Court File No.

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 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 -

METROPOLITAN COMMUNITY CHURCH OF TORONTO
Respondent (Respondent)

- 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)

MEMORANDUM OF ARGUMENT OF THE APPLICANT
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 as am. 1990, c.8 and Rule 25 of the Rules of the Supreme Court of Canada)

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400, Box 95
Toronto ON M5H 3P5
Peter R. Jervis LSUC # 22774A4A
Bradley W. Miller LSUC # 47416M
Phone: 416-867-3076
Fax: 416-867-9192
Email: pjervis@lerners.ca
Email: bmiller@lerners.ca
Counsel for the Applicant (Party Intervener) The Interfaith Coalition on Marriage and Family

Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
PO Box 466, Stn. D
Ottawa, ON K1P 1C3
Ed Van Bemmel
Phone: 416-233-1781
Fax: 613-369-7250
Email: Ed.VanBemmel@gowlings.com

Ottawa Agents for Counsel for the Applicant The Interfaith Coalition on Marriage and Family

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

AND TO:

Epstein, Cole
Barristers and Solicitors
401 Bay Street, Box 52
32nd Floor, The Simpson Tower
Toronto, Ontario M5H 2Y4

Martha A. McCarthy & Joanna L. Radbord
Tel: (416) 862-9888 ext. 241
Fax: (416) 862-2142
Counsel for the Respondent Couples

AND TO:

McGowan Elliott & Kim LLP
Barristers and Solicitors
Suite 1400 - 10 Bay Street
Toronto, Ontario M5J 2R8

R. Douglas Elliott & Victoria Paris
Tel: (416) 362-1989
Fax: (416) 362-6204
Counsel for the Respondent, Metropolitan Community Church of Toronto

AND TO:

Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West, Suite 3400
Toronto, Ontario M5X 1K6

Roslyn J. Levine, Q.C.
Gail Sinclair / Michael H. Morris / Andrea Horton
Tel: (416) 973-9201
Fax: (416) 952-0298
Counsel for the Attorney General of Canada

AND TO:

Ministry of the Attorney General
Constitutional Law Branch
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Robert E. Charney & Lisa J. Solmon
Tel: (416) 326-4452 / (416) 326-4476
Fax: (416) 326-4015
Counsel for the Attorney General of Ontario

AND TO:

City of Toronto, Legal Department
100 Queen Street West
13th Floor, West Tower, City Hall
Toronto, Ontario M5H 2N2

Leslie Mendelson & Roberto E. Zuech
Tel: (416) 392-7246 / (416) 392-7244
Fax: (416) 392-1199
Counsel for Novina Wong, The Clerk of the City of Toronto

AND TO:

Sack Goldblatt Mitchell
Barristers & Solicitors
20 Dundas Street West, Suite 1130
Toronto, Ontario M5G 2G8

Cynthia Petersen & Vanessa Payne
Tel: (416) 979-6440
Fax: (416) 591-7333
Counsel for EGALE Canada Inc. (Party Intervener in Ontario Court of Appeal)

AND TO:

Stikeman, Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

David M. Brown
Tel: (416) 869-5602
Fax: (416) 947-0866
Counsel for The Association for Marriage and the Family in Ontario
(Party Intervener in Ontario Court of Appeal)

INDEX

PART I – FACTS

A. Nature of the Application

1. The Interfaith Coalition on Marriage and Family (the "Interfaith Coalition"), a party that intervened before the Ontario Court of Appeal and the Ontario Superior Court of Justice, Divisional Court, applies:

i) for leave to appeal to this 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* granting the applicant status as a party appellant to take carriage of this appeal; and

iii) for an order directing an oral hearing of this application.

