Court File No.: 29879

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

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

- and -

HEDY 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
Respondents
(Respondents)

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO, and
NOVINA WONG, THE CLERK OF THE CITY OF TORONTO
Respondents
(Appellant)

- and -

Court File No.:

B E T W E E N :

METROPOLITAN COMMUNITY CHURCH OF TORONTO
Respondent
(Respondent)

and

ATTORNEY GENERAL OF CANADA, and
THE ATTORNEY GENERAL OF ONTARIO
Respondents
(Appellant)

MEMORANDUM OF ARGUMENT IN SUPPORT OF THE ATTORNEY GENERAL OF CANADA'S MOTION TO QUASH

(Pursuant to Rule 47 of the *Supreme Court of Canada Rules*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Supreme Court of Canada controls its own processes and docket. It does so by means of the *Supreme Court Act*, *Rules* and the case law interpreting them. All three make clear that a private litigant intervener in the courts below cannot seek leave to appeal.

B. STATUS OF THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO IN THE COURTS BELOW

i) At first instance, in the Divisional Court of Ontario

2. At first instance, the Association for Marriage and the Family in Ontario ("the Association") sought leave to intervene in the application brought by the Respondent Couples (*Halpern et al.)* under Rule 13.01 of the Ontario Court Rules allowing "a person who is not a party to a proceeding" to "move for leave to intervene as an added party" as long as certain conditions are met.[1]

3. The Association's motion to intervene was heard by Madam Justice Lang of the Divisional Court on January 12, 2001.[2] The motion was granted on January 19, 2001 on a number of terms. Among them, the Association could:

(a) file evidence related to only two narrow perspectives:

(i) "On the perspective of the impact of the redefinition of marriage on families and children from a sociological perspective;

(ii) On the historical perspective regarding the debates surrounding the meaning of marriage in the *Constitution Act, 1867*."

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg.14

[2] *Affidavit of Darrel Reid, sworn July 25, 2003, Exhibit "A" – Lang J. 's reasons made January 19, 2001, p. 1*, Applicant's Application for Leave to Appeal, Tab 2A, p. 17

(b) participate in cross-examinations "only the extent that affidavits touch on the designated perspectives";

(c) file a factum "on the designated issues";

(d) "present oral argument at the judicial review if so ordered by me or by the panel hearing the judicial review"; and

(e) not seek costs.[3]

4. On the same day, the Metropolitan Community Church of Toronto (MCCT) was granted party intervener status in the *Halpern et al.* application.[4] However, the MCCT brought *its own* separate and related application several weeks later. The Court ordered the two applications be heard together. The parties consented to the Association also participating as an intervener in the MCCT application under Rule 13.01, subject to the same terms as ordered in the *Halpern et al.* application.[5]

5. The Association participated in the two applications on these terms.[6] It filed two affidavits and a factum on the designated issues, presented brief oral argument and did not seek costs. It did not participate in cross-examinations as the Court greatly restricted their scope, with only a few being conducted, and just by the parties.[7]

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[3] *Affidavit of Darrel Reid, sworn July 25, 2003, Exhibit "A" – Lang J. 's reasons made January 19, 2001, pp. 3 & 5,* Applicant's Application for Leave to Appeal, Tab 2A, pp. 19 & 21

[4] *Affidavit of Darrel Reid, sworn July 25, 2003, Exhibit "A" – Lang J. 's reasons made January 19, 2001, pp. 3 & 5,* Applicant's Application for Leave to Appeal, Tab 2A, pp. 19 & 21

[5] *Affidavit of Stefanie A. McQuaid, sworn August 7, 2003, Exhibit "B" – Consent Endorsement of Lang J. dated January 25, 2001, p. 3,* Motion Record of the Attorney General of Canada, Tab 2B, p. 22

[6] *Affidavit of Stefanie A. McQuaid, sworn August 7, 2003, p. 3,* Motion Record of the Attorney General of Canada, Tab 2B, p. 22

