

Court File No.

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

BETWEEN:

THE INTERFAITH COALITION ON MARRIAGE AND THE FAMILY

Applicant
(Party Intervener)

- and -

HEDY HALPERN and COLLEEN ROGERS,
MICHAEL LESHNER and MICHAEL STARK,
MICHELLE BRADSHAW and REBEKAH ROONEY,
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.

Party Intervener
(Party Intervener)

AFFIDAVIT OF DEREK LEE
ON BEHALF OF THE APPLICANT
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY

AFFIDAVIT OF DEREK LEE

I, DEREK LEE, of the City of Toronto, Province of Ontario, MAKE OATH AND SAY:

1. I am a Member of Parliament and am currently a member of the Standing Committee on Justice and Human Rights ("the Justice Committee"). As a member of the Justice Committee, I have participated in cross-country public hearings and committee deliberations, and I have worked towards drafting recommendations for Parliament as to how Parliament can best meet the needs of those who seek institutional recognition for their committed same-sex relationships and those who seek the preservation of the traditional understanding of their marriages. As such, I have knowledge of the facts, matters hereafter deposed to, except where such matters are stated to be based upon information and belief, and where so stated I believe them to be true.

Overview

2. The issue of how to respond to the needs and interests of those in committed same-sex relationships (and other close domestic partnerships), while at the same time preserving the social good provided by traditional marriage, has been a long-standing concern of the Government of Canada. Legislative action, in the normal course, is always preceded by consultation with effected parties. Lawmakers need to understand how any proposed policy change will impact on all parties. This consultation is never more necessary than when what is proposed is a change to a fundamental social

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institution (such as marriage) that touches everyone's life in some way. Such a consultation with the Canadian people - in part, through hearings conducted by the Justice Committee - was underway by Parliament when the Ontario Court of Appeal delivered its ruling in *Halpern v. Canada*. The effect of that ruling has been to end the work of the Justice Committee. As a member of the Justice Committee, I was working to develop a legislated compromise that I believed could meet the needs and satisfy the constitutional rights of all interested persons. Unless *Halpern v. Canada* is appealed, I believe that an opportunity will be lost for Parliament to continue the process of discussion to a fruitful resolution. This is a decisive and contentious issue among Canadians that requires a careful legislative review and a compromise that is politically and socially acceptable to Canadians and is respectful of all Canadians' constitutional rights.

Curriculum vitae

3. I was elected as a Member of Parliament for the constituency of Scarborough-Rouge River in 1988, and was re-elected in 1993, 1997 and 2000. I am a member of the Liberal Party.

4. Prior to my election to Parliament, I was called to the Ontario Bar and practised law from 1975 to 1988.

5. As a member of Parliament, I have served on the following House of Commons committees:

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CHAIR:

! Standing Committee on Procedure and House Affairs	36 th Parliament, 2 nd Session
! Sub-Committee on Agenda and Procedure of the Standing Committee on Procedure and House Affairs	36 th Parliament, 2 nd Session
! Standing Committee on Procedure and House Affairs	37 th Parliament, 1 st Session
! Sub-Committee on Agenda and Procedure of the Standing Committee on Procedure and House Affairs	37 th Parliament, 1 st Session
! Sub-Committee on National Security of the Standing Committee on Justice and Human Rights	37 th Parliament, 1 st Session
! Sub-Committee on National Security	37 th Parliament, 2 nd Session

MEMBER:

! Standing Committee on Justice and Human Rights	36 th Parliament, 1 st Session
! Liaison Committee	36 th Parliament, 2 nd Session
! Standing Committee on Procedure and House Affairs	36 th Parliament, 2 nd Session
! Liaison Committee	37 th Parliament, 1 st Session
! Special Committee on Non-Medical Use Drugs	37 th Parliament, 1 st Session
! Standing Committee on Justice and Human Rights	37 th Parliament, 1 st Session
! Standing Committee on Procedure and Health Affairs	37 th Parliament, 1 st Session
! Bill-C17, An Act to Amend Certain Acts of Canada, and to Enact Measures for Implementing the Biological and Toxin Weapons Convention, in Order to Enhance Public Safety	37 th Parliament, 2 nd Session
! Special Committee on Non-Medical Use of Drugs	37 th Parliament, 2 nd Session
! Standing Committee on Justice and Human Rights	37 th Parliament, 2 nd Session
! Sub-Committee on National Security	37 th Parliament, 2 nd Session

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! Sub-Committee on Agenda and Procedure of the Standing Joint Committee for the Scrutiny of Regulations	37 th Parliament, 2 nd Session
! Sub-Committee on Agenda and Procedure of the Sub-Committee on National Security	37 th Parliament, 2 nd Session

I have served on the following House of Commons joint committees:

CO-CHAIR:

! Standing Joint Committee for the Scrutiny of Regulations	36 th Parliament, 1 st Session
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VICE-CHAIR:

! Standing Joint Committee for the Scrutiny of Regulations	36 th Parliament, 1 st Session
! Standing Joint Committee for the Scrutiny of Regulations	37 th Parliament, 2 nd Session

MEMBER:

! Standing Joint Committee for the Scrutiny of Regulations	37 th Parliament, 1 st Session
! Standing Joint Committee for the Scrutiny of Regulations	37 th Parliament, 2 nd Session

6. I have a long-standing concern for protecting the powers of Parliament and encouraging a strong democracy. In May 2002, I published a Parliamentary pamphlet entitled *BACK BENCH EXERCISES - Some Procedural Changes and Attitudes to Strengthen our House*, which sets out my proposals for reform of the House of

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Commons. This publication has been used as a guide to procedural initiatives in the House of Commons.

Legislative efforts

7. Institutional support for persons in committed same-sex relationships and other close domestic partnerships has been a long-standing concern of the Government of Canada.

8. For example, the Law Commission of Canada ("LCC") has produced and commissioned several research and discussion papers on the question of close personal relationships, culminating in the report "Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships" ("Beyond Conjuality"), published December 21, 2001. The LCC is an independent Federal Agency that advises Parliament on how to reform Federal Law. The papers that it commissions from third parties do not necessarily express the views of either Parliament or the LCC. They are, however, part of a serious attempt by Parliament to become informed about the issues under study and to develop some policy alternatives for consideration.

9. Prior to the LCC report "Beyond Conjuality", the LCC commissioned a series of papers on the subject of "Close Personal Relationships between Adults". They included the following research and discussion papers:

• Marriage and Marriage-Like Relationships
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1999

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• Recognizing and Supporting Close Personal Relationships Between Adults	May 2000
• The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation	May 2000
• Recognizing and Supporting Close Personal Relationships Between Adults: Discussion Paper	May 2000
• The Evolution and Diversity of Relationships in Canadian Families	September 2000
• Close Personal Relationships Between Adults: 100 Years of Marriage in Canada	March 2001
• Registered Partnerships: A Model for Relationship Recognition	August 2001

10. In 2000, in response to the Supreme Court of Canada's decision in *M. v. H.* [1999] 2 S.C.R. 3, the Government of Canada passed Bill C-23, "An Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations".

11. In 2002, the Superior Court of Ontario, Divisional Court handed down its decision in *Halpern v. Canada*. The panel unanimously held that the common law definition of marriage as "the lawful and voluntary union of one man and one woman to exclusion of all others" infringed the Applicant Couples' equality rights under section 51 of the Charter, in a manner not justified under section 1. The formal judgment of the Divisional Court reflected the remedy proposed by Blair RSJ, that the declaration of invalidity would be suspended for two years in order to give Parliament the opportunity to legislate an appropriate remedy.

12. Parliament responded immediately. The central initial step was to empower the Justice Committee to carry on a wide consultation with persons throughout

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Canada through public hearings. The Justice committee was then to deliberate, and to report back to Parliament with its recommendations. I was at that time, and remain, a member of the Justice Committee.

13. The question that Justice Minister Martin Cauchon referred to the Justice Committee on November 12, 2002, was:

“Given our constitutional framework and the traditional meaning of marriage, should Parliament take measures to recognize same sex unions and, if so, what should they be?”

14. At that same time, Justice Minister Cauchon issued a discussion paper entitled “Marriage and Legal Recognition of Same-Sex Unions” (the “Discussion Paper”). A copy of the Discussion Paper is attached as **Exhibit 1** to this affidavit. The Discussion Paper was intended to set a framework for public discussion about the issues surrounding recognition of same-sex relationships, as well as the social good provided by the legal recognition of the traditional, heterosexual understanding of marriage.

15. In his preface to the Discussion Paper, Justice Minister Cauchon acknowledged the enormous public interest in society’s conception of marriage, explaining that “public debate on marriage began long before the recent legal challenges to the constitutionality of requiring marriage to be between ‘one man and one woman’”. The Minister observed that “perhaps no single issue touches more people”.

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16. The work of the Justice Committee in receiving submissions and making recommendations was explained by the Justice Minister in the preface to the Discussion Paper as being part of the effort by "people living in Canada" to "reconcile the traditional meaning of marriage and the recognition of committed gay and lesbian relationships within our constitutional framework and equality guarantees".

17. As part of its mandate, the Justice Committee was ~~mandated~~ ^{ASKED} to conduct public hearings throughout Canada, in order to allow individual Canadians to have input into the development of a policy initiative that could have a profound effect on them. The Justice Committee held public hearings in eleven locations across Canada during April 2003: Vancouver, British Columbia; Edmonton, Alberta; Moose Jaw, Saskatchewan; Steinbach, Manitoba; Halifax, Nova Scotia; Sussex, New Brunswick; Sudbury, Ontario; Toronto, Ontario; Montreal, Quebec; and Iqaluit, Nunavut.