B. Overview

2. This proposed appeal raises questions of fundamental social and legal importance to all Canadians. First, what should be the core definition of marriage - the basic social institution in our society? Second, does the common law recognition of the institution of marriage's conferral of the status of husband and wife violate the equality rights of gays and lesbians in a manner not justified under s. 1. Third, does justice require that, when Parliament is actively engaged in a law reform review of an issue, and a court renders a declaration of invalidity with respect to that same issue, a remedial suspension be granted in order to allow Parliament time to complete its law reform review. In the Canadian constitutional order, Parliament, which has been consulting with Canadians through nationwide committee hearings on this very issue, is the appropriate governmental entity to develop this fundamental reform. Do traditional principles of deference to Parliament

with respect to non-incremental law reform allow the courts to make such massive changes to Canadian law and society?

3. This appeal also arises in a unique context involving a singular application of the common law. As is discussed in more detail in this memorandum, the institution of marriage at issue in this appeal is not a legal construct. It was not created, defined nor prescribed by the common law. In 1866 in England, and later in Canada, the common law has simply recognized this millennia old social and religious institution and ascribed certain legal aspects to it. "Marriage," as recognized by this Court in both *Egan* v. *Canada*[1] and *M* v. *H*[2] is fundamentally different from the legislative construct of "spouse" considered in those cases.

4. This proposed appeal, therefore, deals with a fundamental issue that has never been dealt with by this court. Unlike the spousal definition cases (*Egan*, *M.* v. *H.*), this appeal does not deal with a non-inclusive legislative category which denies legislative benefits to an identifiable group. It deals solely with the issue of whether the law can constitutionally recognize a pre-existing social and religious institution which confers the status of husband and wife and is uniquely heterosexual. If the law cannot recognize that institution constitutionally, is it appropriate for the courts to fundamentally redefine that institution?

---

1 *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

2 *M.* v. *H.* [1999] 2 S.C.R. 3.

5. Furthermore, this appeal arises in a context in which Parliament was actively dealing with this very issue until the decision appealed from. The Standing Committee on Justice and Human Rights (the "Justice Committee") had been, until the Court's decision in June 2003, considering a number of legislative options to remedy any inequality. These include (i) the redefinition of marriage, and (ii) the proposed legal status of "civil union" which would be equally available to both heterosexual and homosexual partners. The country is very divided on this issue and so is Parliament. Should the court, in this context, simply ignore the role of the democratically elected Parliament and mandate a legal response which may be only one of only several constitutionally viable options?

6. There is much at stake in this appeal for persons of religious faith. All major religious faiths recognize marriage as existing uniquely between one man and one woman. Clergy in many denominations and religious faiths are, by their religious principles, unable and unwilling to solemnize "marriages" between persons of the same sex. Similarly, millions of Canadians, represented by the Applicant, by their religious principles, are unable to recognize same-sex unions as marriages.

7. The decision of the Ontario Court of Appeal will have profound legal and social ramifications for these religious communities. The concern is not just that religious clergy would be required to perform marriage ceremonies between persons of the same sex, or that religious persons and institutions will face legal proceedings as a result of their refusal to accept same-sex unions as marriages.[3] The Ontario Court of Appeal's definition will, for reasons described herein, ostracize members of faith communities in Canada from the

---

[3] Affidavit of David Wiebe, sworn July 24, 2003 ("Wiebe Affidavit")

social mainstream. Many of these are vulnerable minority faith communities. The Ontario Court of Appeal's order, out of a desire to achieve equality for some, will seriously exacerbate inequality for other vulnerable groups in society.[4]

C. History of the Proceedings

8. The Respondent Couples applied to the Ontario Superior Court, Divisional Court, for judicial review of a refusal by the City Clerk of the City of Toronto to issue them marriage licenses. The Respondent, the Metropolitan Community Church Toronto ("MCC") then commenced an application for judicial review of the refusal of the Ontario government to register same-sex marriages performed by the MCC following the publication of banns. The Divisional Court granted both applications, declaring the common law definition of marriage as the "lawful and voluntary union of one man and one woman to the exclusion of all others" to be unconstitutional. The Divisional Court suspended the declaration of invalidity for 24 months, to allow for a legislative response from Parliament.

