File No. 29866

IN THE SUPREME COURT OF CANADA

In the Matter of a Reference by the Governor in Council 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 July 16, 2003

FACTUM ON BEHALF OF THE INTERVENOR WORKING GROUP ON CIVIL UNIONS

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PART I– STATEMENT OF FACTS

1. This Intervenor, the Working Group on Civil Unions makes no submissions as to the facts.

PART II– POINTS IN ISSUE

2. This Intervenor confines its submissions to the Court's answers to the requests in Questions 1 and 4 for particulars of the ways in which the present or proposed law offend the Charter of Rights and Freedoms. The Working Group will submit that the Court in its opinion should state that a civil union registration structure would be consistent with the Canadian Charter of Rights and Freedoms.

PART III– ARGUMENT

3. The Working Group on Civil Unions submits that a civil union regime in which government provides for lawful recognition of domestic relationships between any two persons would be consistent with the Canadian Charter of Rights and Freedoms. Indeed, it is submitted that a civil union structure is the only impartial and neutral answer to the various concerns of inequality arising from the restrictions under the common law and statutory definitions of marriage to a union between persons of the opposite sex. As noted by Chief Justice Rinfret long ago, the Constitution is not the property of any government, but of all Canadians. Given that one purpose of a Reference is to guide legislators, the Working Group submits that all constitutional means of addressing claims around marriage be expressly considered by this Court in its answers to the Reference questions.

A.G. for N.S. v. A.G. Canada [1951] S.C.R. 31 at 34-35

4. In this Reference, the parties and intervenors are contending over what should be the common law and statutory definitions for marriage. Each side of the marriage debate assumes that a statutory marriage regime defined as a union between any two persons to the exclusion of all others would itself be constitutional and consistent with the goals and objectives of the common law in Canada today.

5. If it is unconstitutional and discriminatory to exclude relationships between persons of the same sex from lawful marriage, then it may well be said to be unconstitutional for the law to continue to recognize marriage as an institution carrying lawful rights and obligations. If the common law of marriage must now be changed to suit a pluralistic society and modern social circumstances, then the very notion that government should confer the status of marriage upon two individuals must be questioned.

6. By its very character, a legal institution of marriage discriminates against persons who may have intimate and meaningful relationships, but choose not to be married. The recognition of civil marriage as including same-sex relationships includes some relationships previously excluded, but at the cost of declaring other domestic notions of marriage to be discriminatory and

less deserving of acceptance. The risk of simply reforming marriage either judicially or by legislation is that it transforms the institution as one which excludes some relationships into one which purports to include persons who reject its new definition. In this sense, the change is only facially neutral. By maintaining government's involvement in the institution of marriage, it continues to lend its support and aid to a particular view of a contested social relationship.

7. Indeed, the history of marriage with its varying conditions for entry into marriage and varying conditions for divorce is blanketed with interwoven faith and cultural questions. Except for those countries adopting civil union structures, the questions of who may marry and who may divorce have been questions addressed in a complex way by both the particular society's religious representatives and variously recognized or dissented from by governments. Indeed, it is remarkable that federal law has prior to the statute under consideration never addressed the common law capacity to enter marriage under Parliament's authority under s. 91(26) of the *Constitution Act*, 1867.

> *Constitution Act, 1867*, s. 91(24)

8. This court recently recognized the respect for choice in relation to marriage in *A.G. of Nova Scotia v. Walsh & Bona*. In that case, this court concluded that s. 15 of the Charter did not require the provisions of the *Matrimonial Property Act* relating to the division of matrimonial property to apply to unmarried couples. Justice Bastarache said:

> Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount...
>
> ...
>
> the requirement of consensus... enhances rather than diminishes respect for autonomy and self determination...
>
> *A.G. of Nova Scotia v. Walsh & Bona*, [2002] 4 SCR 325, at paras. 43 & 50

He added that:

> One of those essential [Charter] values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices in regards to one's life.
>
> *A.G. of Nova Scotia v. Walsh & Bona*, supra, at para. 63
> *Matrimonial Property Act* [RSNS 1989], c. 275, s. 2(g)

9. Nevertheless, at least two cultural changes have created tensions within the lawful recognition of marriage that must be recognized as having dimensions that go far beyond the same-sex debate. Public justice for all should concern the public incidents of private relationships and should legally recognise that all people have the constitutional right to live in different ways and to have those ways respected by the law and government.

10. The first cultural change is the development of diverse faith communities within Canada as distinct from interdenominational communities. Prior to recent times, the law and culture had to deal with different principles of marriage and divorce in largely Judeo-Christian faith traditions. Nevertheless, the commonalities as to who might or might not be married outweighed any differences until recently.

11. In Canadian society today you find not just aboriginal, but also faith communities drawn from around the world with concepts of marriage that embrace different marital models, including polygamous marriage. Although a small minority here, a large portion of the world follows Islam, which in both theology and practise affirms the validity of polygamous marriages. Indeed, aboriginal spirituality in this and other countries often structures intimate relationships in ways that would not fall within the proposed definition. In the context of international practice and respect for the real diversity of religious beliefs of other communities the lawful restriction of marriage to monogamous unions must surely be at least as discriminatory as the restriction of marriage to opposite sex relationships. The oft-quoted 19th century definition of marriage from *Hyde v. Hyde* is from a case which concluded that remedies of English matrimonial law would not extend to a polygamous marriage, however valid in accordance with the Mormon Church belief and practice of the time.

