

Court of Appeal File No.: C39172  
and Court of Appeal File No.: C39174

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA  
THE ATTORNEY GENERAL OF ONTARIO  
THE CLERK OF THE CITY OF TORONTO

Appellants

- and -

HEDY HALPERN and COLLEEN ROGERS  
MICHAEL LESHNER and MICHAEL STARK  
MICHELLE BRADSHAW and REBECCA ROONEY  
ALYSIUS PITMAN and THOMAS ALLWORTH  
DAWN ONISHENKO and JULIE ERBLAND  
CAROLYN ROWE and CAROLYN MOFFATT  
BARBARA McDOWELL and GAIL DONNELLY  
ALISON KEMPER and JOYCE BARNETT

Respondents

- and -

EGALE CANADA INC.,  
METROPOLITAN COMMUNITY CHURCH OF TORONTO  
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY  
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO  
CANADIAN HUMAN RIGHTS COMMISSION and  
CANADIAN COALITION OF LIBERAL RABBIS FOR SAME-SEX MARRIAGE

Intervenors

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**FACTUM OF THE CANADIAN COALITION OF LIBERAL RABBIS  
FOR SAME-SEX MARRIAGE**

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Liberal Rabbis for Same-Sex Marriage

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*Firm:* Canadian Human Rights Commission  
*Fax No.:* (613) 993-3089

*No. of Pages:* 21

**Re: Halpern et al. v. A.G. Canada et al.**

Attached is the factum of the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage, which is served on you pursuant to the Rules.

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## PART I – THE FACTS

1. The Intervenor, the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage (the “Liberal Coalition”), was granted leave to intervene in the within appeal and cross-appeal by order of McMurtry, C.J.O., dated March 3, 2003.
2. The Liberal Coalition is made up of rabbis from across Canada who, as described by Chief Justice McMurtry, “have been actively involved in the theological discussion of same-sex unions and who have dealt with the practical reality of the difficulties encountered by gay and lesbian congregants in participating in Jewish religious life.”  
Endorsement of McMurtry, C.J.O., March 3, 2003, para. 5
3. The Liberal Coalition represents a significant and growing constituency within the Jewish community that supports same sex rights and freedom of choice for same sex marriage. A key element of this commitment is facilitating the participation of gays and lesbians in all important aspects of Jewish religious life and culture, including marriage. It is the Liberal Coalition’s position that the religious freedoms and equality rights of the clergy and congregations it represents are impeded by the continued prohibition of same sex marriage.
4. The Liberal Coalition adopts the statements of facts as submitted by the Respondents (and cross-appellant) in the within appeal and cross-appeal.

5. Another intervenor in the case at bar, the Interfaith Coalition on Marriage and the Family (the "Interfaith Coalition"), states that religious Jews in Canada view the prospect of the recognition of same sex marriage as "destabilizing" to their religious freedoms and are "extremely concerned about the impact of the redefinition of marriage in a manner inconsistent with their fundamental religious beliefs." This concern is not shared by all religious Jews. Judaism is far from monolithic, embracing substantial diversity in practices and interpretation. These diverse interpretations include streams of Judaism, such as the Reform movement, which endorse same sex unions.
- Factum of the Interfaith Coalition, para. 18, quoting Novak affidavit, paras. 15-19  
Affidavit of Rabbi Elliot Stevens, MCCT Reply Record, Tab 5, para. 2, 6

## PART II – THE ISSUES

6. The Liberal Coalition submits that:
- a. The common law rule prohibiting same sex marriage infringes the right to religious freedom of its member congregations and clergy under Section 2(a) of the *Canadian Charter of Rights and Freedoms* (the "Charter").
  - b. This rule also infringes the equality rights of the Liberal Coalition's member congregations and clergy under Section 15(1) of the *Charter*.
  - c. Neither of these infringements could be justified under a Section 1 analysis were such an analysis to become necessary for a common law rule.

## PART III – ARGUMENT

### (A) **The Prohibition of Same Sex Marriage Violates Section 2(a) of the Charter**

7. The common law rule prohibiting same sex marriage impinges on the religious freedoms of three separate groups within the constituency represented by the Liberal Coalition. The first consists of Jewish gay and lesbian congregants who wish to enter into a binding, religiously sanctioned, and legally valid marriage. The second consists of clergy who wish to honour and approve their commitment by performing the marriage ceremony. The third comprises the community at large, whose members wish to support and hallow the marriage and participate in its celebration.

