provides genuine equality of political power. As the Supreme Court has noted, there are "groups in society to whose needs and wishes elected officials have no apparent interest in attending." This has surely been the case for gays and lesbians seeking rights and respect in our legislatures over the last several decades. If these sort of "defects in the egalitarian character of democracy" go unremedied, there can be no healthy, functioning democracy and the principle of "government by the people" is not achieved. There can be no real "dialogue" between the courts and legislatures, if at the legislative branch the voices of the

majority drown out those of a vulnerable minority. Section 15 cures this natural imbalance and thereby promotes the ideal of democracy.

> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 140-142, 176; *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 152; J.H. Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980) at 74-75.

197. Given the pervasiveness of discrimination, judicial deference when equality rights are at stake poses a particular threat to democratic values.

> Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. … [J]udges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter.*
>
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 140-142, 176; M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1997) 34:4 Osgoode Hall L.J. 661 at 663.

ii. Other Justifications for Suspension are also Inapplicable

198. The majority also ruled that a suspension was appropriate, because this would allow the government time to consider alternative options. LaForme J. recognized that the idea of an "alternative" scheme was a resuscitation of the "separate but equal" doctrine of racial segregation, and Blair R.S.J. indicated concern about the constitutional adequacy of registered domestic partnership schemes. However, Blair R.S.J. and Smith A.C.J.S.C. ultimately held that there are other alternatives available to the government that should not be judged in advance, including the elimination of civil marriage all together. There are a number of significant errors in law with the approach of the majority.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 10 per Smith, 130, 151, 153 per Blair, 305 per LaForme.

199. First, as discussed above, it is an error of law to suspend as a form of deference in the circumstances of a common law rule that has been found to violate *Charter* rights. No deference is warranted or appropriate: the Court must craft a new common law rule that accords with *Charter* principles. As demonstrated in the analysis of "alternatives" for the purpose of reformulating the rule, there is only one alternative that satisfies the equality rights of the

Applicant Couples: to declare of no force or effect the rule that the marriage of persons of the same sex is void, and that gays and lesbians are free to marry.

> *R. v. Swain*, [1991] 1 S.C.R. 933 at 1033.

200. Blair R.S.J. also suspended because he felt that there might be changes required to various statutes to provide equal treatment as between marriages of opposite-sex and same-sex couples, where gender specific language is used. With respect, it is wrong to deny a fundamental right to a disadvantaged group on the basis that there are a number of provisions, such as property sharing on death and separation, which could also be amended. If necessary and desired, these may be challenged individually, or amended by government subsequent to the declaration of an equality-minded expression of the common law.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 123, 155 per Blair.

201. The Applicant Couples' proposed declaration would require that any necessary amendments be made. In *Vriend,* the Supreme Court amended all the provisions of the *Individual Rights Protection Act* that flowed from sexual orientation discrimination. At the moment, the AGC simply speculates, without evidence, about other possible statutory ramifications. If the amendment of any provision is absolutely required, the Court has the power, and responsibility, to do so.

> *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 155 per Blair; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 45-46.

202. Blair R.S.J. wrote that it would be unfair "to leave it to these Applicants, or others, to commence litigation and in effect start all over again if Parliament (with the Legislatures, where applicable) fails to create appropriate remedial provisions in this area consistent with the requirements of the *Charter*." At the same time, Blair R.S.J. granted a suspension which permits the government to enact an unconstitutional scheme, meaning the Applicant Couples or others will be required to begin the same case anew. The result is that the Couples, and all gays and lesbians, are left without a meaningful remedy after having proven an infringement of their rights.

> To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur.

Halpern v. Canada (Attorney General) (2002), 60 O.R. (3d) 321 (Div. Ct.), at para. 139, 145; Affidavit of Dr. Rayside, Application Record, Vol. 3, Tab 7; *Nelles v. Ontario,* [1989] 2 S.C.R. 170 at 196; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 719.

203. The Applicant Couples therefore request that the Court strike down the bar to marriages between persons of the same-sex, and articulate the new common law principle that same-sex couples are free to marry, without suspension.

C. THE "ANY LAW, PRACTICE OR POLICY" DECLARATION

204. The Applicant Couples have requested a declaration that any law, practice or policy of government that prohibits the otherwise lawful marriages of same-sex couples is of no force and effect. This remedy is intentionally broadly worded. It is clear from the government's history on gay and lesbian equality issues, and its stated intentions in its factum, that it may well attempt to avoid the effect of this judgment.

205. The Respondents are therefore legitimately concerned that their success will be immediately nullified by the creation of a statutory requirement that, in effect, accomplishes a constitutional override, without the government taking responsibility for the serious step of invoking s. 33 of the *Charter*. Such a declaration is also consistent with the broad and purposive remedy adopted by the Supreme Court in human rights cases, the most notable example being *Vriend v. Alberta.*

Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 45-46

206. Justice Iacobucci acknowledged in his dissent in *Little Sisters* that a declaration of constitutional invalidity, without more, leaves open the possibility that administrative action may continue to violate individuals' rights. In *Little Sisters*, the Court found that the s. 2(b) and s. 15(1) *Charter* rights of the appellants, owners of a gay and lesbian bookstore, had been infringed by the way Canada Customs implemented the Customs Tariff provisions against the importation of obscene materials. The majority granted a declaration to that effect, but the majority declined to make mandatory orders or outline a constitutional scheme of administration because it lacked information as to what Customs had done in the years since the trial to address its institutional and administrative problems.

