PART 1 – STATEMENT OF FACTS

1. The Respondent, Metropolitan Community Church of Toronto ("MCCT") brings this motion to quash the Application for Leave to Appeal of the Association for Marriage and the Family in Ontario ("Association"). The Association seeks leave to appeal the decision of the Court of Appeal for Ontario dated June 10, 2003. The Court of Appeal ruled that the common law definition of marriage infringed the equality rights of the Applicants and was not saved by s. 1 of the *Charter*, affirming an earlier Divisional Court ruling.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
> Application Record of the Association for Marriage and the Family in Ontario (hereinafter *Application Record*), tabs 5, 8.

2. MCCT acted as an intervener in the *Halpern* application at both the Divisional Court and the Court of Appeal. MCCT also brought its own application, which was heard together with the *Halpern* application. MCCT consented to the Association's motion to intervene in the lower courts on very strict terms, which did not include a right to appeal. MCCT, in its capacity as intervener, was subject to similar restrictions.

> Exhibits "A" and "B" to the affidavit of Darrel Reid sworn July 25, 2003 (hereinafter *Reid affidavit*), *Application Record*, tabs A, B.
> Affidavit of Rev. Dr. Brent Hawkes, motion record of MCCT, tab 2 (hereinafter *Hawkes affidavit*) at paras. 44-49.

3. The government of Canada has since drafted legislation to address the issue of same-sex marriage, which legislation has been referred to this court for consideration ("Reference"). The affidavit of Rev. Dr. Brent Hawkes sets out the background of MCCT, its participation in these proceedings and the events that have transpired since the Court of Appeal ruling.

> *Reid affidavit*, at para. 13.; *Hawkes affidavit*

PART 2 – STATEMENT OF ISSUES

1. Should the Application for Leave to Appeal of the Association for Marriage and the Family in Ontario be quashed?

PART 3 - ARGUMENT

1. A motion to quash may be brought in proceedings before this Court in which an appeal does not lie, or whenever such proceedings are taken against good faith. An appeal may be quashed because it is moot, or where for other reasons the Court has no jurisdiction to proceed. The appeal may be quashed where it is not *bona fide* or where it is devoid of merit. The Court retains a discretion to hear the appeal despite these factors.

> *Supreme Court Act*, R.S.C. 1985, c. S-26, (hereinafter *Supreme Court Act),* s. 44. *Borowski* v. *Canada (Attorney General),* [1989] 1 S.C.R. 342 at para. 15 (hereinafter *Borowski*).

Standing

2. The Association lacks standing to bring this Application for leave to appeal for the following reasons:

a. the Association does not have any status before this Court;
b. the Association is not a legal person;
c. the Association has not sought to be added as a party or intervener to this proceeding;
d. the Association does not meet the test for individual standing under s. 24 or s. 52 of the Constitution; and,
e. the Association does not meet the test for public interest standing.

3. The Association's position as a party intervener in the courts below does not give it any status before this Court. The Association sought leave to intervene at the Divisional Court level by way of motion; leave was granted by Justice Lang with specific

terms attached to the intervention. At the Court of Appeal, the Association again sought leave to intervene by way of motion. The motion was in fact brought on consent of all parties. MCCT provided its consent on the condition that strict terms be imposed.

> Exhibits "A" and "B" to the affidavit of Darrel Reid sworn July 25, 2003, *Application Record*, tabs A, B.
> *Hawkes affidavit*, at para. 46.
> *Colangelo* v. *Mississauga (City),* [1988] S.C.C.A. No. 477 (hereinafter *Colangelo*).

4. The addition of a party has been permitted where a party has been involved in a proceeding but not made a party to the appeal. Where a party to the proceeding is unwilling to seek leave to appeal, another named party may be permitted to seek leave to appeal. This situation is reserved for particular circumstances not applicable to this case, such as where the issue has become moot for one of the parties, but fairness and public policy considerations mandate that the issue be litigated.

> See, for example, *Carey Can. Ltd.* v. *Hunt,* Nov. 21, 1989, Jan. 4 1990, *Canada (Cdn. Human Rights Comm.)* v. *Canada (Department of Secretary of State*), Oct. 31, 1990, *Andrews* v. *Law Society of British Columbia* (January 28, 1987).

5. Since no party to this proceeding has sought leave to appeal to this Court, the Association does not have the status to bring any application. The Association must seek to be added as a party by way of motion pursuant to Rule 18(1). The motion material must set out the reasons for the addition or substitution of a party.

> *Rules of the Supreme Court of Canada*, SOR/2002-156 made under subsection 97(1) of the *Supreme Court Act*, R.S.C. 1985, c. 34 (3rd suppl.) (hereinafter *Supreme Court Rules*), Rule 18(1).

