

IN THE SUPREME COURT OF CANADA

**IN THE MATTER OF SECTION 53 OF THE *SUPREME COURT ACT*,
R.S.C., 1985, C. S-26**

**IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNSEL
CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS
OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN
ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH OF JULY 2003**

**MEMORANDUM OF ARGUMENT
OF THE PROPOSED INTERVENER
THE INTERFAITH COALITION ON MARRIAGE AND FAMILY**

(Pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*)

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400, Box 95
Toronto ON M5H 3P5

Peter R. Jervis LSUC # 22774A4A
Bradley W. Miller LSUC # 47416M

Phone: 416-867-3076
Fax: 416-867-9192
Email: pjervis@lernalers.ca
Email: bmiller@lernalers.ca

Counsel for the Proposed Intervener
The Interfaith Coalition on Marriage and
Family

Gowling Lafleur Henderson LLP

2600 - 160 Elgin Street

PO Box 466, Stn. D

Ottawa, ON K1P 1C3

Ed Van Bommel

Phone: 613-786-0212

Fax: 613-369-3500

Email: Ed.VanBommel@gowlings.com

Ottawa Agents for Counsel for the Proposed Intervener The Interfaith Coalition on Marriage and Family

I N D E X

	PAGE NO.	
PART I -	STATEMENT OF FACTS	1
	Overview	1
	The Interfaith Coalition's participation in the same-sex marriage cases	2
	Experience of Interfaith Coalition and its members before this Court	3
	The Proposed Intervention on the Reference	4
PART II -	QUESTION IN ISSUE	8
PART III -	ARGUMENT	8
	A. The Interfaith Coalition has an interest in the subject matter of the Reference	8
	B. The submissions of the Interfaith Coalition are distinct and useful	9
PART IV -	COSTS	10
PART V -	ORDERS SOUGHT	10
PART VI -	AUTHORITIES	11
PART VII -	STATUTES AND RULES	11

IN THE SUPREME COURT OF CANADA

**IN THE MATTER OF SECTION 53 OF THE *SUPREME COURT ACT*,
R.S.C., 1985, C. S-26**

**IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNSEL
CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS
OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN
ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH OF JULY 2003**

**MEMORANDUM OF ARGUMENT
OF THE PROPOSED INTERVENER
INTERFAITH COALITION ON MARRIAGE AND FAMILY**
(Pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*)

PART I – STATEMENT OF FACTS

A. Overview¹

1. The Islamic Society of North America (a society representing the interests of Muslims in Canada), the Catholic Civil Rights League (a lay Catholic organization dedicated to protecting religious rights and presenting Catholic positions in the public forum), and the Evangelical Fellowship of Canada (a national association of Evangelical Protestant churches) apply, collectively as the Interfaith Coalition on Marriage and Family (the “Interfaith Coalition”), for leave to intervene in this Reference pursuant to Rule 55 of the *Rules of the Supreme Court of Canada*.

2. This Reference raises issues of profound importance to all Canadians. It addresses a proposed legislated change to the institution of marriage - a social and, primarily, religious institution which has existed independently of the law for millennia.

3. The institution of marriage is of central importance to Canadians. Marriage, as the foundational social institution in Canadian society, touches the lives of everyone in some way. What is at issue in this Reference is not merely a change to the definition of marriage for gays and lesbians, but an unprecedented change to the institution of

¹ Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶¶ 3, 4.

marriage for everyone in Canada, including the persons represented by the Interfaith Coalition.

4. There is much at stake in this Reference for persons of religious faith. An overwhelming majority of Canadians choose to solemnize their marriages through religious ceremonies officiated by religious clergy according to a particular religious creed. All major religious faiths recognize marriage as existing uniquely between one man and one woman. Clergy in many denominations and religious faiths are, by their religious principles, unable and unwilling to solemnize “marriages” between persons of the same sex. Similarly, millions of Canadians, represented by the Interfaith Coalition, by their religious principles, are unable to recognize same-sex unions as marriages.

5. This Reference will have profound legal and social ramifications for these religious communities. Just as the liberalization of divorce law had a profound and unanticipated effect on these communities (despite their formal rejection of it), the proposed change to marriage can be expected to have as yet uncertain and unanticipated effects upon the wider culture and upon these religious communities. They are also concerned that the proposed Act threatens the freedom of religious clergy, religious institutions, and laity, not to participate in marriage ceremonies between persons of the same sex, or to provide other services and facilities ancillary to such marriage ceremonies.

6. Additionally, many of the religious faith communities represented by the Interfaith Coalition are vulnerable minority faith communities. There is a concern that the proposed Act, out of a desire to achieve equality for some, will seriously exacerbate inequality for other vulnerable groups in society, whose conception of marriage cannot be reconciled with the proposed Act, and who will be further marginalized from wider civil society.