9. The Attorney General of Canada (the "AGC") appealed the Divisional Court's decision to the Ontario Court of Appeal. The Respondent Couples and the MCCT cross-appealed on the issue of remedy. On June 10, 2003, the Ontario Court of Appeal unanimously dismissed the AGC's appeal, and ordered, without suspension, that the common law definition of marriage be reformulated to be "the voluntary union for life of two persons to the exclusion of all others". The Court of Appeal for Ontario, unlike the

---

[4] Affidavit of Bruce Clemenger, sworn August 11, 2003 ("Clemenger Affidavit"), ¶ 5 and 6.

Divisional Court or the British Columbia Court of Appeal, refused any deference to Parliament's ongoing legislative review through the Justice Committee.

D. Standing of the Interfaith Coalition to seek leave to appeal

10. The Interfaith Coalition seeks an order to be added as a party appellant in this court for the carriage of this appeal if granted.

11. The Interfaith Coalition represents the members of several faith communities in Canada, including Protestant, Roman Catholic, Muslim, and Sikh communities. The communities represented by the Interfaith Coalition include millions of Canadians. While some of the communities are large (almost 50% of Canadians identify themselves as Roman Catholic), some are small and historically disadvantaged within Canada. These communities share a religiously mandated conception of marriage that has now been labelled by the Ontario Court of Appeal as inconsistent with Canadian values.

12. The Interfaith Coalition was granted leave to intervene as an added party in the Divisional Court, by order of the Honourable Justice Lang. The Interfaith Coalition's participation as an intervener was continued in the Ontario Court of Appeal by consent order. At the Divisional Court, the Interfaith Coalition filed evidence on the religious conceptions of marriage of many Canadian faith communities and the social and legal impact of the judicial authorization of same-sex marriage on religious communities (including clergy). In addition to filing affidavit evidence and written answers to

interrogatories, the Interfaith Coalition was an active participant at both the Divisional Court and Court of Appeal, presenting written and oral argument.[5]

E. The currently ongoing Parliamentary initiative to deal with the issue of same-sex unions

13. Parliament, for a number of years prior to the Divisional Court decision, has been actively dealing with the need to respond to the equality rights of same-sex partners and specifically with the question of how best to achieve institutional support for same-sex unions (and other close domestic partnerships) while maintaining recognition of the uniquely heterosexual nature of marriage.[6] Thus in 1999, when legislating to extend certain benefits and obligations to same-sex couples in an *Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations*,[7] Parliament affirmed its recognition of marriage as an institution between one man and one woman. Long before the decision of the Divisional Court, the Law Commission of Canada commissioned papers from various scholars dealing with potential legislative options for the institutional recognition of committed same-sex unions. In December 2001 it published its own report, "Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships".[8]

14. By the time the Divisional Court handed down its ruling in July 2002, Parliament had thus demonstrated that creating legal recognition for same-sex unions was a priority. It

---

5 Clemenger Affidavit, ¶ 5 and 6.

6 Affidavit of Derek Lee, sworn August 12, 2003 ("Lee Affidavit"), ¶ 15-22.

7 *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12

8 Lee Affidavit, ¶ 9-10.

was therefore not surprising that when the Divisional Court ruled against the status quo, Parliament redoubled its efforts to "reconcile the traditional meaning of marriage and the recognition of committed gay and lesbian relationships within our constitutional framework and equality guarantees". In November 2002, the Minister of Justice issued a discussion paper entitled "Marriage and Legal Recognition of Same-Sex Unions" (the "Discussion Paper"), and referred to the Justice Committee the following question:

> Given our constitutional framework and the traditional meaning of marriage, should Parliament take measures to recognize same-sex unions and, if so, what should they be?[9]

15. The Discussion Paper invited the Justice Committee to consider a number of potential legislative options, including (but not limited to):

i) marriage remaining as an opposite-sex institution, with or without a new federal statute creating a registry for civil unions or domestic partnerships;

ii) marriage being changed to include same-sex couples; and

iii) Parliament withdrawing from the regulation of marriage altogether.[10]

16. The Justice Committee conducted public hearings throughout Canada to consult broadly with Canadians on how to accommodate traditional marriage together with the legal recognition of committed same-sex relationships. Many Canadians made submissions to the Justice Committee, expressing their concerns about the effects that a

---

[9] Lee Affidavit, ¶ 12-16.

