

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

B E T W E E N:

THE INTERFAITH COALITION ON MARRIAGE AND THE FAMILY
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)

**AFFIDAVIT OF SVEND ROBINSON, MP
Sworn August 21, 2003**

AFFIDAVIT OF SVEND ROBINSON

I, Svend Robinson, MP, of the City of Burnaby, in the Province of British Columbia,
MAKE OATH AND SAY:

1. I am the member of federal parliament for the constituency of Burnaby-Douglas, in the Greater Vancouver area and have been a member of parliament since 1979. I also received legal education and was called to the British Columbia Bar in 1978. I am a Member of Parliament and a member of the House of Commons Justice and Human Rights Committee (“the Standing Committee” or “the Committee”) and as such have personal knowledge of the matters contained in this affidavit.

2. I have read the affidavits of Bruce Clemenger, Derek Lee, John McKay, Vic Toews and David Wiebe filed in support of the application by the Interfaith Coalition on Marriage and Family (“Coalition”) for leave to appeal the Court of Appeal for Ontario, however I have yet to read all of the exhibits to those affidavits owing to logistics and time constraints. I have read the majority of the exhibits in connection with my work on the Committee.

3. I am openly gay and an advocate of human rights, including the rights of gays, lesbians, bisexuals and transgendered persons.

4. On October 5, 2000 I introduced a private member's bill, C-501, in the House of Commons to extend marriage to same-sex couples, however that bill failed to obtain the support required to be sent to committee.

5. On February 13, 2003, I re-introduced a similar private member's bill in the House of Commons with the same result.

6. During my tenure as a Member of Parliament I have served on the Special Joint Committee on the Constitution in 1980 and 1981, the Special Committee on Equality Rights, the Justice Committee, the Human Rights Committee and the Foreign Affairs Committee. I was a member of the Canadian Committee for the 50th Anniversary of the United Nations in 1995 and have been named an honorary director of both the British Columbia and Ottawa Civil Liberties Associations, and of Lawyers Against Apartheid. Most recently, I served on the Standing Committee, to whom the Justice Minister referred the following question on November 12, 2002:

“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?”

7. Opponents of equal marriage on the Committee such as Mr. Toews were very anxious to travel across Canada, ostensibly to hear from a wide range of Canadians.. From November 27, 2002 to April 30, 2003, the Standing Committee held a total of 27 hearings on the issue of same-sex marriage, involving 15 hearings in Ottawa and 12 in

other communities across Canada, namely Vancouver, Edmonton, Moose Jaw, Steinbach, Halifax, Sussex, Sudbury, two in Toronto, two in Montreal and Iqaluit.

8. In total, the Committee heard from 467 witnesses. The majority of witnesses favoured extending equal marriage rights to same-sex couples. Just over one third of the witnesses opposed extending equal marriage rights to same-sex couples. There were also hundreds of submissions received in writing.

9. These witnesses represented a broad range of groups and interests of Canadian society concerned with the issue of same-sex marriage.

10. Those speaking in favour of same-sex marriage included same-sex couples, a number of whom were raising children, as well as parents and family-members of gays and lesbians, children being raised by same-sex parents, educators, union groups, women's and ethno-cultural organizations, academics, legal organizations and Bar Associations, family organizations, youth groups, Human Rights Commissions and a variety of religious denominations including representatives of Jewish, Muslim, Sikh, and Catholic communities, the Unitarian Church, the United Church of Canada, Metropolitan Community Churches, and the Religious Society of Friends (Quakers).

11. Those speaking against same-sex marriage included academics, lawyers, family organizations, ethnocultural organizations and a variety of religious denominations including representatives of Catholic, Pentecostal, Islamic, Evangelical, Jewish and

Mennonite faiths. The opposition to same-sex marriage on the basis of religious views was most common.

12. Among those who spoke against same-sex marriage was Mr. Bruce Clemenger of Evangelical Fellowship of Canada (the Appellant). In his presentation to the Committee, Mr. Clemenger stated that “If you redefine marriage, we would want legal protection to ensure that clergy are not required to marry people who would represent a violation of conscience.”

13. There was very little support for the notion of civil unions as an alternative. Many thought they were morally and legally not equal to marriage. Moreover, the legal experts were clear that the federal government lacked jurisdiction, and thus could not create a national civil union, as it only has jurisdiction over marriage.

14. The affidavits of Derek Lee and John McKay in support of the Coalition’s motion are misleading in light of the lack of support for alternatives to marriage among witnesses appearing before the Committee. I believe that the desire of these deponents to continue the Committee’s work in search of alternatives to marriage is really an attempt to delay the implementation of same-sex marriage in the hopes that popular support for it will wane or that a change leadership of the Liberal Party will afford them better prospects of denying same-sex marriage, even if against the will of the majority of Canadians. Mr. Toews has been quoted in the Toronto Star as saying:

“Judges don’t leave their views at the courtroom door, so let’s get their views out in the open.”