18. As a member of the Justice Committee, I came to the Committee Hearings prepared to learn about the needs and experiences of other Canadians. I recognized that the question of legal recognition of same-sex unions is a complicated issue, affecting nearly everyone in society. I wanted to understand the concerns of those who objected to same-sex marriage, and what they understood to be the potential harms to themselves and to society that could result from a legal recognition of same-sex marriage. Similarly, I needed to hear from those who sought legal recognition of same-sex marriage on behalf of themselves or others, and to understand the harms they wished to eliminate, and the benefits that such recognition was expected to deliver.

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19. The Justice Committee staff did an excellent job of soliciting briefs and presentations from diverse groups and individuals across Canada, representing the full spectrum of opinion on same-sex marriage. The over-whelming majority of presentations, regardless of the position, were conducted with appropriate respect and civility. Some presentations, to be sure, were motivated by individual self-interest or ideological commitments. I was impressed, however, with the principled presentations made by individuals on all sides of the debate, motivated by what they believed to be the best for Canadian society.

20. After the hearings ended, the Justice Committee members began to deliberate and to draft proposals individually. I was working to develop a policy initiative that I believed would provide institutional recognition for same-sex and other committed relationships, but would not alter the traditional meaning of marriage. I believed that such a proposal would satisfy all parties (although it would be a compromise), and would be consistent with the Charter of Rights and Freedoms.

21. Before I could complete this proposal, and before the Justice Committee could get very far towards preparing any formal report to Parliament, the Ontario Court of Appeal rendered its decision in *Halpern v. Canada*. The remedy ordered by the Ontario Court of Appeal, taking immediate effect, effectively brought an end to the work of the Justice Committee. The Justice Committee had been working towards a legislated solution, and the Ontario Court of Appeal, in effect, stated that there could be only one

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right answer in the Canadian constitutional order. There was no longer any possibility of a compromise to accommodate both the needs of same-sex couples and the needs of others.

22. I believe that the Court of Appeal erred, and that there are constitutionally acceptable legislative alternatives that Parliament could have chosen (and that remain available to it) that would provide institutional support for committed same-sex relationships, and at the same time respect the needs of other Canadians to maintain marriage as a heterosexual institution. As a lawyer and as a Member of Parliament, I believe that it was possible, and remains possible, to craft a legislated regime that meets the needs of all interested parties. Unfortunately, the Ontario Court of Appeal's decision has ended the conciliatory environment needed for compromise, and brought the consultative process to a premature end. If the Ontario Court of Appeal's judgment is allowed to stand, it will prevent the development of a uniquely Canadian solution that all parties can live with.

23. I am familiar with the draft bill entitled "An Act Respecting Certain Aspects of Legal Capacity for Marriage" that the Minister of Justice has referred to the Supreme Court of Canada under a constitutional reference. A Department of Justice News Release dated July 17, 2003, and the wording of the draft bill and the reference questions are attached as **Exhibit 2** to this affidavit.

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24. The constitutional reference, it seems to me, sidesteps the important questions (which would be dealt with on the proposed appeal) and instead focuses on the comparatively trivial. The draft bill and the constitutional reference start from the assumption that the decision of the Ontario Court of Appeal is correct in all aspects. It does not address the most fundamental question, which is whether the Charter of Rights and Freedoms requires that the institution of marriage be remade so as to include same-sex relationships, or whether, under the constitution, the interests of same-sex couples can be met in some other manner. For example, several countries in Scandinavia and Northern Europe, countries which share our western democratic tradition and our commitment to equality, have enacted registered domestic partnership regimes while preserving the traditional conception of marriage. Other countries, notably the Netherlands and Belgium, have legislated same-sex marriage. In all cases, their parliaments have been able to pursue matters to a resolution, preventing deep social division.

25. Furthermore, given that there is no guarantee that the government's draft bill will be passed by Parliament, I am concerned that absent an appeal of the Ontario Court of Appeal decision, it is uncertain what the common law with respect to marriage is in jurisdictions outside of Ontario. The Minister of Justice has called on the provinces to solemnize same-sex marriages in the absence of federal legislation. To date, most provinces have not done so. In the Canadian constitutional order, it should not be case

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that the decision of a provincial appellate court can create such uncertainty throughout Canada. There is a need for review of this decision by the Supreme Court of Canada.

SWORN before me at the City
of Toronto
in the Province of Ontario
this 12th
day of August , 2003.)


DEREK LEE


A Commissioner for taking affidavits, etc.
PAUL COZZI