[10] Lee Affidavit, ¶ 9.

legislative or judicial transformation of marriage could have on them and on society generally.[11]

17. In April 2003, after the Justice Committee had received evidence from across the country, its members began to prepare to meet in camera and prepare final recommendations to Parliament. Before the Justice Committee could complete its deliberations, the Ontario Court of Appeal delivered its reasons for judgment. The effect was immediate. The AGC concluded that the Ontario Court of Appeal's decision meant that any definition of marriage that excluded same-sex unions would be unconstitutional, and decided not to appeal. According to Vic Toews and Derek Lee, members of the Justice Committee, the effect of the Court of Appeal's ruling was to end the Justice Committee's search to create a legislative solution to satisfy the needs of all Canadians.[12] The consideration of a range of legislative resolutions was terminated by the ruling.

F. The Draft Bill and the Constitutional Reference

18. On July 17, 2003, the Minister of Justice announced that the Government of Canada had drafted a bill that would stipulate that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others". The Minister of Justice referred this bill to this Court, asking this Court three questions:

i) Is the draft bill within the exclusive legislative authority of the Parliament of Canada?

---

[11] Lee Affidavit, ¶17-19; Toews Affidavit, ¶11-15.

[12] Lee Affidavit, ¶ 21; Toews Affidavit, ¶ 16-17.

ii) Is the section of the draft bill that extend capacity to marry 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?

Notably absent from these questions is the central question in the proposed appeal - whether, in the Canadian constitutional order, it is *required* that the institution of marriage be changed to encompass same-sex unions. According to Members of Parliament Derek Lee and John McKay, this draft Bill is unlikely to pass through Parliament given the significant opposition by Canadians, and the prospect of other legislative resolutions which may be constitutionally viable.[13]

PART II - QUESTIONS IN ISSUE

19. This application raises the following issues of public and national importance:

i) Whether the Charter requires that the institution of marriage be fundamentally redefined in Canadian society?

ii) Did the Ontario Court of Appeal err in holding that the common law's recognition of marriage as a social and religious institution between one man and one woman conferring the status of husband and wife violates s. 15(1) of the *Charter*, and that such violation could not be justified under s.1?

iii) Did the Ontario Court of Appeal err in holding that the appropriate remedy is for the Court to order the immediate reformulation of marriage as an institution between "two persons", rather than suspending the declaration of invalidity to allow Parliament to reform the law to the extent constitutionally necessary?

---

[13] Lee Affidavit, ¶ 23-25; Affidavit of John McKay, sworn August 13, 2003 ("McKay Affidavit"), ¶4-7.

PART III - ARGUMENT

A. The Public and National Importance of Marriage

20. There are few matters that could have greater national and public importance than the constitution and definition of marriage - the most basic social institution in Canadian society.

21. The institution of marriage within Canadian society is of central importance to Canadians. As Justice Minister Cauchon expressed it, "(p)erhaps no single issue touches more people."[14] The change wrought by the decision of the Ontario Court of Appeal is, as described by Blair J at the Divisional Court,'a profound change':

> ...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.[15]

As Justice LaForest wrote in *Egan*:

> ...marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[16]

---

[14] Lee Affidavit, ¶ 15.

[15] *Halpern v. Canada* (AG), (2002) 60 O.R. (3d) 321,¶ 97.

[16] *Egan v. Canada*, [1995] 2 S.C.R. 513, 536.

22. Furthermore, this appeal arises in the context of a singular function of the common law - to legally recognize a pre-existing "institution". Marriage is a religious and social institution and not a legal construct; it both pre-exists the law and exists outside of the law. The common law did not create the institution of marriage, or prescribe its core features. Instead, it has recognized and *described* marriage as a religious and social institution that confers the status of "husband and wife". While there is a common law rule that recognizes marriage as being an institution between one man and one woman, it is not a common law rule in the ordinary sense. It is a rule of singular recognition - a rule that recognizes the legal aspects of an extra-legal institution.