#### (i) **The Place of Marriage and Family in Jewish Tradition**

8. Marriage in the Jewish tradition is not centered solely on procreation. While the family is a primary vehicle for transmitting Jewish identity and values, families have taken different forms during the historic evolution of Judaism. The nuclear family is a relatively recent development, its predecessors having included polygamous marriages and multi-generational extended families. Many kinds of families, including those with same sex partners, are capable of fulfilling Jewish family values.

Affidavit of Rabbi Elliot Stevens, paras. 9-11

9. The liberal streams of Judaism recognize the right of individuals to listen to their own consciences in making life choices. Jewish law and interpretations are rooted in tradition, but are not immutable. In liberal Judaism, religious traditions and understandings of social institutions such as marriage are open to interpretation in accordance with community values and individual morality.

Affidavit of Rabbi Elliot Stevens, paras. 7, 14

10. The congregations represented by the Liberal Coalition are committed to an inclusive Jewish community, and have a special concern about just and fair treatment for those needing protection. For the Liberal Coalition this includes gay and lesbian congregants, whose religious needs must be met and whose legal rights must be protected just as much as any other members of the community.

**(ii) Jewish Attitudes To Homosexuality**

11. As with all other religions, there is a broad range of views and interpretations within Judaism. There is certainly no single spokesperson for Jewish law and its interpretation. Contrary to assertions made by the Interfaith Coalition, Jewish law on the subject of same sex unions is subject to change, and contemporary Jewish leaders speak with a variety of voices on the subject.

Affidavit of Rabbi Elliot Stevens, paras. 2-6

Factum of the Interfaith Coalition, para. 18

12. The general trend in Judaism outside of the Orthodox community is toward a modernized reading of Jewish values that affirms the inherent dignity all persons.

Certainly, the Reform Jewish approach is to emphasize contemporary conceptions of equality over historic views based on those biblical and medieval texts that condemn homosexuality outright.

Affidavit of Rabbi Elliot Stevens, para. 5

13. This evolution is fully in keeping with the Reform Jewish view that Jewish law must be interpreted in light of the fact that "the revelation continues." As stated by Rabbi Stevens in his affidavit:

The question of moral right and wrong and the relationship of judgment to religious decision is a matter of conscience and decision-making. Jewish tradition recognizes that differences will emerge. An oft-cited Talmudic maxim is, '*eilu v'eilu divrei Elohim chayim*,' 'These and those are the words of the living God.'

Affidavit of Rabbi Elliot Stevens, paras. 4, 14

14. The Liberal Coalition represents those who view it as a religious duty to correct the misunderstandings and resulting injustices of the past towards gays and lesbians, and to fulfill the Jewish obligation to seek justice. Support of gay and lesbian families helps to strengthen the Jewish family in its diversity, and allows all community members to participate in the committed and loving relationships fostered by the Jewish faith.

Affidavit of Rabbi Steven Greenberg, MCCT Reply Record, Tab 2, para. 6

**(iii) Impact of Allowing Same Sex Marriage on Religious Communities**

15. The Interfaith Coalition has submitted that the termination of the common law prohibition on same sex marriage will seriously and negatively impact religious communities across Canada, including the Jewish community. Further, the Interfaith Coalition suggests that such a change would cause clergy in various religions to



withdraw from the solemnization of marriage altogether, in order to avoid being "required" to recognize a same sex marriage or being subject to a human rights challenge for failing to perform one. The Liberal Coalition agrees with the judgment of LaForme, J. below that there is no merit in such a submission and that no such negative impact will be felt; indeed, religious freedom is augmented by the inclusion of same sex partners within the definition of marriage. The Liberal Coalition further concurs with LaForme, J. that under no result of the within appeal will any clergy be required, under threat of legal sanction, to perform a marriage ceremony against their conscience.

