

**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 -

**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.

Respondent
(Party Intervener)

**NOTICE OF APPLICATION FOR LEAVE TO APPEAL AND STAY
BY THE APPLICANT,
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO**

(Pursuant to Sections 40(1), 43(1), 58(1)(a) and 65.1(1) of the *Supreme Court Act*)

TAKE NOTICE THAT the Association for Marriage and the Family in Ontario (the "Association"), 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*, 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 section 65.1(1) of the *Supreme Court Act* staying such judgment until the disposition of the appeal; and,
- (iii) for an order directing an oral hearing of this application for leave to appeal and a stay;

or such further and other order that the said Court may deem appropriate;

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

(a) **Marriage is an Issue of the Utmost Public Importance**

1. This case involves a matter of the greatest public importance: the legal definition of marriage.
2. Since the founding of the Canadian nation, its law has recognized marriage as the union of a man and a woman. In past cases this Court has described marriage as a "basic social institution" (*Egan v. Canada*, [1995] 2 S.C.R. 513, per LaForest, J. at 536) and stressed the "fundamental importance of marriage" (*Miron v. Trudel*, [1995] 2 S.C.R. 418 at 448).
3. In its judgment the Ontario Court of Appeal changed the definition of this "basic social institution" by holding that the definition was unconstitutional because it did not include same-sex couples. The court below reformulated the common law

definition of marriage to become "the voluntary union for life of two persons to the exclusion of all others" and ordered the Clerk of the City of Toronto to issue marriage licences to the Respondent Couples.

4. The change in the definition of marriage ordered by the Court of Appeal of Ontario is a profound one, and raises an issue of public importance. This Court has not previously considered the issue of the constitutionality of the definition of marriage as the union of a man and a woman, and the issue therefore merits attention by this Court.

(b) The 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 in ruling that the marriage licences in question should be issued by the Clerk of the City of Toronto:

- (a) The Court of Appeal for Ontario erred in holding that the current 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 section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter");
- (b) The Court of Appeal for Ontario erred in holding the any violation of the equality rights of the Respondent Couples resulting from the definition of marriage as the union of a man and a woman could not be justified in a free and democratic society under section 1 of the *Charter*;
- (c) The Court of Appeal for Ontario erred in holding that it is an appropriate remedy for the Court, rather than Parliament, to reformulate immediately the common law definition of marriage and to order the Clerk of the City of Toronto to issue marriage licences to the Respondent Couples; and,

(d) The Court of Appeal for Ontario erred in finding that the courts have the jurisdiction to alter the definition of marriage in section 91(26) and 92(12) of the *Constitution Act, 1867* and that resort to constitutional amendment procedures is not required to change the definition of marriage.

(c) **The Status of the Applicant, the Association, to make this Application**

6. On June 10, 2003 the Court of Appeal for Ontario released its decision. On June 17, 2003 the Prime Minister of Canada and the Justice Minister announced that the Respondent, the Attorney General of Canada, would not seek leave to appeal the decision, but would table draft legislation on marriage and refer questions about the draft legislation to this Court. The Justice Minister did so on July 17, 2003.

7. The key question at issue in this matter is whether the definition of marriage as the union of a man and a woman is unconstitutional. The Justice Minister did not refer this key question to this Court. Accordingly, it is important that through a hearing of this appeal Canadians will 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.

8. In the courts below the Association was granted leave to intervene as an added party, having demonstrated an interest in the subject-matter of the proceedings. As an added party the Association actively participated at both levels of court by filing evidence, submitting written argument and making oral submissions at the hearings.

9. In the circumstances where the Attorney General of Canada fails to seek leave to appeal in a case raising such profound issues as the present one and where the Association has participated actively as an added party in the courts below in support of the constitutionality of the definition of marriage as the union of a man

and a woman, it is appropriate that this Court grant the Association's application for leave to appeal the decision of the Ontario Court of Appeal.

(c) The Need for a Stay of the Judgment of the Ontario Court of Appeal


10. As widely reported in the media, following the release of the decision of the Ontario Court of Appeal, municipal clerks in Ontario began to issue marriage licences to same-sex couples and some same-sex marriages took place.

11. Presently great confusion prevails in Canada about marriage. First, a checkerboard appears to exist across Canada in respect of same-sex unions: Ontario and British Columbia appear to recognize them as lawful, whereas other provinces do not. 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 the present 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.

12. The Association moves for a stay before this Court rather than before the panel of the Ontario Court of Appeal 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.

Dated at Toronto, Ontario this 28th day of July, 2003.

SIGNED BY:



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