

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)**

BETWEEN:

**THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO**

Applicant  
(Party Intervener)

- and -

**HEDY HALPERN and COLLEEN ROGERS  
MICHAEL LESHNER and MICHAEL STARK  
ALOYSIUS PITTMAN and THOMAS ALLWORTH  
DAWN ONISHENKO and JULIE ERBLAND  
CAROLYN ROWE and CAROLYN MOFFATT  
BARBARA McDOWALL and GAIL DONNELLY and  
ALISON KEMPER and JOYCE BARNETT (the "Respondent Couples"), and  
METROPOLITAN COMMUNITY CHURCH OF TORONTO**

Respondents  
(Respondents)

- and -

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

Respondents  
(Appellants)

- and -

**EGALE CANADA INC.**

Respondents  
(Party Intervener)

**AFFIDAVIT OF DARREL REID**

(filed on behalf of the Applicant, The Association for Marriage and  
the Family in Ontario)

I, **DARREL REID**, of the City of Vancouver, in the Province of British  
Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of Family (Canada) Association ("Focus"), and as such have knowledge of the facts and matters herein set forth except where stated to be on information and belief, and where so stated, I believe them to be true.

(a) **The Association and its Status in these Proceedings**

2. The Association for Marriage and the Family in Ontario (the "Association") consists of three groups: Focus, REAL Women of Canada and the Canada Family Action Coalition. These three groups have been involved for many years in the public policy debates surrounding issues relating to the family, including the issue of the interplay between equality rights claims based on sexual orientation and the legal status of the family, spouses and marriage. The groups have participated as interveners in a number of cases on such issues before this court, including: *Attorney General of Canada v. Mossop*, [1993] 1 S.C.R. 554; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, as well as in the Ontario Court of Appeal case, *Rosenberg v. Attorney General of Canada* (1998), 38 O.R. (3d) 577 (C.A.). The groups also intervened as a friend of the court as the British Columbia Coalition for Marriage and Family in the British Columbia same-sex marriage case, *Baribeau v. British Columbia (Attorney General)*, 2003 BCCA 251, both at the B.C. Court of Appeal and the B.C. Supreme Court.
3. The Association was granted the right to intervene as an added party in the application commenced by the Respondent Couples before the Ontario Divisional Court. Rule 13 of the *Ontario Rules of Civil Procedure* provides that a court may grant a person the right to intervene in a proceeding as an added party (Rule 13.01) or as a friend of the court (Rule 13.02). The Association applied for and was granted standing to intervene in the application as an added party by order of The Honourable Madam Justice Lang. A copy of Justice Lang's reasons made January 19, 2001 is attached hereto and marked as Exhibit "A".
4. The Association took an active role in the proceedings before the Divisional Court. It filed affidavit evidence, including the affidavit of David Coolidge that was extensively referred to in the decision of The Honourable Mr. Justice Blair [*Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321, per Blair, R.S.J. at 351-353, 360]. The Association also filed a factum and made oral submissions at the hearing of the application.
5. Before the Divisional Court the Association made two basic submissions. First, that the definition of marriage as the union between a man and a woman was

constitutionally enshrined in section 91(26) [federal jurisdiction over "Marriage and Divorce"] and section 92(12) [provincial jurisdiction over "the solemnization of marriage in the province"] of the *Constitution Act, 1867* and, consequently, the courts lacked the jurisdiction to alter that definition. Any change in the definition of marriage, the Association argued, would require a constitutional amendment. The Association also argued that the definition of marriage as a union between a man and a woman did not infringe the equality rights of the Respondent Couples under section 15(1) of the Canadian Charter of Rights and Freedoms.

6. The Association also actively participated in the appeal of this matter before the Court of Appeal of Ontario. Attached hereto and marked as Exhibit "B" is the order of directions made by the Associate Chief Justice of Ontario on December 19, 2002 describing the scope of participation of the Association, and others, in the appeal. On the appeal the Association filed a written factum and made oral submissions on the same issues as before the Divisional Court.