B. The Interfaith Coalition’s participation in the same-sex marriage cases²

² Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶¶ 5-13.

7. The member organizations of the Interfaith Coalition, both corporately and individually, have participated in the provincial same-sex marriage litigation as interveners (in BC), added party interveners (in Ontario), and as appellants (in Québec). Through the Interfaith Coalition's extensive participation in these cases - participation well beyond the ordinary scope of intervention - it has developed considerable expertise, particularly in those issues related to freedom of religion and the impact on religious communities of a fundamental change to the institution of marriage.

8. In Ontario, the Interfaith Coalition participated in *Halpern v. Attorney General of Canada*, as a party intervener. It was actively involved in that litigation, filing five expert affidavits at the Divisional Court, responding to interrogatories, and providing extensive written and oral argument. It also intervened before the Court of Appeal for Ontario, filing a factum and presenting oral argument, and sought leave from this Court to appeal the decision of the Ontario Court of Appeal.

9. Similarly, in British Columbia, the Interfaith Coalition appeared as an intervener before the BC Supreme Court and the BC Court of Appeal in *EGALE Canada Inc. v. Canada (Attorney General)*.

10. In Québec, the Catholic Civil Rights League intervened before the Québec Superior Court in *Hendricks v. Québec (Attorney General)*, and appealed the decision of that court to the Québec Court of Appeal. The EFC and the Catholic Civil Rights League are now carrying the appeal in that proceeding.

C. Experience of Interfaith Coalition and its members before this Court³

11. Additionally, the Interfaith Coalition and its member organizations have a long history of intervening before courts in Canada in cases dealing with the legal definition of marriage and the constitutionality of the definition of "spouse". For example, members of the Interfaith Coalition have intervened in: *Attorney General of Canada v. Mossop*, [1993] 1 S.C.R. 554, *Layland v. Ontario* [1992] O.J. 1963 (C.A.), *Egan v.*

³ Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶ 20.

Canada, [1995] 2 S.C.R. 513, *Vriend v. Alberta*, [1998] 1 S.C.R. 493, *M. v. H*, [1999] 2 S.C.R. 3; *Trinity Western University v. College of Teachers (British Columbia)*, [2001] 1 S.C.R. 772; and *Chamberlain v. Surrey School District No. 36 (Surrey)* 2002 SCC 76.

D. The Proposed Intervention on the Reference⁴

12. The proposed Act and the Reference are both premised on assumptions about the scope of freedom of religion in Canada, and the constitutionality of the traditional conception of marriage recognized by the common law. These assumptions have not been made explicit by the Attorney-General, and are therefore not addressed. The Interfaith Coalition, through its extensive participation in *Halpern*, *EGALE*, and *Hendricks* is particularly well-placed to identify and address issues relating to the scope of freedom of religion in Canada (with respect to clergy, religious institutions, and laity), the nature of marriage across religious communities, and the impact of the proposed Act on vulnerable religious communities. Given the need for representation of religious communities, and the Interfaith Coalition's role in the same-sex marriage litigation in the courts below, the Interfaith Coalition requests that it be granted intervener status on wider terms than would ordinarily be granted. In addition to being granted leave to intervene, the Interfaith Coalition seeks the following:

(a) that it be granted leave to file affidavit evidence relevant to the Reference questions, including the five affidavits filed by the Interfaith Coalition in *Halpern* (speaking to conceptions of marriage within the Jewish, Muslim, Catholic, and Evangelical Protestant religions) and the affidavits filed by the Attorney-General in *Halpern*, described in Schedule "A" to the Notice of Motion. The Interfaith Coalition also seeks leave to file affidavits in response to the affidavits filed by the Attorney-General herein, in order to provide this Court with a factual background that is commensurate with the importance of a legislative redefinition of a fundamental religious institution;

(b) that the Interfaith Coalition be granted leave to file a written factum of up to 40 pages;

⁴Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶¶ 19-21.

(c) that the Interfaith Coalition be permitted to make oral submissions of up to one hour at the hearing of the Reference.

13. If granted leave to intervene in the Reference, the Interfaith Coalition would make submissions on the following issues raised in the Reference:

Question 1: Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

(a) While not the primary focus of the proposed submissions of the Interfaith Coalition, the Interfaith Coalition will argue that the subject matter of the proposed bill is a matter of shared jurisdiction between Parliament and the provincial legislatures. In particular, it will argue that Parliament, by stipulating a change to the definition of marriage to include relationships which were previously non-marriages, would be taking jurisdiction over those relationships from the provincial legislatures. The Interfaith Coalition would argue that in so doing, Parliament would be unilaterally altering the division of powers, and illegitimately side-stepping the constitutional amendment required to authorize such a change.