23. Unlike other common law rules that are the special responsibility of the judiciary to safeguard and incrementally modify (such as those governing civil or criminal proceedings or establishing principles of liability), a common law rule that recognizes the existence and legal aspects of an extra-legal institution does not vest in the judiciary the authority (let alone a special responsibility) to profoundly change the very nature of that institution. Because marriage is not a judicial creation, the questions of what the core characteristics of marriage are, and what the definition of marriage should be, are not primarily legal questions. Judges have no special expertise with which to answer these questions.

24. The characteristic features of marriage (its permanence, its consensual nature, its monogamous nature, its opposite-sex nature, and its adult nature) have remained consistent throughout successive generations for millennia. One comparatively recent legislative change to civil marriage - the availability of no fault divorce - has provoked an

enormous social change. The experience of the social revolution to which the 1960s liberalization of divorce contributed, suggests that significant changes to fundamental social institutions such as marriage, can have unexpected and unpredicted results, and that persons (be they parliamentarians or judges) who are asked to make profound changes to fundamental social institutions should approach the issues carefully and with caution.[17]

25. Additionally, the institution of marriage is one that is central to the self-understanding of many individuals and many Canadian communities (particularly religious communities), and is for many a religious sacrament.[18] The change to the legal definition of marriage stipulated by the Ontario Court of Appeal is not only different from the concept of marriage held by millions of Canadians, it is antithetical to it. In effect, the Court of Appeal of Ontario has purported to change marriage not only for gays and lesbians, and not only for residents of Ontario, but for all Canadians. Canadians, and particularly those Canadians of religious faith, whose conception of marriage cannot encompass same-sex unions, are being told that their conception of marriage is antithetical to Canadian values.[19]

B. Section 15(1) and s. 1 of the Charter should be read *inter*subjectively

26. The proposed appeal raises the issue of the extent to which the test for a violation of s. 15(1) of the Charter requires the Court to evaluate the *reasonableness* of the subjective experiences of rights claimants. It raises the issue of whether the reasonable

---

[17] Clemenger Affidavit, ¶ 5.

[18] Clemenger Affidavit, ¶ 5.

[19] Wiebe Affidavit, ¶ 9; Clemenger Affidavit, ¶ 5-6.

person, for the purposes of s. 15(1) analysis, is one who takes into account the obligation of government to accommodate the needs of others in society. This issue is not only of importance to the parties to this litigation, but is an important and unsettled aspect of the general interpretation of s. 15(1).

27. Similarly, the proposed appeal also raises questions about the interpretation of the relationship between s. 15(1) and s. 1 of the Charter; specifically, it raises the question of the degree to which the legitimate needs of other individuals and groups are properly considered at under s. 15(1) analysis. This, again, is an unsettled point of Charter interpretation, and one which was raised in the respective reasons for judgment of Bastarache J. and Arbour J. in *Lavoie v. Canada.*[20]

C. Proper dialogue between Parliament and the Judiciary requires a suspension of the declaration of invalidity

28. This appeal squarely raises an issue which this Court has, on occasion, described as the relationship between the legislative and judicial branches of government involving a "dialogue": a metaphor that describes the judiciary's responsibility to review the work of the legislature, and the legislature's ability to respond to the judiciary (where necessary) by enacting new legislation.[21]

29. Implicit in the dialogue model, is the principle that in the Canadian legal order, it is the legislative branch of government that bears the responsibility for complex law reform.

---

[20] 2002 SCC 23.

[21] *Vriend v. Alberta* [1998] 1 S.C.R. 493, ¶ 138-139, citing PW Hogg and AA Bushell, 'The Charter Dialogue between Courts and Legislatures', (1997) 35 *Osgoode Hall LJ* 76.

