

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

B E T W E E N :

THE INTERFAITH COALITION ON MARRIAGE AND FAMILY
Applicant (Party Intervener)

- and -

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 CAROLY 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.
Party Intervener (Party Intervener)

- and -

THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO
Party Intervener (Party Intervener)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
of The Interfaith Coalition on Marriage and Family

TAKE NOTICE THAT the Interfaith Coalition on Marriage and Family (the "Interfaith Coalition") hereby applies:

- (i) for leave to appeal to the Court, pursuant to sections 40(1), 43(1), and 58(1)(a) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and Rule 25 of the *Rules of the Supreme Court of Canada* (the "*Rules*"), from the judgment of the Court of Appeal for Ontario (Files Nos. C39172 and C39174) made June 10, 2003;
- (ii) for an order pursuant to Rule 18 of the *Rules* that the Interfaith Coalition be added as a party to the proposed appeal and be granted carriage of the appeal;
- (iii) for an order directing an oral hearing of this application for leave to appeal;

and such further and other order that this Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

- (a) Marriage is a fundamental social institution of importance to all Canadians**
 - 1. The proposed appeal raises an issue of national importance - whether the Court should fundamentally redefine the social and religious institution of marriage.
 - 2. As a social and religious institution, marriage has pre-existed the Canadian legal order by millennia. Its importance cannot be overstated; this Court has described marriage as "fundamental to the stability and well-being of the family" (*Egan v. Canada*, [1995] 2 S.C.R. 513, per LaForest J., 536).

3. The Ontario Court of Appeal has utilized the common law to fundamentally redefine marriage as "the voluntary union for life of two persons to the exclusion of all others", judicially creating a new social conception of marriage as a committed domestic partnership of two persons. This new institution replaces the millennia-old institution of marriage constituted as "the voluntary union for life of one man and one woman to the exclusion of all others."
4. This change to the common law rule recognizing marriage is sudden and profound, has created significant confusion in the Canadian polity, and raises an issue of public importance. This Court has never previously addressed the definition of marriage, and specifically distinguished this issue when it considered the exclusion of same-sex partners from the legislative concept of "spouse" in *Egan v. Canada*, [1995] 2 SCR 513, and *M. v. H.*, [1999] 2 SCR 3.

(b) Errors Made by the Court of Appeal for Ontario

5. The Court of Appeal for Ontario, on the standard of review of correctness, committed the following errors:
 - (a) The Court of Appeal for Ontario erred in holding that the common law definition of marriage as the union of a man and a woman violates the equality rights of the Respondent Couples on the basis of sexual orientation under s. 15(1) of the *Charter of Rights and Freedoms* (the "*Charter*");
 - (b) The Court of Appeal for Ontario erred in holding that any violation of the Respondent Couples' s. 15(1) rights resulting from the common law definition of marriage as the voluntary union of a man and a woman cannot be justified in a free and democratic society under s. 1 of the *Charter*;
 - (c) The Court of Appeal for Ontario erred in failing to recognize the unique and singular role of the common law in *recognizing* the pre-existing social and

religious institution of marriage, and by treating it as though it were an ordinary common law rule which should only be incrementally modified by the courts.

- (d) The Court of Appeal for Ontario erred in failing to suspend the declaration of invalidity of the common law definition of marriage, at a time when Parliament was actively engaged in a nationwide, consultative law reform initiative.

(c) Consequences of the decision of the Court of Appeal for Ontario

6. The remedy granted by the Court of Appeal, if left undisturbed, will:

- (a) unreasonably fetter Parliament's ability to choose among alternative, constitutionally viable legislative regimes which could be crafted to accommodate the many competing interests here in issue;
- (b) leave unresolved the issue of whether, when dealing with the fundamental reform of a basic social and religious institution that was not created by the law, the courts should defer the appropriate remedial response to Parliament through a suspension of the declaration of constitutional invalidity;
- (c) imperil the religious freedom of religious clergy of many faiths to act according to their consciences in refusing to perform same-sex marriage ceremonies;
- (d) imperil the religious freedom of other religious adherents whose religious faith does not permit them to accept same-sex unions as marriages;

(e) alienate clergy who can no longer, in good conscience, act as agents of the state in solemnizing marriages, and ostracize religious adherents out of full participation in Canadian public life.

(d) The Status of the Interfaith Coalition to make this Application

7. On June 17, 2003, after the Court of Appeal for Ontario released its decision, the Prime Minister of Canada announced that the Respondent the Attorney General of Canada (the "AGC") would not seek leave to appeal the decision. Instead, the Minister of Justice has prepared draft legislation, and referred questions about this legislation to this Court.
8. The Interfaith Coalition has demonstrated its interest in this case in the courts below, having been added as a party intervener before the Divisional Court and having its intervener status continued at the Ontario Court of Appeal. It has filed affidavit evidence to support the constitutionality of the traditional conception of marriage, and attesting to the anticipated impact on its member communities of the recognition of same-sex unions as marriages.
9. The decision of the Ontario Court of Appeal will have a major impact both in the Canadian faith communities represented by the applicant and for all Canadians. The decision of the AGC not to seek leave to appeal means that without the Interfaith Coalition being added as a party and being granted leave to appeal, this important constitutional issue will now be resolved by this Court.

DATED at Toronto, in the Province of Ontario this 13th day of August , 2003.

SIGNED BY 

LERNERS LLP

Counsel for the Applicant

The Interfaith Coalition on Marriage and Family