

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

JANE DOE

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

-and-

**THE FOUNDATION FOR EQUAL FAMILIES
and EGALE**

Moving Parties/
Proposed Interveners

AFFIDAVIT OF John Fisher

(in support of the motion for leave to intervene of EGALE)
(sworn October 30, 2002)

I, John Fisher, of the City of Ottawa, MAKE OATH AND SAY:

1. I am the Executive Director of EGALE Canada Inc., "EGALE", and, as such, have knowledge of the matters to which I hereinafter depose.

The Structure and Objectives of EGALE

2. The acronym "EGALE" stands for Equality for Gays and Lesbians Everywhere. EGALE is a federally incorporated not-for-profit organization that advances equality and justice for lesbians, gays and bisexuals across Canada.

3. EGALE was founded in 1986. As a national advocacy organization for lesbians,

gays and bisexuals, EGALE has members in every province and territory of Canada.

4. The organizational structure of EGALE comprises a Board of Directors, the Executive Director, six Standing Committees, Regional Coordinators in each province and territory, and the general Membership. The Board of Directors consists of the President, Vice-President, Secretary, Treasurer and eight Directors who are Members-at-Large.

5. The objectives of EGALE as set out in the organization's by-laws, include developing expertise in issues that affect equality and justice for lesbians, gays and bisexuals; making that expertise available to the general public; communicating and cooperating with others who are interested in advancing equality and justice for all disadvantaged groups; lobbying governments on issues relating to sexual orientation in general, and to lesbians, gays and bisexuals, in particular.

EGALE'S Interest in this Application

6. This application raises several important issues of concern to EGALE and its membership, including:

- i) whether the *Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254, "*Semen Regulations*" discriminate against lesbians on the basis of sexual orientation, in contravention of section 15 (1) of the *Charter*;
- ii) whether the *Semen Regulations* discriminate against women without male "sexual partners" on the basis of family status, in contravention of section 15(1) of the *Charter*;

- iii) whether the *Semen Regulations* deprive lesbians and women without male sexual partners of their right to life, liberty and security of the person under section 7 of the *Charter*;
- iv) whether the *Semen Regulations* discriminate against gay men, on the basis of sexual orientation, in contravention of section 15(1) of the *Charter*;
- v) whether the *Semen Regulations* discriminate against men over 40, on the basis of age, in contravention of section 15(1) of the *Charter*; and
- vi) whether the intersection of the discrimination on the basis of sexual orientation, described in (iv), and the discrimination on the basis of age, described in (v), has a disproportionate effect on gay men.

7. As an organization concerned with the equality rights of gays, lesbian and bisexuals, the outcome of this application is of great significance to EGALE and its membership. Gay men and lesbians, in many cases, rely upon assisted insemination in order to achieve pregnancy. The impugned provisions in the Semen Regulations impair the reproductive freedom of both gay men and lesbians. This impairment has two significant impacts—it impedes the choices to reproduce for gay men and lesbians, and makes a statement that lesbians and gay men are less worthy and less capable of being parents.

EGALE'S Expertise in Addressing the Issues Before the Court

8. Since its inception, EGALE has been committed to advancing both equality and justice for lesbians, gays and bisexuals in Canada. This includes a commitment to safeguarding the constitutional rights of lesbians, gays and bisexuals to freedom from discrimination and to life, liberty and the security of the person.

9. EGALE'S activities include: legal research and consultations on subjects that concern lesbians, gays and bisexuals; public education about the rights of lesbians, gays and bisexuals; interventions in test case litigation challenging alleged violations of the rights of lesbians, gays and bisexuals; and appearances before governmental committees dealing with important issues of concern to lesbians, gays and bisexuals.

