National Association of Women and the Law
Association nationale de la femme et du droit

1066 Somerset Ouest/West, Ottawa, ON, K1Y 4T3 Tel/Tél 613-241-7570 Fax/Télécopieur 613-241-4657 info@nawl.ca

SUBMISSIONS OF THE NATIONAL ASSOCIATION OF WOMEN AND THE LAW ON MARRIAGE AND THE LEGAL RECOGNITION OF SAME-SEX UNIONS TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

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Introduction

The National Association of Women and the Law (NAWL) is a non-profit organization that has been working to improve the legal status of women in Canada through legal education, research and law reform advocacy since 1974. We recognize that each woman's experience of inequality is unique due to systemic discrimination based on race, class, sexual orientation, disability, age, language and other factors. In our view, a just and equal society values diversity and is inclusive in it. In keeping with this mandate, NAWL is concerned about the impact of the prohibition against same-sex marriage on lesbians, bisexual women and transgendered women, and recommends that the exclusive preserve of marriage to heterosexual couples be abolished, and that all women have the right to marry the person of their choice.

NAWL is very pleased to have the opportunity to present our views to the members of the Standing Committee on Justice and Human Rights, with respect to the question of whether the federal government should recognize same-sex marriages. In addressing this question, we urge you to keep in mind your constitutional obligations as lawmakers to promote a society in which all persons enjoy equal recognition at law, to prevent the violation of human dignity and freedom, to advance the equality of historically disadvantaged groups, and to not be swayed by political and social prejudice and stereotyping (such as that born of religious dogma and right wing ideology). These basic, guiding principles comprise the purpose of the constitutional equality guarantees,

as affirmed unanimously by the Supreme Court of Canada, in the recent case of *Law* v. *Canada* (1999). It is your role to ensure that Canadian law reflects the egalitarian values and human rights that were enshrined in our Constitution in 1982. With this in mind, we call on you to remove the discriminatory restrictions on marriage between persons of the same sex, and to recognize their equal human dignity and their freedom to make such fundamental personal choices about their relationships.

It is NAWL's position that the prohibition against same-sex marriage is discriminatory and in violation of section 15 of the *Charter*, and that such discrimination is not justifiable in a free and democratic society. Furthermore, we submit that registered domestic partnerships (RDPs) and other similar options are not an acceptable alternative to recognizing the right to marriage, and that the respect of the human rights of lesbians and gays in the 21st century requires nothing less than the equal right to marriage. In this regard, we agree with—and urge you to adopt—the equality considerations and related conclusions provided by the Law Commission of Canada, in its final report on personal relationships (*Beyond Conjugality*, 2001): that governments cannot continue to maintain an institution of marriage in a discriminatory fashion; that, in light of the state's current objectives underlying its regulation of marriage, there is no justification for maintaining the current distinctions between same-sex and heterosexual unions; and that while a registration scheme might serve to recognize the diversity of relationships, it should not be seen as a policy alternative to reforming marriage (2001, 130).

1. It is discriminatory to reserve marriage only for heterosexual couples and exclude lesbians and other same sex couples

Historically, marriage laws have been shaped and deeply influenced by medieval Christian theology and canon law, which once buttressed the exclusive jurisdiction of the Church over this 'sacrament'. Such features have formed our understanding of how marriage has been traditionally construed as a sacred, "indissoluble" union between a man and a woman. This approach to marriage has commanded the silence and obedience of women to men. Whatever its objectives and however its influence in the past, for the purpose of the state's role in regulating marriage, it is no longer in keeping with the lived reality of personal relationships and it is inconsistent with egalitarian values that Canadians have increasingly embraced.

Since the state assumed jurisdiction over marriage in the late 18th century, we have consistently witnessed profound changes to its regulation, as is evidenced by the state's current objectives of providing a more equitable distribution of benefits, protections and legal obligations during *and* after a marital relation breaks down, and its general interest in a providing a framework to assist in organizing the private affairs of married persons. These changes have been influenced by social values increasingly open to cultural and religious diversity, just as they have been of the principles of women's equality and of the universality of human rights and the freedom to make fundamental choices about our adult personal relationships. While many of our laws regulating personal relationships have been changed to bring them in line with such principles of equality and freedom of choice (as we see, for example, with the *Modernization of Benefits and Obligations Act* of 1999), the laws that restrict marriage to heterosexual couples rely on archaic stereotypes and social prejudice, and they remain explicitly discriminatory.

It is NAWL's contention that the prohibition against same-sex marriage is direct, formal and explicit discrimination against lesbians and gays that is not permissible under our current constitutional framework. Indeed, section 15 of the *Canadian Charter of Rights and Freedoms* provides that "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination".