(b) The AGC's defence of the proposed act asserts at paras. 39-41 of his factum that a line can be drawn in Canada between the solemnization of religious marriage and the solemnization of civil marriage, akin to the distinction which exists in many European jurisdictions, and that the proposed act would only affect civil marriage. The Interfaith Coalition will argue that the AGC's submission rests on an inaccurate depiction of the solemnization of religious marriages in Canada, and that religious marriage ceremonies cannot be broken down into religious components and civil components. A change to one will affect the other.

Question 2: If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars, and to what extent?

(a) The Interfaith Coalition will argue that the necessary first step in establishing whether the proposed bill is *consistent* with the Charter, is to enquire into what features of marriage are thought to be *required* by the Charter (if any), and what features are thought to be prohibited (if any). Part of this enquiry involves determining whether the traditional conception of marriage is (as the Attorney-General has assumed in his factum) inconsistent with s. 15(1) and s. 1 of the Charter, and if so, in what respects.

(b) The Interfaith Coalition will argue that Question 2 (framed as a matter of *extending* the category of marriage, rather than a matter of replacing marriage with a new institution with new features), wrongly assumes that the act of legislatively stipulating marriage to be an institution between two persons, will simply be a matter of adding new legal rights for some, without derogating from the rights of others.

(c) The Interfaith Coalition will argue that the proposed Act, by stipulating a change to the definition of marriage, will be replacing the heterosexual conception of marriage - one that is consistent with the conception of marriage held by the religious faith communities represented by the Interfaith Coalition as well as millions of other Canadians - with a conception of marriage that is *antithetical* to it. The Interfaith Coalition will argue that by altering the conception of marriage in the manner proposed, Parliament would be failing to manifest equal concern for the interests of the members of the religious faith communities represented by the Interfaith Coalition as well as other Canadians, who will be marginalised from full participation in civil society. This would be a violation of s. 15(1) of the Charter.

Question 3: Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

(a) Clause 2 of the proposed Act declares that '(n)othing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.' Clause 2 does not purport to legislatively establish any legal protection for clergy. The proposed Act simply assumes a level of

legal protection for clergy which may or may not exist under Canadian law. The Interfaith Coalition will argue that in contemporary Canadian human rights jurisprudence, the dominant methodology for establishing what, as a question of fact, constitutes a person's religious beliefs, makes the protections assumed by the proposed Act radically uncertain.

(b) The Interfaith Coalition will argue that the concept of religious freedom that is dominant in contemporary Canadian jurisprudence results in sincerely held religious beliefs being misidentified by triers of fact when drawing distinctions between what constitutes a "core" religious belief (deserving of protection) and what constitutes a merely "peripheral" belief (which does not warrant protection). The Interfaith Coalition will argue that increasingly, acts based on conceptions of marriage and sexuality have been relegated by triers of fact to the "peripheral", and not accorded the protection of freedom of religion. The assessment of religious belief on an objective or "reasonable" standard, undermines the religious freedom assumed (but not provided) by the proposed Act.

(c) Furthermore, the Interfaith Coalition will argue that the AGC's reading of Question 3 inaptly focusses on the role of *clergy* in performing marriage ceremonies, and ignores critical questions implicit in Question 3, surrounding the religious freedom of religious institutions and of lay individuals who do not *officiate* as clergy at marriage ceremonies, but are nonetheless involved (eg through the provision of facilities, pre-marriage counselling, etc.). The Act provides no protection for religious institutions and lay persons against actions brought against them (as distinct from clergy) by persons seeking to compel religious institutions to change their religious doctrine and practices to recognize same-sex marriage (cf *Hall (Litigation Guardian of) v. Powers* (2002) 59 O.R. 423 (S.C.J.)).

(d) Several key concerns of the Interfaith Coalition have not been addressed by the Attorney-General in his factum. The Interfaith Coalition will argue, for example, that a religious institution's right to control the use of its facilities (such as synagogues, mosques, churches, and other facilities such as halls, camps, and schools) such that the institution is not compelled to make them available for the celebration of same-sex

weddings or post-wedding receptions, will be threatened by the proposed Act. The Interfaith Coalition will also argue that the inclusion of same-sex unions in marriage can only be accomplished by specifically excluding or bracketing out elements of marriage that are central to the members of the Interfaith Coalition. For many minority religious faith communities, the adoption of a new form of marriage that is antithetical to their own would fundamentally undermine their ability to participate fully in civil society.

14. If the terms of this Reference are later changed to address additional questions, or if the proposed Act is amended, or if the Court finds that the terms of the Reference include consideration of whether the traditional conception of marriage violates s. 15(1) and s. 1 of the Charter, the Interfaith Coalition would also seek leave to make submissions on these additional questions and issues.

PART II - QUESTION IN ISSUE

15. The Interfaith Coalition has satisfied the test for intervention under Rule 57 of the *Rules of the Supreme Court of Canada*.