As this Court held in *Watkins v. Olafson*, and subsequent cases, courts, by their nature, are not well-suited to conducting complex law reform, and courts should be reluctant to venture beyond incremental developments to the common law.[22] In *R v. Salituro*, this Court elaborated on *Watkins v. Olafson*, holding that courts should not change a common law rule where this would "upset the proper balance between judicial and legislative action":

> ... there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours **it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature.** The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[23] (emphasis added)

30. Consistent with the "dialogue" model of judicial review, this Court has held that when a court makes a declaration of constitutional invalidity, the court must then determine whether it should temporarily *suspend* the declaration, in order to allow Parliament an opportunity to craft a legislative solution to the identified problem.[24] The principles established by this Court in *Watkins v. Olafson*, governing exercises of judicial authority to modify the common law, should inform this Court's approach to the exercise of judicial

---

[22] *Watkins v. Olafson* [1989], 2 S.C.R. 750, pp. 760-61; *M.* v. *H.* [1999], 2 S.C.R. 3, ¶ 59-62; and *Thomson Newspapers Co.* v. *Canada (AG)* [1998], 1 S.C.R. 877, ¶ 87-88. In *Watkins v. Olafson*, this Court articulated several factors that determine whether a proposed change to the common law is incremental: (1) the change is to specifically *legal* principles; (2) the change is to principles historically within the special competence of the judiciary; (3) the change does not involve significant social or legal ramifications; and (4) the change does not involve adopting an entirely new principle.

[23] *R. v. Salituro* [1991] 3 S.C.R. 654, 675 (Iacobucci J).

[24] *Schacter v. Canada* [1992] 2 S.C.R. 679, pp. 715-716.

authority to choose to suspend a declaration of invalidity in cases of Charter rights violations. If those principles are to be changed, it should be done explicitly by this Court.

31. Section 15(1) decisions, typically, invite the judicial-legislative dialogue that can be facilitated through a suspension.[25] As this Court explained in *Schacter v. Canada*, where a legal regime has found to be underinclusive, a suspension of the declaration of invalidity may be appropriate, one reason being that there are typically several ways in which Parliament could choose to remedy an inequality: by extending the existing benefit more broadly, by withdrawing the benefit from everyone, or by introducing some new benefit scheme.[26] The decision of how best to remedy the inequality, where there are many competing interests, should be made by Parliament.

32. It has been the practice of this Court to allow Parliament the latitude necessary to create a legislated solution that accommodates competing interests. In *M.* v. *H.*[27], for example, when this Court suspended a declaration of invalidity, Parliament responded with a wide-reaching review of federal legislation and extended benefits to persons in same-sex relationships through the *Modernization of Benefits and Obligations Act.*[28]

33. All Canadians would be affected by changes to society's foundational unit. Any proposed change to that unit will be uncertain in its effects. Parliament, having listened to

---

[25] Hogg and Bushell, supra, pp 90-91.

[26] *Schacter v. Canada* [1992] 2 S.C.R. 679, 715-16.

[27] *M.* v. *H.* [1999], 2 S.C.R. 3.

[28] Modernization of Benefits and Obligations Act, SC 2000, c. 12.

presentations from individuals and groups throughout Canada, is best placed to understand the diverse needs of Canadians, and how they can be mutually accommodated.

34. The Ontario Court of Appeal has not left Parliament with the appropriate latitude with which to craft a legislative solution. By refusing to grant a suspension, it sent a message to Parliament that Parliament had no fully constitutional option other than to codify the new status quo that the Court of Appeal created. The draft bill that was referred to this Court by the federal government ("an Act Respecting Certain Aspects of Legal Capacity for Marriage") is thus not the product of a proper dialogue between the legislative and judicial branches. It is not at all clear that Parliament, had it been given any latitude by the Ontario Court of Appeal, would not have created a new legislative regime that recognized committed same-sex partnerships as well as traditional marriages, and that such a regime would not satisfy the requirements of s. 15(1) of the Charter. Other free and democratic societies (which share Canada's commitment to the rule of law and respect for human dignity), have found it acceptable to extend recognition to same-sex couples while at the same time preserving the traditional meaning of marriage. The Justice Committee had been considering some of these options.[29]