**(b) The Public Importance of the Issues in this Case**

7. It would be trite to say that the issue of marriage is one of fundamental public and national importance. Both Gonthier, J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 448 and LaForest, J. in *Egan*, [at p. 536] stressed the "fundamental importance of marriage" as a social institution and described marriage as a "basic social institution".

8. In its reasons for judgment, the Ontario Court of Appeal stated that the "appeal raises significant constitutional issues that require serious legal analysis." (para. 2) In the reasons of the Ontario Divisional Court Justice Blair described changing the definition of marriage to include two persons of the same sex as a "profound change" in the law. The Association submits that Justice Blair accurately captured the magnitude of the consequences of changing the definition of marriage in the following passage:

"However, the consequences and potential reverberations flowing from such a transformation in the concept of marriage, it seems to me, are extremely complex. They will touch the core of many people's belief and value systems, and their resolution is laden with social, political, cultural, emotional and legal ramifications." (*Halpern*, Divisional Court, at para. 97)

9. The change in the definition of marriage ordered by the Ontario Court of Appeal is the most profound change in Canada's social order mandated by a court since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982.

10. The Canadian Constitution divides legislative jurisdiction over marriage between the federal and provincial legislatures. Under section 91(26) of the *Constitution Act, 1867* the federal Parliament can legislate with respect to "Marriage and Divorce"; under section 92(12) the provinces enjoy legislative jurisdiction over "the solemnization of marriage in the province". The decision of the Ontario Court of Appeal affects both the federal and the provincial governments. The questions involved in this case therefore are of the greatest public and national importance.

11. The Ontario Court of Appeal released its decision on June 10, 2003. On June 17, 2003 the Minister of Justice announced that he would not seek leave to appeal the decision of the Ontario Court of Appeal, but would make public draft legislation to legalize same-sex marriage, refer the draft legislation to the Supreme Court of Canada for its opinion, and following the court's decision would introduce legislation in Parliament for a free vote. The Justice Minister subsequently made the reference to this Court on July 17, 2003. Attached hereto and marked as Exhibits "C", "D" and "E" are copies of newspaper articles that appeared on June 18, 2003 in the National Post, Globe and Mail and Toronto Star, respectively. It is apparent from these articles that the Prime Minister and Minister of Justice were acting on the basis that the courts had concluded that the definition of marriage as the union of a man and a woman was unconstitutional:

"For me, we have a Charter of Rights, there is evolution in society, and according to the interpretation of the courts, they concluded these unions should be legal in Canada," Mr. Chretien said. (National Post, p. 2; Globe and Mail, p. 2; The Toronto Star, p. 3)

"Our hand was forced," Chretien said in French. (The Toronto Star, p. 2)

12. Some provinces expressed disappointment that the Attorney General of Canada was not seeking leave to appeal the Ontario decision because it would deprive other provinces of the opportunity to make submissions to the Supreme Court of Canada on a matter of national importance:

“Dave Hancock, Alberta’s Justice Minister, said the federal government should have appealed the Ontario ruling. “Alberta is very disappointed,” he said. “It would have been an opportunity to go to the Supreme Court so all jurisdictions could have been involved in the discussion.” (National Post, p. 1)

13. The key question at issue in this matter is whether the definition of marriage as the union of a man and a woman is constitutional. It is apparent from the Minister’s July 17 statement that the federal government has decided not to refer this key question to this Court. The legislation proposed by the Minister would provide that “marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”. The federal government has asked this Court three questions regarding the draft bill:

- (i) Is the draft bill within the exclusive legislative authority of the Parliament of Canada?
- (ii) Is the section of the draft bill that extends capacity to marry to persons of the same sex consistent with the *Canadian Charter of Rights and Freedoms*?
- (iii) Does the freedom of religion guaranteed by the Charter protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