6. The language "a person" in Rule 18(1) refers to a legal person, that is, an individual or an incorporated entity. The Association is not incorporated and therefore

does not qualify to bring a motion under Rule 18. Unincorporated associations generally do not have legal standing, except in the case of labour unions.

> *Berry* v. *Pulley*, [2002] 2 S.C.R. 493.
> *Hawkes affidavit* at para. 45.
> *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*, [1992] O.J. No. 1963 (Div. Ct.).

7. The Association should have sought to be added as a party for the purpose of bringing the application for leave to appeal. All of the considerations under Rule 18, including the capacity of the Association as an unincorporated association, would then arise; however the Association's application would still fail.

> *Novopharm Ltd.* v. *Eli Lilly Canada Inc.,* [2003] S.C.C.A. No. 150 (hereinafter *Novopharm*).

8. If leave to appeal were subsequently granted, the Association's role in the appeal proceeding could then be addressed. It would not automatically be entitled to either party or intervener status before this Court.

> *Canadien Pacifique ltee* c. *Montreal (Communaute urbaine),* [2001] 3 S.C.R. 426
> *Colangelo, supra.*
> *Novopharm, supra.*

9. Rule 55 provides that any person with an interest in the proceeding may bring a motion to intervene. The Association has not brought such a motion.

> *Supreme Court Rules*, rule 55.

10. The Association has no personal standing under the *Charter*, the two possible means being subsections 24(1) and 52(1).

> *Borowski, supra*, at paras. 53-56.

11. The Association does not meet the test for public interest standing. In *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration),* Justice Cory, speaking for the Court, observed at paragraph 33 that:

> The question of standing was first reviewed in the post-Charter era in *Finlay* v. *Canada (Minister of Finance),* [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing *to challenge an exercise of administrative authority as well as legislation* (emphasis added).
>
> *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236 (hereinafter *Canadian Council*) at para. 33.

12. Prior to the *Charter*, the conditions which a plaintiff had to satisfy were set out by Justice Martland, writing for the majority in *Minister of Justice (Canada)* v. *Borowski*:

> … to establish status as a plaintiff in a suit *seeking a declaration that legislation is invalid*, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable an defective manner in which the issue may be brought before the Court (emphasis added).
>
> *Minister of Justice (Canada)* v. *Borowski*, [1981] 2 S.C.R. 575 at p. 598.

13. In *Canadian Council*, *supra*, Justice Cory held that the whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge, and that the principles for granting public standing need not and should not be expanded.

14. Accordingly, quite apart from the fact that the Reference is another reasonable and effective way to bring the issue before the Court, there is no serious issue as to *invalidity*. No legislation or public act is challenged by the Association.

15. To permit applications of this kind would be to invite persons to seek standing in an attempt to have courts "freeze" existing common law rules and legislation, by seeking declarations that they meet minimum constitutional requirements. The Court is not in the business of telling the state when it has done barely enough. Outside of the reference procedure, open only to governments by statute, such questions are not justiciable.

> *Gosselin* v. *Quebec (Attorney General),* [2002] S.C.J. No. 85, per Arbour J. (dissenting on other grounds) at 332-333.

16. Accordingly, the Association seeks its own private reference. This is not permitted.

> *Borowski, supra,* at para. 56.

Justiciability

17. The Court has held that the most basic notion of justiciability in the Canadian legal process is that it is not the place of the courts to pass judgment on the validity of statutes, save as modified by the federal division of powers and by the entrenchment of substantive protection of certain constitutional values in the Constitution, most notably the *Charter*. "In 1982 with the passage of the *Charter* there was for the first time a restraint placed on the sovereignty of Parliament to pass legislation that fell within its jurisdiction. . . . Courts are the final arbiters as to when that duty has been breached."

> *Canada (Auditor Gen.)* v. *Canada (Min. of Energy, Mines & Resources),* [1989] 2 S.C.R. 49 at para. 50.
> *Canadian Council*, supra. at para. 31.

18. "The task of the court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the

prerogatives of the political forces that operate within that framework." The Reference in the case at bar will meet that objective.

Reference re: Quebec Secession, [1998] 2 S.C.R. 217 at para. 153.

19. The law need not be perfectly congruent with *Charter* protection. There is nothing anomalous in this.

R. v. *G. (B.) [B.G.],* [1999] 2 S.C.R. 475 at para. 83.

20. Common law principles, even those that reflect Charter values, may in their details offer more protection than the Charter guarantees. The Charter sets out minimum standards to which the common law and statute law must conform. It does not preclude the common law and statute law from offering additional protection.