While section 15 of the *Charter* does not explicitly prohibit discrimination on the basis of sexual orientation, the Supreme Court of Canada has recognized in the *Egan and Nesbitt* case, that lesbians and gay men are an "analogous" group, and they have a right to be protected by the constitutional equality rights provisions of the *Charter*. Furthermore, in the *Vriend* case, the Supreme Court ruled that it was contrary to section 15 of the *Charter* to exclude gays and lesbians from the protection of Alberta's human rights legislation; the court stressed the fact that this legislation was demeaning and harmful, because it sent the message that gays and lesbians are less worthy of human rights protection and that "the potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination". And more recently, in *M. v. H.*, the Supreme Court of Canada held that a provision of Ontario's *Family Law Act* that excluded same-sex couples from spousal support entitlements that were available to common law spouses was discriminatory because it exacerbated their pre-existing disadvantage, failed to take into account their actual situation and contributed to the erasure of their existence.

It is NAWL's contention that excluding lesbians and other same-sex partners will be judged by the Supreme Court to be discriminatory, for the very same reasons. Indeed, three courts of first instance in B.C., Ontario and Québec have already come to the conclusion that the exclusion of same-sex couples from marriage violates section 15 of the *Charter*. While the B.C. court found that this discrimination is justifiable under section 1 of the *Charter*, the Québec and Ontario courts concluded that it was not. Justice Laforme of the Ontario court wrote:

> [T]he denial of equal marriage can—and no doubt does—reflect and reinforce existing, inaccurate understanding of the merits, capabilities and worth of lesbian and gay relationships within Canadian society....Excluding gays and lesbians from marriage disregards the needs, capacities, and circumstances of same-sex spouses and their children. It declares an entire class of persons unworthy of the recognition and support of the state sanction for their marriages. (p. 204).

The prohibition against same-sex marriage compounds the pre-existing disadvantage of gays and lesbians by withholding benefits and conveying the message that same-sex relationships are less worthy of recognition and protection. In addition, the

prohibition of same-sex marriage does not take into consideration the actual situation of many lesbian couples, who do have and raise children together, form committed relationships of economic interdependence, and to all intents and purposes are "married" couples. Many women in that situation would like to have the security and the benefits of marriage (however allusive they may prove to be in the future). Marriage is especially important for women who have children, because it ensures that they, and their children, will have some security in their family home and assets.

The prohibition against same-sex marriage also deprives lesbians of the very real benefits that only marriage will automatically confer, such as an equal share in matrimonial property and all acquired assets, a share in health and other private and public benefits, enjoyment of the family residence, succession rights in case of death, domestic and international recognition of the conjugal unit across all jurisdictions. To the extent that there are any social benefits attached to marriage, and they are regulated by the state, constitutional obligations now requires that they be provided equally to both heterosexual and same-sex couples.

In addition to receiving benefits or protections, there are many other reasons why individuals choose to marry, and this holds true for heterosexual and same-sex couples alike. For some, marriage may serve a symbolic function; it may simply be about publicly affirming one's love; or it may be to celebrate and bring together different families and social groups. Whatever the reason for this socially significant and symbolic choice, the recognition of basic human dignity and equality of rights for all individuals demands that it be a choice available to same sex couples as well. Since marriage continues to be, to many, an important practice or ritual validating their most intimate choice of lifelong commitment towards another person, and since marriage continues to provide a wealth of tangible and intangible benefits that have a direct impact on the psychological, social and economic well-being of so many persons, it is NAWL's contention that as long as the institution of marriage is in the realm of public law and state control, the right to marry should be extended to same-sex couples. The denial of such benefits to lesbians, bisexual and transgender women, and their exclusion from such choices confers a second-class status to their relationships, and it perpetuates the view that they are less worthy of protection.

2. Not justifiable in a free and democratic society

The *Charter* provides that equality rights must be guaranteed to all persons living in Canada, and that any restrictions to those rights are only permissible when they can be justified in a free and democratic society. It is NAWL's contention that the prohibition against same sex marriage is not justifiable in a free and democratic society.

The discriminatory distinction is not saved by s. 1 of the *Charter* because the objective of fostering only opposite-sex relationships is a discriminatory objective. Indeed, the objective of fostering heterosexual marriages to the exclusion of same-sex marriages is a reflection of heterosexist values inherited from religious dogma and patriarchal laws. It is the expression of social prejudice and hatred, and serves no other purpose than excluding those members of society who are deemed to be "deviant" from the dominant heterosexual model. Such a prohibition is out of step with the evolution of Canadian society: it is a sociological fact that in the 21st century, families are diverse, parenting patterns are different and that the responsibility of having children and caring for them is no longer the preserve of heterosexual couples. Lesbians do form long lasting relations of interdependence and family kinship, relations that in every regard are functionally similar to marriage. Such relationships must be recognized and the law must be modernized accordingly if Canada is to be a truly democratic society.