35. Additionally, in circumstances such as these, where the Justice Committee has held hearings and was deliberating towards a legislative solution at the time of the Ontario Court of Appeal's ruling, a suspension is supported by the principle of democracy - a principle

---

[29] Lee Affidavit, ¶ 20-22; and Toews Affidavit ¶ 17-20.

that this Court has said underlies the Constitution.[30] This Court has held that democracy requires a continuous process of discussion, and that a democratic system of government is one that is committed to hearing dissenting voices:

> ....a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.[31]

A suspension, in this instance, would allow for the process of discussion to continue to a natural end, working towards a legislative solution that both respects the needs of gays and lesbians, and respects the needs of others in society to maintain the traditional conception of marriage.

36. Allowing the process of discussion to continue to its conclusion, without resorting prematurely to a court-ordered solution, would also avoid the possible alienation and discord that has resulted in threats of the invocation of s.33 of the Charter by provinces who were not parties to this litigation.

37. In conclusion, in situations where Parliament is required to take many competing interests into account, suspending the declaration of invalidity is not only permissible, but

---

30 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 64-68.

31 *Reference re Secession of Quebec*, ¶ 68.

it is the most just approach to take, and the approach most consistent with the principles underlying the Constitution.

D. The Constitutional Reference does not make the proposed appeal moot

38. The Constitutional Reference brought by Executive branch of the Government of Canada does not make this proposed appeal moot. The Reference does not ask the ultimate question in this proposed appeal, which is, does s. 15(1) of the Charter require that marriage be redefined to include "two persons" rather than "one man and one woman".

39. Furthermore, as the Affidavit of John McKay (as well as any reading of the recent national media) makes clear, there is no certainty at all that the legislation proposed by the current Executive branch will pass Parliament.[32] The Executive is likely to change later this year or early next year, before the Reference has been determined by this Court. Therefore, the issue of appropriate remedy and the constitutionally viable responses to a declaration of unconstitutionality remains essential to guide both the Executive and Parliamentary branches of government.

E. Standing of the Interfaith Coalition

40. It is within this Court's discretion to grant leave to appeal to an intervener and add the intervener as a party where "such addition or substitution is necessary to enable the Court to adjudicate the questions in issue."[33]

---

[32] McKay Affidavit, ¶ 7.

[33] Rule 18 of the *Rules of the Supreme Court of Canada*.

41. Significantly, the proposed appeal is of an issue of national importance, and without the interveners, there is no one else to bring it forward. The decision of the Ontario Court of Appeal has a major impact in the Canadian faith communities represented by the applicant. The decision of the AGC not to seek leave to appeal, has meant that the interests of a large proportion of Canadian society will not otherwise be heard by this Court.

42. The Interfaith Coalition ought to be granted standing because of: (1) the public importance of this appeal, (2) the failure of the AGC to carry on this appeal, and (3) the impact of the litigation on the individual Canadians and faith groups represented by the Interfaith Coalition.

43. This Court has previously granted leave to appeal to an intervener where the issue was of public importance, where other parties chose not to appeal, and the issue was one of public importance that the Court would otherwise not hear. In *M. v. H.*, the Attorney General of Ontario ("AGO") had intervened in response to a Notice of Constitutional Question, with respect to the constitutionality of Ontario's *Family Law Act.* When H. did not seek leave to appeal, the AGO applied for leave to appeal, which this Court granted.[34]

44. Also in *Canadian Pacific Ltd. v. Montreal Urban Community*, this Court granted the motion of an intervener in the Quebec Superior Court and Court of Appeal to be added as a party where there was no party willing to defend an application for leave to appeal, and where the intervener in the courts below (as in the case of the Interfaith Coalition) had

---

[34] *M.* v. *H.* [1999], 2 S.C.R. 3.

been actively involved in all aspects of the initial hearing and appeal.