[7] *Affidavit of Stefanie A. McQuaid, sworn August 7, 2003, p. 3 & Exhibit "A" – Summary of Case Management Results for the Divisional Court Panel Halpern v. Wong prepared October 2, 2001, p. 9,* Motion Record of the Attorney General of Canada, Tab 2A, p. 10

ii) In the Court of Appeal for Ontario

6. In the Court of Appeal for Ontario, all of the parties and interveners in the court below consented to a motion for directions regarding numerous aspects of the conduct of the appeals, including the role of interveners from the court below.[8] The Court ordered that "each of the party interveners to the two applications before the Divisional Court is an intervener to the appeals and cross-appeals before this Court on the following conditions:

(a) The interveners can neither seek costs nor have them awarded against them;

(b) The interveners will not duplicate the submissions made by the parties, either in writing or at the hearing; and

(c) The interveners will not raise any new issue not raised by the parties, but can only respond to ones already raised by the parties."[9]

7. This order was drafted by the parties and interveners and was signed by the Court exactly as consented to by all counsel.[10]

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[8] *Affidavit of Stefanie A. McQuaid, sworn August 7, 2003, Exhibit "F" – Cover letter to the Court of Appeal regarding a motion for directions by counsel for the Attorney General of Canada, dated December 13, 2002, p. 1,* Motion Record of the Attorney General of Canada, Tab 2F, p. 64

[9] *Affidavit of Darrel Reid, sworn July 25, 2003, Exhibit "B" – ORDER dated December 19, 2002, pp. 3-4,* Applicant's Application for Leave to Appeal, Tab 2B, pp. 24-25

[10] *Affidavit of Stefanie A. McQuaid, sworn August 7, 2003, pp. 3-4 & Exhibits "C", "D", "E" and "F" – Notice of Motion, Association's Consent to the motion as filed in both applications, each attaching a copy of the draft order, and cover letter to the Court of Appeal regarding Motion for Directions by counsel for the Attorney General of Canada, dated December 13, 2002,* Motion Record of the Attorney General of Canada, Tab 2C, 2D, 2E and 2F pp. 27, 36, 50 & 64

PART II – ISSUE

8. Whether the Association for Marriage and the Family in Ontario can apply for leave to appeal.

PART III – ARGUMENT

A. THE ASSOCIATION HAS NO STANDING TO SEEK LEAVE TO APPEAL

9. The jurisprudence of this Court is clear that a private litigant intervener in the court below has no standing to seek leave to appeal to this Court.

10. In *Colangelo v. Mississauga (City),* this Court ruled:

> *In our view, the fact that a consent order was made in the Court of Appeal giving the applicant the right to intervene as a party is insufficient to constitute the applicant a party in this Court. An intervener has no status to apply for leave to appeal and the applicant has no status in this Court. The application is therefore dismissed with costs.*[11]

11. In that case, Donna Colangelo sued the City of Mississauga when she fell and was hurt on the municipality's sidewalk she alleged was in a state of disrepair. Mississauga pleaded that the suit was statute-barred based on the limitation period set by the *Municipal Act.* Separately, Mary Morencie sued the City of Windsor when she fell and was hurt on the municipality's sidewalk she alleged was not free of snow and ice. Windsor pleaded that the suit was statute-barred based the limitation period and notice requirement set by the *Municipal Act.* In response, the plaintiffs challenged the constitutionality of the *Municipal Act* provisions, and a special case on these points of law was referred directly to

[11] [1988] S.C.C.A No 477, Sopinka J. (orally for the Court):

the Court of Appeal. The City of Toronto participated in the "special case"[12] as an intervener on the basis of a consent order.

12. Once the Court of Appeal had rendered its judgment on the special case, none of the parties sought leave to appeal to the Supreme Court of Canada. The City of Toronto attempted to do so. In response, the Court made the ruling set out above. The application for leave before this Court presents circumstances identical to the *Colangelo* case. The Association participated in the court below as an intervener on the basis of a consent order and this Court should quash the application for leave to appeal on that basis.

13. The only case cited by the Association in support of their claim that an intervener in the lower courts has standing to apply for leave to appeal is *M. v. H.* The Association's reliance on the application for leave by the Attorney General of Ontario in *M. v. H.*[13] is misplaced. In *M. v. H.*, the Attorney General of Ontario had a statutory right to participate as a party and did so. The Attorney General took part in each lower court level under s. 109(5) of the *Courts of Justice Act*[14], which deems the Attorney General a party where a constitutional issue is raised. The Attorney General was not simply an added party intervener under Rule 13.01. In the present case, the Association, by contrast, was added as a party intervener at first instance, and as an intervener at the Court of Appeal, under the Rules, the latter status granted on the basis of a consent order.