None of these questions deals with the key issue – i.e. is the prevailing definition of marriage as the union of a man and a woman constitutional or unconstitutional? The second question referred to this Court ignores this key question; a key question that would have to be dealt with on an appeal to this Court from the decision of the Ontario Court of Appeal. Accordingly, it is important that through a hearing of this appeal Canadians have the guidance of the highest court in this land on the key question. The issue is one of nation-wide importance and its resolution should not be left to provincial appellate courts. Attached as Exhibit “F” is a copy of the Department of Justice Canada news release dated July 17, 2003 announcing the draft bill and the reference to the Supreme Court of Canada.

14. The questions raised by this case are novel. This Court has never before considered the constitutionality of the definition of marriage as the union of a man and a woman. The social and legal implications of this case are national in dimension.

15. In the absence of this Court hearing an appeal from the judgment of the Ontario Court of Appeal, a judicial change in the law that will affect every province and every Canadian will proceed without Canadians ever knowing whether their highest court agreed or disagreed with the rulings of the provincial appellate courts. A profound social change could result from lower court rulings that were wrong at law. The national interest requires this Court to hear the appeal and, as an active participant in the courts below as an added party, the Association may appropriately bring this appeal before the Court.

**(c) Stay of the Judgment of the Ontario Court of Appeal**

16. In its judgment the Ontario Court of Appeal ordered that its declaration of the invalidity of the common law definition of marriage and its reformulation of the definition as “the voluntary union for life of two persons to the exclusion of all others” have immediate effect. As was widely reported in the media, following the release of this decision municipal clerks in Ontario began to issue marriage licences to same-sex couples and some marriages took place between same-sex couples.


17. At the present time great confusion prevails in Canada regarding marriage. First, a checkerboard pattern now seems to exist concerning the lawfulness of same-sex unions. Ontario and British Columbia appear to recognize them as lawful, whereas some other provinces do not. Further, the government of Alberta has announced that it will not comply with the draft bill proposed by the federal Minister of Justice, as reported by the Globe and Mail on July 18, 2003 (Exhibit “G”). Second, if this Court allowed the appeal, but did not grant a stay, the status of same-sex marriages entered into before the Court’s disposition of the appeal would be very uncertain. Third, religious groups would not know whether or not the decision of this Court on an appeal would affect their understanding of marriage or any civil obligations that they might have with respect to the solemnization of marriage. In order to avoid confusion and uncertainty on such an important legal and social issue, in the event this Court grants leave to appeal it should stay the judgment of the Ontario Court of Appeal pending disposition of the appeal.

18. The Association appreciates that this Court has previously stated that an applicant initially should move for a stay before the relevant provincial appellate court. The

Association respectfully requests that this Court consider the Association's stay motion because the Association has a reasonable apprehension that it would not receive an impartial hearing before the panel of the Ontario Court of Appeal that decided this case. On June 26, 2003 the Law Society of Upper Canada held its annual Pride Week reception and public education forum in Toronto. A report of that event published on the website of "Equal Marriage for same-sex couples" showed that two of the members of the Court of Appeal panel attended the reception; one spoke at it. Photographs of the event were posted on the website. A copy of the web report is attached as Exhibit "H". Given that the report of the event describes it as a celebration of the success of the Respondent Couples before the Court of Appeal, the Association submits that the attendance of members of the panel at the reception creates an apprehension as to the impartiality of the panel on any hearing of a stay motion. For this reason, the Association requests that this Court hear the stay motion and not the panel of the Ontario Court of Appeal.

19. I make this affidavit in support of an application by the Association for leave to appeal the Decision of the Court of Appeal for Ontario and for a stay of its judgment.

SWORN BEFORE ME )  
 at the City of <sup>Langley</sup> Vancouver, )  
 in the Province of British Columbia, )  
 this 25 day )  
 of July, 2003. )

  
 A Commissioner for taking Affidavits )

  
 DARREL REID

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