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 at para 258; *Little Sisters Book and Art Emporium v. Canada*, Action # L020443 (Van. Registry), Notice of Application, dated February 13, 2002.

207. While the majority declined to provide a mandatory order, Binnie J. stated that the findings "should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary". While this may have been the case, it is a very unsatisfactory and onerous result for the successful *Charter* applicant. Indeed, the small gay and lesbian bookstore has recently been forced to start a second lawsuit to vindicate the same rights that the S.C.C. already recognized. It is, of course, highly possible given the history of that case and the AGC's attitude towards gay and lesbian issues, that the second *Little Sisters* case could also go all the way up to the Supreme Court. The little bookstore faces the possibility of having to litigate the same issues twice, for perhaps as long as twenty years in total.

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 at paragraphs 157, 158, 167, 262

208. In the present case, it is not necessary to devise a detailed scheme of administration or set out complex guidelines. The simple mechanisms for issuing licences and registering marriages are already in place. All that is necessary is for the same procedures to be followed in all cases, without regard to the sex of the couple applying for a marriage licence or submitting their certificate of marriage for registration. Making the mandatory order requested is a straightforward and simple matter.

209. Same-sex couples should not be subjected to the uncertainty of whether marriage licences will be issued to them, or their marriage certificates accepted for registration, without further resort to the courts for an order that their rights be practically and substantively recognized. They should not be exposed to the risk of having to undertake fresh litigation nor the burden of enforcement. As Chief Justice McLachlin noted in *Sauvé,* "the prospect of someday" having a right "is cold comfort to those whose rights are denied in the present."

Sauvé v. Canada (Chief Electoral Officer), [2002] S.C.C. 68 at para. 60; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 196; *Schachter v. Canada,* [1992] 2 S.C.R. 679 at 719.

D. CONSTITUTIONAL EXEMPTION

210. On the rare occasions that the Supreme Court of Canada suspends the remedy in constitutional cases, the Court "has always allowed the party bringing the case to take advantage of the finding of unconstitutionality".

Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice) [1998] 1 S.C.R. 3 at para 20.

211. In *R. v. Brydges*, the Supreme Court of Canada restored the acquittal of an accused who claimed that his right to counsel had been infringed, although the Court's ruling requiring police officers to inform detained persons of the availability of Legal Aid and duty counsel was suspended for a transition period of thirty days to allow police to prepare new cautions. Similarly, in *R. v. Feeney*, the Court granted an application for a rehearing on the issue of whether there should be a transition period before its ruling prohibiting warrantless dwelling house searches came into effect, but explicitly stated that the transition period would have no effect on the disposition of the accused's case.

R. v. Brydges, [1990] 1 S.C.R. 190 at 215-217; *R. v. Feeney*, [1997] 2 S.C.R. 117 at 117.

212. In *Rodriguez v. British Columbia (Attorney General),* Lamer C.J., dissenting, would have declared s. 241(b) of the Criminal Code, which makes it an offence to aid or abet a suicide, of no force or effect. He would have suspended the declaration for one year, but would have granted Ms. Rodriguez a personal remedy in the form of a constitutional exemption, and would have permitted others during the period of suspension to apply to a superior court for a constitutional exemption.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at 572-573.

213. The Applicant Couples, having made the personal sacrifices necessary to bring the issue of equal marriage before the courts, should enjoy the benefits of any favourable ruling without being required to wait for the expiry of a period of suspension.

PART V - RELIEF REQUESTED

214. The Respondents in Appeal and Appellants in Cross-Appeal ask this Honourable Court for the following relief:

(a) An immediate declaration that the common law does not render void otherwise lawful marriages between two persons of the same sex;

(b) In the alternative, an immediate declaration that it is unconstitutional and so of no force and effect that a marriage be deemed void on the sole basis that it involves two persons of the same-sex, rather than two persons of the different sex;

(c) A declaration that any law, policy or practice of government, whether federal, provincial or municipal, that restricts otherwise lawful marriages between two persons of the same-sex is contrary to the *Canadian Charter of Rights and Freedoms* and of no force or effect;

(d) In the alternative to an immediate declaration with respect to paragraphs a - c, a declaration of the relief sought, suspended for a maximum period of one month;

(e) An order in the nature of mandamus directing the Clerk of the City of Toronto to issue a marriage licence to each of the Applicant Couples;

(f) An order that the Clerk of the City of Toronto shall process marriage licence applications of couples of the same sex, such that applications shall not be refused solely on the ground that the couple is the same sex;

(g) An order that the Registrar General of the Province of Ontario shall accept registration of the marriage certificates for those couples otherwise legally married, but refused recognition of their marriages solely on the ground that the couple is the same sex;

(h) Costs of this Appeal and Cross-Appeal on a total indemnity basis; and

(i) Such further and other relief as to this Honourable Court may seem just.

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

Martha A. McCarthy

Joanna L. Radbord

EPSTEIN COLE LLP
401 Bay Street, Suite 3200
Toronto, ON M5H 2Y4

Telephone (416) 862-9888
Fax (416) 862-2142