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[12] *Rules of Civil Procedure*, R.R.O. 1990, Reg.14, Rule 22.03(1)
[13] *M. v. H.*, [1997] S.C.C.A. No. 101
[14] "Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question."

14. When the Court of Appeal rendered its judgment in *M. v. H.*, finding the province's legislation unconstitutional, the Attorney General of Ontario had obtained the status of a party in the court below. The Attorney General therefore had standing as a party to seek leave to appeal. For greater certainty, nevertheless, the Attorney General of Ontario asked this Court to rule on two motions. The first was an application for leave to appeal. The second was a motion to add the Attorney General as a party, just in case this Court was of the view that the Attorney General did not already enjoy the status as a party under s. 109 of the *Courts of Justice Act*. This Court did not issue any reasons, but chose only to decide the first motion, granting the application for leave to appeal. As a result, *M. v. H.* has no application to the present circumstances of the Association.

15. The Association's reliance on *Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426 is equally misplaced. In that case, the applicant for leave to appeal – Canadian Pacific Ltd. – was a full party in the courts below. Rather, the problem for the Court was that none of the opposing parties from the lower courts wanted to respond to the leave application – neither the municipalities involved nor the Attorney General of Quebec. As a result, Nadon, a private litigant who had participated as an intervener in the two levels below, applied to be added or substituted as a party under Rule 18 in order to oppose the application. Nadon was "authorized to file an objection to the application for leave, as if she were a respondent in the application for leave".[15] The Court granted the motion in order to assist *itself*, as otherwise the Court did not have the benefit of an opposing view in deliberating on the application for leave properly filed by a party. Mr. Justice LeBel ruled:

> *In the context of an application for leave to appeal, where none of the respondents appears to want to debate the merits of the application for leave to appeal, her participation is justified. Indeed, I consider it necessary, in the interests of justice, in order to inform*

[15] *Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426 at para. 6

> *the Court fully, in particular on the appropriateness of granting leave to appeal, and to obtain her assessment of the importance of the matters in issue.*[16]

16. Here, in contrast, the Court is not seized with an application by a party properly seeking leave to appeal. Therefore, the Court is not required to deliberate on the matter and seek out an opposing view. But for this application, the Court would have no cause to deliberate on the matter in any way.

17. This application is more analogous to another case recently decided by this Court. In *Novopharm Ltd. v. Eli Lilly Canada Inc.*, [2003] S.C.C.A. No 150, a corporation that was a complete stranger to litigation conducted below - as party *or* intervener – asked the Court to grant leave as it was concerned about the issue. The corporation, a drug company, asked to be added or substituted as a party under Rule 18 in the stead of another party – a drug company that had chosen not to pursue the matter. The applicant argued that granting leave was "*the only effective way to bring these issues of general interest*"[17] before the Court.

18. In response, LeBel J. queried whether the Court even has jurisdiction to grant such a motion. In any case, he ruled against it on several grounds:

> *In effect, granting the motion would allow the applicant to take over litigation abandoned by another party, in a case where it has no specific, particular interest, other than its interest in the sound evolution of patent law and its concerns about the jurisprudential fall out from the judgment of the Court of Appeal. Although it might be more convenient and faster to try to bring the particular legal issues before the Court, other ways remain available.* [...]
>
> *...I would be concerned about allowing parties not only to intervene in litigation, which can be allowed in proper circumstances, but also*

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[16] *Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426 at para. 5
[17] *Novopharm Ltd. v. Eli Lilly Canada Inc.*, [2003] S.C.C.A. No. 150

> *to attempt to gain control and carriage of litigation initiated or terminated by other parties.*[18]

19. While the Association has, by no means, been a stranger to the litigation below, Mr. Justice LeBel's reasons for refusing Novopharm's motion and, in effect, its leave application, have direct application here. The Association should not be allowed to step into the shoes of the Attorney General. The Association established its status as intervener[19] in the courts below and should neither be allowed to gain control and carriage of the litigation nor affect the rights of parties that have chosen to terminate it.