In addition, the right to marriage has been recognized, at home and abroad, as a fundamental human right. Prohibiting same-sex marriage is not only discriminatory, it violates the most basic of human rights: human liberty and freedom. It has long been recognized by the Supreme Court that the right to "life, liberty and security of the person" guaranteed in section 7 of the *Charter* "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives", that is "inextricably tied to the concept of human dignity" and the "ability to pursue one's own conception of a full and rewarding life" (Justice Wilson, in *Morgentaler No 2*). To deprive lesbians of the right to marry, is to deprive them of a right which is a basic aspect of full membership –indeed of effective citizenship– in society.

The claim that marriage has always been, and should be, reserved for heterosexual partners is no justification for such a serious violation of equality rights and human rights. The effects of the prohibition are clearly disproportionate to any benefits that may be derived, if any, from the rule.

3. Other options are not acceptable

One of the proposed alternatives to lifting the ban on same-sex marriage is the development of Registered Domestic Partnerships (RDPs). It is NAWL's contention that RDPs are not a suitable substitute for marriage. A first and important problem is that, given the constitutional division of powers, a domestic partnership regime will never be equal to marriage. In the absence of co-operative federal legislative reform, registered domestic partners will have only those rights that a province is capable of conferring within its areas of jurisdiction.

More importantly, RDPs consistently confer fewer rights than marriage and usually require that the couple cohabit in order to register. RDPs clearly would not have the same social status as marriage, and they would do little to move toward equal recognition of same-sex couples. As long as opposite-sex couples could have the option of marriage and/or a domestic partnership, and same-sex couples would only have the latter, the RDP scheme simply reinforces a second-class status for same-sex couples.

In *Moore v. Canada*, the Canadian Human Rights Tribunal and, subsequently, the Federal Court found that certain government departments discriminated when instead of including same-sex partners within the definition of common law spouse, they created a new category of "same-sex partner". Justice MacKay concluded that such distinctions are reminiscent of the "separate but equal" doctrine used to justify racist policies in the U.S., and that even if in practical terms such legislative distinctions may not give rise to substantive distinctions, they may reaffirm pre-existing discriminatory notions, and, on this basis, be themselves discriminatory. This decision supports the view that including same-sex couples in a domestic partnership regime, which provides all of the benefits associated with marriage, while excluding them from marriage is indeed discriminatory. Given the importance of

marriage in our society, in the absence of the right to marry, the RDP scheme sends the message that same-sex relationships are less worthy than opposite-sex relationships.

Another option that was proposed is the elimination of marriage altogether, and indeed the Law Commission of Canada has introduced a very interesting discussion of this question. However, we do not believe that Canadian society and the federal government are seriously considering this option. To use this arguments as a reason to deny same-sex marriage would be disingenuous, at best, and would lead many to believe that this option is raised exactly to counter the legitimate claims brought forward by lesbians, gays and other same-sex partners.

Conclusion

In almost three decades of work as a feminist, equality-seeking organization, NAWL has been critical of the extent to which the institution and regulation of marriage has been implicated in structures of gender inequality. We have recognized that, historically, marriage has been used to reinforce women's social and economic subordination to, and dependence on, men. In the past, its rules and regulations have facilitated the appropriation and devaluation of women's work, and the denial of women's rights to independent earnings, to property, and to custody of her children. And even as recently as 1969, for example, married women in Québec were considered legally "incapable" and the husband was the "chef de famille" who had the exclusive power to administer all matrimonial assets. In addition, up until 1985, marriage has been used to further the colonialist and racist policies of the Canadian state, by disenfranchising Indian women who married white men, and excluding them from their Aboriginal heritage. The discrimination and inequality that were engendered by these policies have severe impacts that are ongoing and create untold hardship for women and their children to this very day. Such inequalities have been reflected in, and exacerbated by, the ongoing gendered division of labor in the family, the systemic sexual and racial discrimination in the labour market, the cuts to social security programs and the increasing trend in favor of privatization, which still result in the "feminization" of poverty and the ongoing inequality of women.

Even though marriage has been infused with archaic ideologies and social prejudices regarding sex roles and behaviors, over the years we have seen substantial changes, both in

the courts and before provincial and federal legislatures, which have brought reform to family law and that have gradually introduce egalitarian principles. NAWL applauds those developments that are in keeping with Constitutional equality guarantees and that aim to prevent the imposition of disadvantage and to promote a society in which all persons enjoy equality recognition at law as human beings or as full participants in Canadian society, equally deserving of concern and respect.

At the dawn of the 21st century, it is imperative that this movement toward women's equality in the family and in society not be blocked by discriminatory legislation and policies. It is imperative that the Canadian government recognize the rights and the dignity interests of lesbians, bi-sexual women and transgendered women, and that it remove all legal barriers to their equality. A just, fair and equal society is one which respects the dignity and the human rights of lesbians, and that fully recognizes their right to marry the person of their choice. Nothing short of this will suffice. We count on you to be the advocates for justice and human rights, and to recommend that the government effectively protect and promote the equality rights of *all* Canadians.