Attached hereto and marked as Exhibit "A" to this, my affidavit, is a true copy of the April 16, 2002 article "Courts and Parliament: Seeking a fine balance – Canada's top judge defends 'activist' role of Supreme Court." including this quotation.

15. It may also then be instructive to get The Honourable Member's views that did not make their way into his affidavit out into the open. In the same article, Mr. Toews was quoted as follows:

Toews criticizes decisions by the high court to extend commercial free speech to the tobacco industry, to "read into" Canada's anti-pornography law a defence to exempt self-created artistic works (visual or other) made for oneself, to extend rights to gays, to strike down the abortion law, and to virtually rule out extradition of fugitives where there's a possibility of the death penalty.

I think it's important for Parliament to make those determinations based on (its) understanding of ultimately what's acceptable to people.

.....

Instead, the Charter has made parliamentarians "irrelevant," he says, by providing politicians with an easy excuse not to do things, or to hand off tough questions to the court. '

16. On April 9, 2002, Mr. Toews made clear his objection to the courts making law:

If the prime minister wants to avoid the entire issue in Parliament, all he does is appoint the right judges to the right courts and the courts will make the determination," he said. "I think that's overstepping the constitutional authority of the courts."

Toews has long been a critic of courts making law, and says Parliament needs to debate issues of the day.

Attached hereto and marked as Exhibit “B” to this, my affidavit is a copy of the August 9, 2002 CBC News article, “Alliance MP critical of top court appointment process”.

17. Mr. Toews has also been quoted as holding the view that there are only two choices: same-sex marriage or no same-sex marriage, and that the government should utilize the notwithstanding clause in the Charter, if necessary.

“Let’s be honest,” Vic Toews said. The options are: do you recognize traditional marriage or do you recognize same-sex marriage?”(emphasis added)

....

“...if the [Justice] minister thinks that Parliament has such a substantial role to play in this question, there is a clear remedy for this issue, and that is the use of section 33, the override clause,” said Toews in a committee meeting on November 27, 2002. “We don’t have to go around hearing from Canadians if he’s already determined where he’s going to go and if he wants to maintain the traditional concept of marriage. He has his remedy. Either we go to the courts and ask them what they want, or Parliament speaks as it did two or three years ago in an overwhelming vote of 216 to 55 to retain the traditional definition of marriage.”

Attached hereto and marked as Exhibit “C” to this, my affidavit is a report from Equal Marriage for Same-Sex Couples dated May 30, 2003 attributing these comments to Mr. Toews.

18. The first of these propositions contradicts Mr. Toews statements in his affidavit that alternatives to equal marriage could have been reached by the Standing Committee and the second proposition is conspicuously absent from his affidavit. On June 3, 2003

Mr. Toews basically encouraged the Justice Minister to appeal solely to buy the Committee more time to do work that very few Canadians seemed to want:

“In his role as the federal Justice Minister and chief law officer in Canada, the only responsible course of action is to immediately appeal this decision to the Supreme Court of Canada. This will allow the elected members of the Committee to continue their work on this important social policy issue that has far-reaching social and legal implications.”

Attached hereto and marked as Exhibit “D” to this, my affidavit is a copy of Vic Toews, “Alliance Warns Marriage Committee May Become Irrelevant – Justice Minister urged to immediately appeal court ruling; keep Parliament’s options open” Canadian Alliance Canadienne, June 3, 2003, Vic Toews’ member site. Taken together, the comments of The Honourable Member amount to endorsing the use of this appeal to the Supreme Court of Canada solely to influence or delay decisions by the executive branch.

19. What Mr. Toews does not say in his affidavit but has said, is that he believes that the longer the issue of same sex marriage is debated, the more likely it is that popular support for it will wane. In an interview with the American Fox News Channel on June 19, 2003, Mr. Toews had the following to say:

NAUERT: How do the majority of Canadians seem to be feeling about this issue?

TOEWS: It seems that the longer [sic] it’s debated, the more against same-sex marriages the polling indicates. It is very similar to the state of Hawaii where there was initial polling done when that was brought forward. When it came to the eventual referendum, of course, that was defeated.

NAUERT: But some opinion polls there in Canada now suggest actually that a majority of Canadians actually support this.

TOEWS: Well, the most recent poll that I saw showed a slight majority, but that is quite down from prior polls back in 1999, where a greater number of people supported same-sex marriages. As I indicate, the longer this is debated and the concerns brought out, the support actually goes down.

Attached hereto and marked as Exhibit "E" to this, my affidavit is a copy of "Canada Readies to Legalize Same-Sex Marriage" FoxNews, June 19, 2003.