20. Finally, the *Rules of the Supreme Court* support the submission that the Association has no status to seek leave to appeal.

21. Rule 2 defines a party as follows:

> *"party" means a person named in the style of cause in accordance with Rule 22 including any person added or substituted as a party under Rule 18, but where referring to the court appealed from, it means a person who was a party in that court.*[20]

22. Further, no Rule makes reference to interveners in the lower courts as participants in the leave application process. It follows that, by virtue of the combination of Rules 2 and 22(2), the Association has no status before the Supreme Court of Canada. It can have no status as a party as it was added as an intervener in the court appealed from.

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[18] *Novopharm Ltd. v. Eli Lilly Canada Inc.*, [2003] S.C.C.A. No. 150

[19] By contrast, MCCT, a party intervener at the outset, commenced its own application in relation to the questions in issue.

[20] *Rules of the Supreme Court of Canada*, Rule 2

B. EXTENSION OF TIME

23. If this motion is denied, the Attorney General of Canada asks the Court to grant a 30-day extension of time, from the date of the Court's decision on this motion, to file a response to the application for leave to appeal.

24. The decision to bring this motion is premised on efficiency for both the Court and the Attorney General in disposing of a leave application that is not properly before the Court. Otherwise, a full response to the application for leave is required, that will unnecessarily engage further time and resources of the Court and the Attorney General.

25. The Attorney General requires an extension of time in the event that this motion is denied, since the short time for response to the leave application will require the Attorney General to file a full response notwithstanding that this motion is pending. This would obviate the utility of this motion.

PART IV – COSTS

26. The Attorney General of Canada requests costs of this motion. The Attorney General of Canada submits that this Court's decisions are clear that an intervener in the courts below cannot bring an application for leave to appeal. The Association did not file the application for leave on a viable basis.

PART V – NATURE OF ORDER SOUGHT

27. The Attorney General of Canada requests that this motion be granted, with costs, and the Association's application for leave to appeal be quashed. The Attorney General of Canada also requests that if this motion is denied, the Court grant the Attorney General of Canada an extension of time of 30 days from the decision on this motion to serve and file a response to the leave application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 8th day of August, 2003.

Roslyn J. Levine, Q.C.

Gail Sinclair

Counsel for the Respondent (Respondent),
The Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

CITED AT PAGE(S)

CASES

STATUTORY PROVISIONS

APPENDIX "A" – STATUTES RELIED ON

***Rules of Civil Procedure*, R.R.O. 1990, Reg.14, Rule 13.01**

(1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

***Rules of Civil Procedure*, R.R.O. 1990, Reg.14, Rule 22.03(1)**

A motion under rule 22.01 may be made to a judge of the Court of Appeal for leave to have a special case determined in the first instance by that court and the judge may grant leave where subrule 22.01(2) is satisfied and where the special case raises an issue in respect of which,

(a) there are conflicting decisions of judges in Ontario and there is no decision of an appellate court in Ontario;
(b) there is a conflict between decisions of an appellate court in Ontario and an appellate court of another province, or between decisions of appellate courts of two or more other provinces; or
(c) one of the parties seeks to establish that a decision of an appellate court in Ontario should not be followed.

***Courts of Justice Act*, R.S.O. 1990, c. 43, s. 109(5)**

Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of a constitutional question.

Rules 2, 18(1) and 22(2) of the *Rules of the Supreme Court of Canada*, pursuant to s. 97 of the *Supreme Court Act*, R.S.C. 1985, c. S-26

2. The following definitions apply in these Rules.

[...]

"party" means a person named in the style of cause in accordance with Rule 22 including any person added or substituted as a party under Rule 18, but where referring to the court appealed form, it means a person who was a party in that court.

[...]

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.

22(2) The style of cause in an application for leave to appeal shall name, followed by their status in the court appealed from,

(a) as an applicant, each party bringing an application for leave to appeal;

(b) as a respondent, each party – including, in Quebec, a mise-en-cause – who was adverse in interest to the applicant in the court appealed from ; and

(c) as an intervener,

(i) each person who has been granted leave to intervene in accordance with Rule 59, and

(ii) each administrative board or tribunal in the court appealed from whose jurisdiction is at issue.