10. EGALE has intervened in the following cases:

- i) *Mossop v. Canada*, [1993] 1 S.C.R. 554;
- ii) *Egan and Nesbit v. Canada*, [1995] 2 S.C.R. 513;
- iii) *Vriend v. Alberta*, [1998] 1 S.C.R. 493;
- iv) *M. v. H. and Ontario*, [1999] 2 S.C.R. 3;
- v) *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120
- vi) *Chamberlain v. Surrey School District No. 36* (2000), 191 D.L.R. (4th) 128 (B.C.C.A.); [2001] S.C.C.A. No. 324
- vii) *Rosenberg & CUPE v. Canada* (1998), 158 D.L.R. (4th) 664 (On.C.A.) [joint intervention with other equality-seeking groups]
- viii) *Hill v. Fredericton (City)*, [1998] N.B.H.R.B.I.D. no. 1 (N.B. Bd. Inq.)
- ix) *United States of Mexico v. Hurley* (1997), 116 C.C.C. (3d) 414 (On.C.A.)
- x) *Ontario (HRC) v. Brockie*, [2002] O.J. No. 2375 (Div. Ct.) [joint intervention with 10 other equality-seeking groups]
- xi) *Halpern v. Canada (Attorney General)*, [2002] O.J. No. 2714 (Div. Ct.)
- xii) *Hendricks c. Quebec (Procureur general)*, [2002] J.Q. no. 3816 (Cour Sup.)
- xiii) *Hall (Litigation Guardian of) v. Powers et al.* (2002), 59 O.R. (3d) 423 (Sup. Ct.) [joint intervention with other equality-seeking groups]

11. EGALE initiated the *Charter* case of *EGALE Canada Inc. v. Canada (Attorney*

General), [2001] B.C.J. No. 1995 (Sup. Ct.) with five same-sex couples who were denied marriage licenses by the provincial Director of Vital Statistics on the basis that a marriage between two people of the same sex is not legally recognized in Canada. EGALE and the couples challenged the constitutionality of the restriction on the freedom of same-sex partners to marry. Our petition was dismissed by the British Columbia Supreme Court. The decision is being appealed to the British Columbia Court of Appeal.

12. EGALE has been accredited to participate in international conferences to advance understanding of lesbian and gay human rights, including presenting to the plenary session of the United Nations World Conference on Human Rights in Vienna, participating in the World Conference on Women in Beijing and speaking at the International Year of the Family Conference in Montreal.

13. In addition, EGALE distributes a newsletter across Canada; has prepared a number of Court Challenges Program Case Development Reports; has written a legal analyses of the impact of the decisions of the Supreme Court of Canada in *Egan v. Canada* and *Vriend v. Alberta*; develops Fact Sheets on current issues affecting the lesbian, gay and bisexual communities; maintains a Website (www.egale.ca) and two e-mail discussion groups to help keep our communities informed across the country; has participated in seminars on lesbian, gay and bisexual equality issues; has participated in numerous public education programs and has undertaken many individual human rights projects.

14. EGALE believes that with the wealth of experience and expertise available to it, it can make an important oral and written contribution to the hearing of this application. In the interests of avoiding duplication, I adopt and refer the court to the bibliography, based on a brief review of the academic literature on gay and lesbian parents, attached as Exhibit "A" to Michelle Douglas's affidavit, to be sworn October 29, 2002.

Arguments to be Made by the EGALE if Leave to Intervene is Granted

15. The impugned provisions of the *Semen Regulations* create six distinct *Charter* violations as set out in paragraph 6. The Applicant has limited herself to raising the grounds which directly affect her, viz., the infringement of her section 7 and section 15 rights. EGALE hopes to raise the other four grounds and thus expand the scope of the application to include the perspective of potential donors.

16. EGALE will argue that the exclusion of all men who have had sex with another man, even once, since 1977, is more sweeping than is necessary to protect the safety of the semen supply. The blanket exclusion of all donors over the age of 40 is likewise overly broad. These section 15 violations do not minimally impair the rights of those affected and cannot be saved under section 1 of the *Charter*.

17. EGALE also seeks a broader remedy than that sought by the Applicant. Jane Doe has requested that the an exemption be read into the *Semen Regulations* so they do not apply where a woman has a designated donor of her choice. EGALE will seek a remedy reflecting the further issues that we raise, including that the discriminatory provisions be struck down altogether.

No Prejudice to Court or Other Parties

18. No prejudice to the court or other parties will occur if EGALE is granted intervener status. I adopt the statements set out in paragraphs 20 – 28 of Michelle Douglas’s affidavit, to be sworn October 29, 2002.

SWORN BEFORE ME at the City)
)
of Ottawa, in the Province of)
)
Ontario, on October 30, 2002)
)
_____)
Commissioner of Oaths

John Fisher