20. In a self-proclaimed Canadian Alliance friendly newsmagazine, Mr. Toews was quoted as follows in August of 2002:

Given Mr. Chretien's public endorsement of traditional marriage in 1993, I asked Mr. Toews if the Alliance could "hold the prime minister's feet to the fire." He struck a gloomy note: "If people care about it, which apparently they don't." He added, however, "In my riding it's a big issue."

Attached hereto and marked as Exhibit "F" to this, my affidavit, is a copy of "The exasperation of Vic Toews" Report, August 12, 2002.

21. Mr. Toews' views can be summarized as follows:

- a) The *Charter* (and not any failure by the federal government to appeal the decision of the Court of Appeal for Ontario) has made parliamentarians irrelevant;
- b) Parliament and not the courts, should make laws;
- c) Parliament should make laws based on “what’s acceptable to people;”
- d) The majority of Canadians support same-sex marriage;
- e) Apparently, many people don’t care much about this issue;
- f) It is, however, a big issue in his own riding;
- g) He hopes that the longer the issue is debated, the more likely it is that support for same-sex marriage will wane;
- h) The Justice Committee conducted lengthy cross-country hearings and heard the diverse views of thousands of Canadians and voted to recommend that the government not appeal the decision of the Court of Appeal for Ontario;
- i) The only issue is whether there will be same-sex marriage or not;

- j) The court has no role in determining whether there should be legal recognition of same-sex marriage so, technically, his position can not fail in the Supreme Court of Canada, but might succeed;
- k) If all else fails, Parliament should invoke the notwithstanding clause of the *Charter* to deny same-sex marriage;
- l) Nevertheless, the responsible thing for the government to do is to appeal, not so much to get a favourable ruling, but to obtain “time and leeway” in the face of a reference directed by the federal government on new proposed legislation

22. I believe the process was certainly fair to opponents of same-sex marriage and that during the Committee’s extensive hearing all concerned groups in every part of Canada had plenty of opportunity to express their views.

23. More importantly, throughout this process, my colleagues and I had an opportunity to form or challenge our own views on the basis of arguments presented before us.

24. It is important to note that although we were aware of the judgments of the courts, I did not feel compelled to vote in any particular way because of what those judgments

have said. Yet, I felt informed by them. Many of the groups who appeared before the Committee were litigants in the court actions in Ontario, British Columbia and Québec. The Committee therefore had a unique opportunity to weigh all the *pros* and *cons* of this issue and take a democratic vote.

25. On June 12, 2003 I made a motion to the Standing Committee that the Committee recommend to the Government that it not appeal the decision of the Ontario Court of Appeal in this matter.

26. The vote was carried in favour of my motion with a 9-8 margin. Mr. Lee was not present when the vote took place. This vote shows that the Committee, as well as Canadian society, was divided on the issue of same-sex marriage, with a slight majority of the Committee favouring the legalization of same-sex marriages.

27. The Committee's recommendation not to appeal the decision of the Ontario Court of Appeal was not binding upon the Government. It was the Minister of Justice and Attorney-General of Canada of who had to make the final decision on the issue, not the Legislative branch. I was pleased that the Government agreed with the Committee's recommendation and decided not to appeal.

28. It is also important to note that there was the consensus within the Committee that no church or other religious authority would be forced to conduct marriage ceremonies that are not in conformity with its beliefs and rituals. All clergy have the right to

determine the additional criteria necessary before they will agree to marry two individuals.

29. Therefore, the Minister's draft Bill seems to reflect almost exactly the main concerns raised during the consultations. It affirms equal marriage as most witnesses urged, and it protects religious freedom. It has been coupled with a Supreme Court reference to address the concerns of those who were sceptical about whether the Courts would ultimately uphold a religious freedom provision.

30. It is my opinion that further hearings, by the Committee or the court, would be unnecessary and time-consuming. It is unlikely that there is any important evidence that was left outside the scope of the Committee's or court's inquiry. Liberal MPs as well as groups forming part of the so-called Interfaith Coalition (the appellants in this motion) had an ample opportunity to make their views known before the Committee. They proved to be part of a minority, however.

31. In addition, the process of passage of the Bill will give Canadians of all political beliefs and religious denominations further opportunity to express their views with regard to the Bill. In fact, a vigorous debate continues in the Liberal caucus where opponents have had ample opportunity to express their views, especially Mr. McKay. The Leader of Mr. Toew's party has signalled his intention to use his first opposition day in the Fall sitting to have a debate on this very topic.

32. I therefore oppose the motion for leave to appeal to the Supreme Court by religious groups supported by several MPs, as it is an unnecessary step duplicating the work of the Justice Committee and the efforts of the Government to resolve the issues by the way of the Reference to the Supreme Court of Canada.

SWORN before me)
At the City of)
In the Province of)
This day of August, 2003)
)
)
_____)
)
A Commissioner for taking affidavits)

SVEND ROBINSON, MP