

**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 -

**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 (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)

**MEMORANDUM OF ARGUMENT OF THE APPLICANT,
THE ASSOCIATION FOR MARRIAGE AND THE FAMILY IN ONTARIO
(Rule 18 motion supplemental to Application for Leave to Appeal)**

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- and -

EGALE CANADA INC.

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PART I - STATEMENT OF FACTS

1. The Association for Marriage and the Family in Ontario (the "Association") moves under Rules 18(1) and (5) of the Rules of the Supreme Court of Canada for an order adding or substituting the Association as a party herein or such further or other order as the said judge may deem appropriate.

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2. The Association repeats and relies on the submissions contained in its Memorandum of Argument filed with its Application for Leave to Appeal dated July 28, 2003.

3. This Memorandum will address only those further issues relating to a motion under Rules 18(1) and (5) of the Rules of the Supreme Court of Canada.

PART II – QUESTIONS IN ISSUE

4. This motion raises only one issue: should this Court add or substitute the Association as a party to the Application for Leave to Appeal from the judgment of the Court of Appeal of Ontario made June 10, 2003?

PART III - ARGUMENT

(a) Rule 18

5. Rule 18 of the Rules of the Supreme Court of Canada provides, in part, as follows:

“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.

(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.”

(b) Public Importance of the Questions in Issue in this Proceeding

6. As the Association submitted in its Memorandum of Argument filed with its Application for Leave to Appeal, this proceeding “raises significant constitutional issues that require serious legal analysis”, as put by the Ontario Court of Appeal in its reasons

for judgment dated June 10, 2003.¹ The constitutionality of the legal definition of marriage as the union of a man and a woman is a question of public and national importance of the first order.

5 7. The Attorney General of Canada announced that he would not seek leave to appeal from the judgment of the Ontario Court of Appeal. As explained in the Application Memorandum, the Association thinks that it is important that the highest court in this land consider the very important legal issues raised by this case. In the Association's view, the questions referred to this Court by the Attorney General of Canada will not enable such an examination by this Court. Consequently, the
10 Association submits that this Court should grant leave to appeal from the judgment of the Ontario Court of Appeal.

(c) The Standing of the Association to Bring this Application

8. In its Application the Association described its participation in the proceedings below as an added party. As stated, by order of the Honourable Justice Lang dated
15 January 19, 2001, the Association was granted leave to intervene as an added party in the application commenced by the Respondent Couples pursuant to Rule 13.01(1) of the Ontario Rules of Civil Procedure. In *Bank of Montreal v. Hatheway Realty Ltd.*,² the New Brunswick Court of Appeal confirmed that a person granted leave to intervene as an added party under rules virtually identical to those in Ontario possesses a right of appeal
20 from the judgment. Hughes, C.J.N.B. stated:

25 "I cannot accept the submission that a person who is made an 'added party' on the ground that he may be adversely affected by a judgment in the proceeding is not bound by the judgment therein. Having reached that conclusion, I can find no basis for denying the Intervenor a right of appeal even though the effect may be that the rights of the original parties could be affected."

¹ Court of Appeal Reasons for Judgment, para. 2, Application, Tab 9, p. 222

² *Bank of Montreal v. Hatheway Realty Ltd.*, [1983] N.B.J. No. 180; 47 N.B.R.(2d) 81 (N.B.C.A.), at para.18.

9. The Association acknowledges that this Court is not bound by the decisions of provincial courts regarding the status and rights of participants in a proceeding. In the 1988 case of *Colangelo v. Mississauga (City)*³ this Court stated that the fact that a consent order was made in the appellate court giving the applicant the right to intervene as a party was insufficient to constitute the applicant a party before this Court.

10. The *Colangelo* decision, however, appears confined to the facts of that case, for in subsequent cases this Court has permitted intervenors to apply for leave to appeal to this Court or participate in leave to appeal applications. The Ontario Court of Appeal decision in *M. v. H.*⁴ raised the issue of whether a person in a same-sex relationship qualified as a "spouse" for purposes of *Ontario's Family Law Act*. The proceeding was a private one between M. and H. The Attorney General of Ontario ("AGO") intervened in the case in response to a Notice of Constitutional Question. The Ontario Court of Appeal struck down as unconstitutional the provision of the Ontario statute excluding persons in a same-sex relationship from the definition of "spouse". Although H. did not seek leave to appeal the decision, the AGO brought an application for leave, which this Court granted without reasons.⁵ Justice Sopinka, who had given the reasons for the Court in *Colangelo*, participated in the panel that granted leave in *M. v. H.* In granting leave, this Court must have concluded that notwithstanding that the AGO only had been an intervenor in the courts below, the seriousness of the issues in the case and the active participation of the AGO in the proceedings below were sufficient to give it standing to seek and obtain leave to appeal. The Association submits that the same factors are present in this case and favour granting the Association leave to appeal.