45. Furthermore, in *Canada (Cdn. Human Rights Comm.) v. Canada (Dept. of Secretary of State)* (October 30, 1990), the intervener Canada Human Rights Commission was granted leave to appeal by this Court notwithstanding that the unsuccessful named party was unwilling to seek leave to appeal. Similarly, in *Ministry of Labour (Ont), Employment Standards Branch v. Zittrer, Siblin & Associates Inc. (Trustee)* (December 12, 1997), an employee group (not previously a party in any capacity) was added as a party and granted leave to appeal when the Ministry of Labour discontinued its application for leave to appeal.

PART IV - ORDER SOUGHT

46. The Interfaith Coalition requests that this Court:

i) direct an oral hearing of this application;

ii) grant the Interfaith Coalition leave to appeal to this Court from the judgment of the Court of Appeal for Ontario dated June 10, 2003; and

iii) grant the Interfaith Coalition status as a party appellant for the carriage of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Peter R. Jervis

Bradley W. Miller

of Counsel to the Applicant
The Interfaith Coalition on
Marriage and Family

PART V - TABLE OF AUTHORITIES

Para. No.

OTHER AUTHORITIES:

PART VII - STATUTES

Supreme Court Act, R.S.C. 1985, c. S-26, sections 40(1), 43(1) and 58(1)

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

43. (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(*a*) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;

(*b*) dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (*a*); and

(*c*) order an oral hearing to determine the application, in any other case.

(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

(1.2) On the request of the applicant, an oral hearing shall be ordered to determine an application for leave to appeal to the Court from a judgment of a court of appeal setting aside an acquittal of an indictable offence and ordering a new trial if there is no right of appeal on a question of law on which a judge of the court of appeal dissents.

(2) Where the court makes an order for an oral hearing, the oral hearing shall be held within thirty days after the date of the order or such further time as the Court determines.

(3) Any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered.

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

(*a*) quashing a conviction of an offence punishable by death; or

(*b*) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

58. (1) Subject to this Act or any other Act of Parliament, the following provisions with respect to time periods apply to proceedings in appeals:

(*a*) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from; and

(*b*) in the case of an appeal for which leave to appeal is not required or in the case of an appeal for which leave to appeal is required and has been granted, a notice of appeal shall be served on all other parties to the case and filed with the Registrar of the Court within thirty days after the date of the judgment appealed from or the date of the judgment granting leave, as the case may be.

(2) The month of July shall be excluded in the computation of a time period referred to in subsection (1).

Rule 18 of the *Rules of the Supreme Court of Canada*

18. (1) A person may be added or substituted as a party on motion before a judge or the Registrar that sets out the reasons for the addition or substitution.

(2) Subject to subrule (5), no person shall be added or substituted as a party without the person's consent being filed with the Registrar.

(3) The motion referred to in subrule (1) shall also be served on the proposed added or substituted party.

(4) Parties added or substituted shall be served with all documents provided for in these Rules, and any time periods shall begin as provided for in the order unless a judge or the Registrar otherwise orders.

(5) In any proceeding, the Court or a judge may order that a party be added or substituted where, in the opinion of the Court or the judge, such addition or substitution is necessary to enable the Court to adjudicate the questions in issue.

S.C.C. No.:

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 et al.
Respondents (Respondents)

-and-

THE ATTORNEY GENERAL OF CANADA et al.
Respondents (Appellants)

- and -

EGALE CANADA INC.
Respondent (Party Intervener)

- and -

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

MEMORANDUM OF ARGUMENT OF THE APPLICANT THE INTERFAITH COALITION ON MARRIAGE AND FAMILY

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400, Box 95
Toronto, ON M5H 3P5

Peter R. Jervis LSUC # 22774A4A
Bradley W. Miller LSUC # 47416M
Tel: (416) 867-3076
Fax: (416) 867-9192

Counsel for the Applicant (Party Intervener) The Interfaith Coalition on Marriage and Family