R. v. *G. (B.) [B.G.],* [1999] 2 S.C.R. 475 at para. 83.

Mootness

21. The test for mootness may be divided into two considerations to be made by the Court:

a. whether the requisite tangible and concrete dispute has disappeared, rendering the issues academic, and;
b. if so, whether the Court should exercise its discretion and hear the appeal in any event; this issue may then be divided into three sub-issues:
    i. whether an adversarial element remains;
    ii. whether judicial economy would be served by hearing the appeal; and
    iii. the efficacy of judicial intervention.

Borowski, supra at para. 16.

22. The Court has quashed motions for leave to appeal where the legislation at issue has been changed or where there is no lis involving the remaining parties.

> *Burke* v. *Arab* (sub nom. *Nova Scotia (Attorney General)* v. *Burke*), [1983] 1 S.C.R. 55.
> *Banque Nationale du Canada* v. *Neilson* (October 21, 1993).
> *Webster* v. *British Columbia Hydro & Power Authority,* [1994] 3 S.C.R. 549.
> *Oatway* v. *Canada (Wheat Board),* [1945] S.C.R. 204.
> *R.* v. *Malmo-Levine; R.* v. *Clay,* [2002] S.C.J. No. 88 (hereinafter *Malmo-Levine*).

23. The mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient for leave to appeal to be granted. There must also be present a certain social cost in leaving the matter undecided. Any social cost in this case will be more than compensated for by the Reference.

> *Borowski*, *supra* at para. 39.

24. Pronouncing judgment in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the legislative sphere. The Court in *Borowski* stated "an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the court will be asked to examine specific legislation or governmental action in any event."

> *Borowski, supra* at para. 40.
> *Malmo-Levine, supra.*

25. While not strictly moot, the proposed appeal may become moot once the Court addresses the Reference and will become moot if the proposed legislation passes.

26. There are no exceptional factors in the case at bar favouring the Court's practice of not hearing moot appeals.

> *Payne* v. *Ontario (Minister of Energy, Science and Technology)*, [2002] O.J. No. 2566 (C.A.) (hereinafter *Payne*) at para. 18.

27. Even if the applicant is able to seek standing, the principles of:

a. avoiding unnecessary constitutional pronouncements;

Phillips v. *Nova Scotia (Comission of Inquiry into the Westray Mine Tragedy),* [1995] 2 S.C.R. 97.

b. the proper role of the Court and avoiding influencing primarily political questions except where required by the Court's mandate; and

Operation Dismantle Inc. v. *Canada,* [1985] 1 S.C.R. 441.
Payne, supra.

c. the need to preserve scarce judicial resources,

Canadian Council, supra.

All militate against extending standing to the applicant in the case at bar.

28. "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular agendas, certain in the knowledge that their case is all-important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants."

Canadian Council at para. 35.

Good Faith

29. The application for leave to appeal has not been brought in good faith. The Association has consistently argued in the Courts below that the appropriate forum for the resolution of the marriage question is Parliament. Now that Parliament has decided to introduce legislation that the Association does not support, the Association is arguing that the Supreme Court should decide the issue. Allowing the Association to bring its application for leave to appeal would bring the administration of justice into disrepute.

The Association is using this Court's process to politicize its position on the issue of same-sex marriage and to usurp the reference process.

30. MCCT would be severely prejudiced should the motion for leave to appeal be permitted to proceed. The Association is not an incorporated body and was not subject to any costs orders in the Courts below.

Hawkes Affidavit, at paras. 45, 60

31. The Association had numerous opportunities to object to the marriages performed by MCCT and chose not to do so. The Association should not now be permitted to bring an application for leave to appeal in an action to which it has not sought to become a party.

Hawkes Affidavit, at paras. 35, 57.

Stay

32. The Court, or the Court appealed from, may order a stay on terms deemed appropriate at the request of the party filing the notice of application for leave to appeal.

Supreme Court Act, s. 65.1 (1).

33. The Court of Appeal for Ontario specifically declined to order a suspension of the remedy in this case, although the appellants requested this relief. The Court did not decline the suspension based on a finding based on evidence; rather, it determined that there was no evidence before it of any harm that would be occasioned by an immediate change to the definition of marriage.

Halpern v. *Canada (Attorney General),* [2003] O.J. No. 2268, at paras. 152, 153.

34. The need for a stay in this case would only arise if the Association is granted leave to appeal.

PART 4 – NATURE OF ORDER SOUGHT

35. MCCT requests that the Application for Leave to Appeal of the Association for Marriage and the Family in Ontario be quashed, with costs on a substantial indemnity basis to MCCT.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of August, 2003

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