Factum of the Interfaith Coalition, para. 8

*Halpern v. Canada*, [2002] O.J. No. 2714, para. 431

16. In the Liberal Coalition's view, a change in the law regarding same sex marriage is not, as the Interfaith Coalition puts it, equivalent to an "attack" that would fundamentally undermine the values and beliefs of the Jewish community. The Jewish faith has always been capable of accommodating itself to the secular legal system, even where the law does not accord with Jewish norms. The fact, for example, that Canadian society permits the sale and consumption of non-*kosher* food is not an "attack" on Jewish values, despite the fact that Orthodox Jewish law contains numerous dietary restrictions; likewise, the fact that Canadian marriage laws permit marriage between Jews and non-Jews is not an "attack" on Jewish values, despite the fact that Orthodox Jewish law prohibits such marriages.

Factum of the Interfaith Coalition, para. 18

Affidavit of Rabbi Elliot Stevens, para. 8

17. Moreover, the Liberal Coalition does not represent a "dissentient" view of Judaism, as described by the Interfaith Coalition. Rather the fact is that the different streams of Judaism co-exist as interpretations of equal stature. Indeed, the Interfaith Coalition's narrow conception of Judaism does not reflect the values and beliefs of the Central Conference of American Rabbis, the governing body of the Reform movement (the largest branch of Judaism in the United States, representing a majority of American Jews, and one of the major branches in Canada). The Conference passed a resolution in June 1990 which specifically stated that "... all Jews are religiously equal regardless of their sexual orientation."

Factum of the Interfaith Coalition, para. 18

Affidavit of Rabbi Elliot Stevens, paras. 8, 13

18. The Liberal Coalition submits that section 2(a) of the *Charter* was expressly intended to ensure that there would be no state support for the domination of one religious viewpoint over any other, whether between faiths or within a faith. In *Freitag*, this Honourable Court indicated that state action cannot be used to impose the moral tone of one religion on those who do not adhere to that religious belief. Similarly, in the *Big M* case, Dickson, J. (as he then was) stated that while moral views may appear "good and true" to one religious group, "or to the state acting at their behest", they may not, for religious reasons, be imposed on others. He continued:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 96, 123

*Freitag v. Town of Penetanguishine*, 44 O.R. (3d) 301, paras. 19, 20

19. In the case at bar, recognizing the rights of those within the liberal streams of Judaism to affirm and support same sex marriage – whether done in a religious ceremony or in a civil ceremony – would not in any way infringe the rights of fellow Jews to withhold affirmation from same sex marriages in accordance with their beliefs. An alteration of the rule would not attack or undermine Orthodox Judaism or any other religion, since its members would not be required to solemnize or recognize same sex marriages if they did not choose to do so.
  
20. However, the current state-enforced prohibition of same sex marriage prevents liberal Jews from acting in accordance with their conscience on this important issue. Heterosexual couples within the Jewish community automatically receive legal recognition for their union and the benefits that flow from it, through the clergy's power to solemnize their marriages under the law. These legal benefits attach to a solemn religious commitment that forms a deep part of their faith and joins them to the wider spiritual community.
  
21. Same sex marriages are relegated to second-class status within this community because the clergy have no legal authority to confer the same benefits on them even if they are willing to perform the ceremony. This constitutes an indirect burden on religious practice as outlined by Dickson, C.J.C. in *Edwards Books*:

The first question is whether indirect burdens on religious practice are prohibited by the constitutional guarantee of freedom of religion. In my opinion indirect coercion by the state is comprehended within the evils from which s. 2(a) may afford protection.... It

matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a).

*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, para. 96

22. The common law rule prohibiting same sex marriage creates a barrier to freedom of conscience and religion of both Jewish and non-Jewish gays and lesbians, and those who support their commitments. It imposes majority religious thinking on the wider community in a manner that is not in accordance with section 2(a) of the *Charter*.