PART III - ARGUMENT

16. In an application for leave to intervene, the applicant must demonstrate two things: first, that it has an interest in the outcome of the reference, and second, that the submissions it intends on providing to the Court will be different from those of the parties and other interveners, such that it will impart to the Court a perspective that is distinct and useful.⁵

A. The Interfaith Coalition has an interest in the subject matter of the Reference

17. As McMurtry CJO recently held, greater latitude for intervention is given in cases of 'constitutional or societal importance so as to have the benefit of various perspectives of the historical and sociological context'.⁶ Greater public impact necessitates that a

⁵ *R. v. Finta* [1993], 1 S.C.R. 1138.

⁶ *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 730, ¶ 4.

broad range of perspectives be placed before the Court. The matters in issue in this Reference, considering the redefinition of a fundamental religious and social institution, affect millions of people, and affect them at a very deep level.⁷

18. The Interfaith Coalition has a direct interest in the subject matter of this Reference. Its members represent millions of Canadians in a variety of religious faith communities,

⁷ Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶ 13.

with shared religious beliefs that affirm marriage as a uniquely heterosexual institution, necessary for social stability.

19. Furthermore, the vast majority of marriages are solemnized by clergy. Because clergy are asked to perform same-sex marriages, and because religious institutions and lay persons are asked to provide facilities and services ancillary to the celebration of same-sex marriages, and their refusals raise the prospect of litigation and human rights complaints from persons who would use the courts to attempt to force a change in the doctrine and practices of clergy and religious institutions, the Interfaith Coalition, its members, and the persons whose interests they represent, all have a direct interest in the outcome of the Reference. Both the purposes of the organizations which constitute the Interfaith Coalition, and the religious freedoms of the individuals represented by the members of the Interfaith Coalition, are engaged in this Reference.⁸ The Interfaith Coalition thus has an interest in the Reference that is over and above that of the general public.

⁸Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶¶ 2, 17-19.

B. The submissions of the Interfaith Coalition are distinct and useful⁹

20. The Interfaith Coalition, through the submissions outlined in paragraph 12, will provide submissions that are distinct and useful to this Court. The Interfaith Coalition will draw on substantial experience from its interventions in the same-sex marriage cases in the courts below, and in *Egan* and *M v. H* to articulate the interests of clergy, religious institutions, and laity implicated in this Reference.

21. Marriage is a fundamental religious and social institution that has existed for millennia. Any proposed change to marriage will impact millions of Canadians, particularly those whose interests are represented by the Interfaith Coalition. It is in the interests of justice that this Court have before it submissions from those, such as clergy, religious institutions, and laity of diverse religious communities, who will be profoundly affected by the outcome of this Reference.

PART IV - COSTS

⁹Affidavit of Janet Epp Buckingham, Motion Record, Tab 2, ¶13.

22. The Coalition seeks its costs of this motion as against the Attorney General of Canada.

22. that the Interfaith Coalition be granted leave to file a written factum of up to 40 pages;

PART V - ORDERS SOUGHT

23. The EFC, the Catholic Civil Rights League, and the Islamic Society of North America, as the Interfaith Coalition, request the following orders:

23. that the Interfaith Coalition be permitted to make oral submissions of up to one hour at the hearing of the Reference.

20. that the EFC, the Catholic Civil Rights League, and the Islamic Society of North America be granted leave to intervene in the Reference, either individually or collectively as the Interfaith Coalition;

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Peter R. Jerv

Bradley W. M

21. that the Interfaith Coalition be granted leave to file affidavit evidence relevant to the Reference questions including: (a) the five affidavits filed by the Interfaith Coalition in *Halpern* and listed in Schedule "A" of the Notice of Motion; (b) the affidavits filed by the Attorney-General of Canada in *Halpern* listed in Schedule "A" of the Notice of Motion; and (c) further affidavits to respond directly to the affidavits filed by the Attorney-General of Canada in this Reference;

C
o
u
n
s
e
l

f
o
r

t
h
e

P

r
o
p
o
s
e
d

I
n
t
e
r
v
e
n
e
r
,

a
r
r
i
a
g
e

a
n
d

F
a
m
i
l
y

PART VI - AUTHORITIES

T
h
e

R. v. Finta [1993] 1 S.C.R. 1138

I
n
t
e
r
f
a
i
t
h

Halpern v. Canada (Attorney General)

C
o
a
l
i
t
i
o
n

o
n

M

(b) an appeal, within four weeks after the filing of the factum of the appellant.

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

P

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take in the proceeding; and

(b) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

PART VII - STATUTES AND RULES

Rules 55-57 of the *Supreme Court of Canada Rules*:

G:\DOC\PRJ\22220004\Pleadings\Memorandum of Argument.wpd

55. Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

56. A motion for intervention shall be made in the case of

(a) an application for leave to appeal, within 30 days after the filing of the application for leave to appeal; and