11. The converse of the *M. v. H.* situation arose recently before this Court in the case of *Canadian Pacific Ltd. v. Montreal Urban Community*⁶ where Canadian Pacific Ltd. filed an application for leave to appeal from the decision of the Quebec Court of Appeal and the respondent municipalities did not want to contest the application. However, an

³ [1998] S.C.C.A. No. 477

⁴ *M. v. H.* (1996), 142 D.L.R. (4th) 1 (Ont. C.A.), p. 6

⁵ *M. v. H.*, [1997] S.C.C.A. No. 101, application for leave to appeal granted April 24, 1997, without reasons, per L'Heureux-Dube, Sopinka and Iacobucci, JJ.

⁶ *Canadian Pacific Ltd. v. Montreal Urban Community*, [2001] 3 S.C.R. 426, at 428-9

intervenor in the courts below sought standing as a party before this Court in order to resist the leave application. In granting the order Justice LeBel stated:

5 "There is merit to the objection to Mrs. Nadon's request that she be substituted as a party. A private party cannot be allowed to substitute itself for the municipal bodies that will make their own decisions regarding the conduct of this case. The latter must retain their full right to participate in the court proceedings, if they choose to exercise this right.

10 However, generally speaking, it is clear in this case that Mrs. Nadon is the party who presented the opposing position in the Court of Appeal and the Superior Court. She was granted intervener status. She participated aggressively in the debate in order to contest the plaintiffs' arguments in support of their action in nullity. Legally speaking, she was a full party to the proceedings in the Superior Court and on appeal. 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 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.* If leave to appeal is then granted, the question of Mrs. Nadon's status and participation in the appeal will be decided in accordance with the provisions of the Act and the rules of procedure of the Court, having regard also to the situation that might be created by the attitude of the other parties."

25 For these reasons, the motion is granted in part and the applicant Francoise Nadon is authorized to file an objection to the application for leave, as if she were a respondent in the application for leave..."

30 12. In the *Canadian Pacific* case this Court exercised its jurisdiction under Rule 18 in order to permit Mrs. Nadon to oppose the application for leave to appeal. In making that order, the Court stated that her participation was "justified" in the circumstances of the case and that it was "in the interests of justice" that she participate to "inform the Court fully" on the appropriateness of granting leave.

35 13. The Association submits that it would also be "in the interests of justice" to add or substitute it as a party to this proceeding if such an order is required to enable this Court to consider and grant the Association's application for leave to appeal. 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 proceeding. 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 in favour of the constitutionality of the definition of marriage as the union of a man and a woman. In the circumstances of the present case where the Attorney General of Canada “changes his mind” mid-stream and fails to seek leave to appeal notwithstanding that this case raises “significant constitutional issues that require serious legal analysis”, it is “in the interests of justice” that this Court consider and grant the Association’s application for leave to appeal from the decision of the Ontario Court of Appeal.

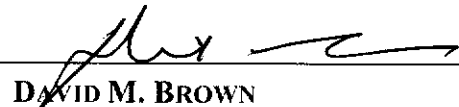
PART IV – COSTS

14. The Association asks for its costs of this motion as against the Attorney General of Canada.

PART V – ORDER SOUGHT

15. The Association therefore respectfully requests that this Court add or substitute the Association as an added party to this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



DAVID M. BROWN
Counsel for the Applicant,
The Association for Marriage and the Family in
Ontario

PART VI – TABLE OF AUTHORITIES

<u>Cases</u>	Cited at Paragraphs
*1. <i>Colangelo v. Mississauga (City)</i> , [1998] S.C.C.A. No. 477	9, 10
*2. <i>Bank of Montreal v. Hatheway Realty Ltd.</i> , [1983] N.B.J. No. 180;	8
*3. <i>M. v. H.</i> (1996), 142 D.L.R. (4 th) 1 (Ont. C.A.)	10
4. <i>Canadian Pacific Ltd. v. Montreal Urban Community</i> , [2001] 3 S.C.R. 426 (See Tab 5)	11, 12

5 * Copies of these cases can be found in the Applicant's Book of Authorities filed with its Application for Leave to Appeal

PART VII – STATUTES*Rules of the Supreme Court of Canada, Rule 18***Adding and Substituting Parties – s. 18**

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.

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