**(B) The Prohibition of Same Sex Marriage Violates Section 15(1) of the *Charter***

23. As previously noted, the Liberal Coalition submits that the prohibition of same sex marriage violates the section 15(1) equality rights of gays and lesbians under the *Charter*, including those of Jewish gays and lesbians. Equally, the prohibition infringes upon the equality rights of the Jewish clergy and community who wish to support and participate in their congregants' same sex marriages as an integral part of their religious practice.
24. The common law rule imposes differential treatment on the clergy and congregants by negating the authority to legally solemnize a same sex marriage, contrary to the test of equality set out by the Supreme Court of Canada in *Law*. It imposes this differential treatment on the basis of sexual orientation, which is an analogous ground to those prohibited under section 15(1); and, in addition, the rule functions in a way that also

unfairly differentiates on the section 15(1) enumerated ground of religion. The state recognizes and gives legal endorsement to all of the marriages solemnized and participated in by members of conservative religious groups, while it does not similarly recognize and endorse *all* of the marriages solemnized and participated in by members of the Liberal Coalition in exercise of their faith.

*Law v. Canada*, [1999] 1 S.C.R. 497, para. 88

25. There can be little doubt that the constituency represented by the Liberal Coalition suffers from pre-existing disadvantage, as specified in the *Law* case. One need only take note of the Supreme Court's discussions of the history of anti-Semitism in *Keegstra* and the history of homophobia in *Vriend* to understand that gay and lesbian Jews more than fulfill this aspect of the section 15(1) test. The clergy that ministers to them and the community of which they are a part are equally disadvantaged by the pre-existing state of the law.

*R. v. Keegstra*, [1990] 3 S.C.R. 697

*Vriend v. Alberta*, [1998] 1 S.C.R. 493

26. Further, it is the Liberal Coalition's submission that the differential treatment contained in the impugned rule serves no ameliorative purpose in that it does not improve the situation of any other group. Writing in the *Gosselin* case, L'Heureux-Dubé, J. concluded that if a law is to be understood as having an ameliorative purpose, it "must be for the benefit of a group less advantaged than the one targeted by the impugned distinction." While the rule prohibiting same sex marriages does not improve the lot of

people who do not care to enter into or officiate at such unions, it certainly discriminates against those who do.

*Gosselin v. Québec*, [2002] S.C.J. No. 85, para. 136 (L'Heureux-Dubé, J., dissenting)

27. The Supreme Court of Canada made it clear in *Lovelace* that there is a subjective element in assessing the impact of the unequal treatment. That is, the impugned law must be analyzed from the perspective of a "reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim." Accordingly, as the Supreme Court set out in *M. v. H.*:

[a]ll of that individual's or that group's traits, history, and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.

*Lovelace v. Ontario*, [2000] 1 S.C.R. 950, para. 55

*M. v. H.*, [1999] 2 S.C.R. 3, para. 60

28. In the Liberal Coalition's submission, the differential treatment afforded to same sex couples under the existing marriage laws deprives them of an actual need – i.e. state recognition of their unions. In addition, this differential treatment affects the human dignity of those couples, the clergy who would officiate at their marriage ceremonies, and all of their gay and lesbian co-religionists.
29. The nature of the interest affected in this case is a deeply personal and important one – i.e. the right to marry in accordance with one's religious beliefs. Marriage holds a central place in the Jewish tradition, and it is natural that Jewish gays and lesbians would wish to be included in a sacrament that is at the heart of their religious belief and practice. The

Liberal Coalition and the community they represent support this aspiration as a matter of faith and morality, interests that are profoundly central to their integrity.

30. In *Law*, Iacobucci, J. emphasized the need to respect the divergent values and belief systems that provide meaning for an individual:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.

*Law v. Canada*, [1999] 1 S.C.R. 497, para. 53

31. The effect of the common law rule prohibiting same sex marriage is to demean the human dignity of gays and lesbians, and to de-value the religious beliefs of those who wish to support their full membership in the religious community. The prohibition on same sex marriage therefore infringes therefore their section 15(1) rights.

**(c) The Violations of Sections 2(a) and 15(1) Are Not Saved by Section 1 of the Charter**

32. The Liberal Coalition agrees with the judgment of LaForme, J. in the court below that a section 1 analysis is generally only applied to a statute, not to a common law rule. However, should a section 1 analysis be deemed applicable to this case, the Liberal Coalition submits that the infringement of section 2(a) and 15(1) rights cannot be justified under section 1 of the *Charter*.

*Halpern v. Canada*, [2002] O.J. No. 2714, para. 395

33. LaForme, J. found that the government had not met the evidentiary burden under section 1 requiring it to prove its assertion that the purpose of the common law rule is to preserve procreation and institutional support for families. The Liberal Coalition agrees with this finding, and submits that in any case procreation is not impossible within same sex marriages. Advances in reproductive technology and adoption have opened the door to parenthood for same sex couples, as they have for the many heterosexual married couples who are unable to procreate.

*Halpern v. Canada*, [2002] O.J. No. 2714, para. 413

34. In the absence of another stated purpose for the rule, LaForme J. found that its apparent purpose "is based upon sexual orientation and is intended to specifically exclude marriage between same-sex couples." As the Supreme Court has pointed out in other contexts, a law aimed specifically at undermining a constitutional right cannot itself be a reasonable limit on that right. As LaForme, J. put it, the impugned rule "is categorically a rights violation based upon a discriminatory objective", and therefore could not constitute a pressing and substantial objective, as required under the *Oakes* test.

*Halpern v. Canada*, [2002] O.J. No. 2714, paras. 411, 414

*R. v. Oakes*, [1986] 1 S.C.R. 103, paras. 69-71

*A.G. Quebec v. Québec Ass'n of Protestant School Boards*, [1984] 2 S.C.R. 66

35. Even if procreation is found to be the purpose of the impugned common law rule (which, it is submitted, is not the case), the rule is not rationally connected to this purpose. It



takes no account of the fact that alternative methods of procreation and alternatives to traditional families exist for and are used by both heterosexual and homosexual couples.

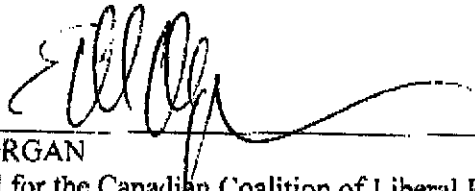
36. In addition, the rule does not meet the proportionality test. If the supposed objective of procreation is linked to traditional religious views of marriage and the family, as the Appellant and its supporting intervenors describe it, then the interests balanced by the law would be those of religious groups on the one hand and same sex couples on the other. As already outlined, this is a false dichotomy. The inclusion of same sex marriage in the common law rule would not oblige clergy or religious groups to engage in same sex ceremonies in violation of their beliefs, but would permit other religious groups, including those represented by the Liberal Coalition, to perform them in accordance with their values.
37. There is therefore no need for a balancing exercise between religious freedoms under section 2(a) of the *Charter* and equality rights under section 15(1) of the *Charter*, since on this point they are not in conflict. The Liberal Coalition submits that the current common law rule has deleterious effects on same sex couples and the faith communities that wish to support them, and that the salutary effects of religious freedom would not be in the least impaired by an alteration of this rule. The salutary effects would in fact be enhanced, by allowing the clergy and congregations represented by the Liberal Coalition, among others, to practice their faith in accordance with their conscience.

**PART IV – ORDER REQUESTED**

38. The Liberal Coalition supports the Respondents in their request that this Honourable Court declare as follows:
- a. that the common law prohibition of same sex marriage infringes the section 2(a) right to freedom of religion;
  - b. that the common law prohibition of same sex marriage infringes section 15(1) equality rights on the grounds of religion and sexual orientation; and
  - c. that the common law rule restricting marriage to heterosexual couples be reformulated to permit marriage between any two persons regardless of the sex of those persons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 13, 2002



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ED MORGAN  
Counsel for the Canadian Coalition of Liberal Rabbis for  
Same-Sex Marriage

## AUTHORITIES

- Halpern v. Canada*, [2002] O.J. No. 2714
- Freitag v. Town of Penetanguishine*, 44 O.R. (3d) 301
- R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295
- R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713
- Law v. Canada*, [1999] 1 S.C.R. 497
- R. v. Keegstra*, [1990] 3 S.C.R. 697
- Vriend v. Alberta*, [1998] 1 S.C.R. 493
- Gosselin v. Québec*. [2002] S.C.J. No. 85
- Lovelace v. Ontario*, [2000] 1 S.C.R. 950
- M. v. H.*, [1999] 2 S.C.R. 3
- R. v. Oakes*. [1986] 1 S.C.R. 103
- A.G. Quebec v. Québec Ass'n of Protestant School Boards*, [1984] 2 S.C.R. 66