> *Hyde v. Hyde & Woodmansee* (1866), L.R. 1 P&D 130

12. The second, and more general tension is that created by the growing portion of the Canadian population who choose to arrange their domestic relationships entirely outside of the institution of marriage.

13. The trend to greater choice is obvious within and without faith communities. At one time, the notion of composing one's own marital vows would have been contradictory: the choice to marry involved accepting the vows accepted by every married person within the faith community. A civil registration system would permit the free exercise of choice by both individuals and communities without legal impediment or favour.

14. The recent jurisprudence commencing with *Egan v. Canada* concerned claims of discrimination relating to benefits where Parliament or the legislature had mandated rights or imposed obligations on people who had not married but were living in circumstances of mutual dependence. Although the term "common law spouse" was misappropriated for this purpose there can be no doubt that statute law has been in the process of recognizing a very real thing. People are now in relationships which in all justice require the imposition of rights and obligations relating to dependent persons, domestic property and children outside of marriage. Indeed, the social reality is that most of these relationships are relationships where the parties have declined to be married and the law has imposed quasi-marital obligations upon them so as to achieve substantive equality in the rights and obligations of persons similarly situated. It should be recalled that the principal defence in this court in *M v. H* was that the two women had a relationship which did not have the power imbalance inherent in opposite-sex relations because both were women. This was rejected as not being true to the circumstances of all same-sex couples. Inherent in the statutory trend is the recognition that persons similarly situated should not be deprived of the benefits of statutory benefit schemes purely because they lack the lawful status of husband or wife. By far the greatest portion of these people are in opposite sex relationships and not gay, lesbian or in some other domestic arrangement. The balance of obligations freely assumed but legally recognised, and those imposed by law irrespective of choice on the basis of need and justice may be made neutrally through the creation of a civil registry for domestic unions.

Egan v. Canada, [1995] 2 S.C.R. 513
M. v. H., [1999] 2 S.C.R. 3, at para.'s 101-132.

15. A much earlier reaction against a religiously supervised institution of marriage arose out of the French revolution. With the development of civil unions and the spread of the Code Civil, a lawful regime for civil unions separate and apart from arrangements blessed by any church came into being and is currently the legal structure in many countries of the world.

16. A reformed civil marriage structure that is defined as a "union between any two persons to the exclusion of all others" adopts only part of the structure of marriage accepted by most of the world's cultures and faiths heretofore, but does so by incorporating all within the new and expanded version. Interestingly, it continues to impose the notion of "union", with all its religious overtones as well as monogamy. Given the desire of some to be rid of the Judeo-Christian rejection of same-sex relationships why should the legislature retain parts of that tradition to the exclusion of those who disagree in whole or part with the notions of "union" and monogamy? Furthermore, it is idle to think that everyone will treat this new legal recognition of "marriage" as more accommodating than the last. To the degree it represents an invalid view of marital relationships for some it will be rejected by those who disagree with the statutory definition. Instead of ushering in peace over this controversy, this Court will have declared a victory for one conception of intimate relationships over those who hold a contrary view. In the interests of avoiding discrimination, this Court will have sanctioned a different form of discrimination embodied in an altered legal form of marriage.

17. A civil union structure has compelling advantages relating to the remedial concern for substantive equality:

(a) by separating the religious recognition of a relationship from the governmental, the law would pay regard to that which it ought: namely, the needs of the vulnerable, the necessities and equities of domestic property and the best interests of children.

(b) religious communities as well as all people of conscience are entitled to order their affairs independently of civil unions and people may choose to participate or not in those separate institutions without fear of favour or prejudice being embodied within the law itself. If this Court concludes that the question of the nature and extent of marriage is a matter for the Charter or the Court as the

interpreter of the common law, then surely any change made by the Court must be consistent with "freedom of conscience and religion".

Charter of Rights of Freedoms, s. 2(a)

(c) the statutory claims of children and those respecting domestic property already properly extend beyond the bounds of traditional monogamy. Under statutory support regimes more than one father may have support obligations for a child. Similarly, as a consequence of divorce or serial relationships more than one spouse may have claims against one person's property both on equitable grounds and for the purpose of spousal or child support.

(d) a civil union structure would permit the development of laws that would protect and support the vulnerable and children outside sexually intimate relationships.

18. In the lower Courts the fundamental claims advanced in the same-sex marriage litigation were for the social acceptance and affirmation that may come through lawful recognition of one's intimate relationships As none of the same-sex marriage cases concerned challenges to benefits or obligations imposed by law, (except as by legal recognition) and as this Court recently affirmed the ability of Parliament to distinguish between married and unmarried persons for some purposes this leaves open the question as to how Parliament must accept and affirm intimate relationships.

EGALE Canada Inc. v. Canada 2003 BCCA 251; 2003 BCCA 406
(additional reasons)

19. A civil union structure would permit people choosing to accept the obligations or rights of that civil institution to do so. It may be that the legal incidents of a civil union will differ materially from informal relationships. By avoiding entirely the category of marriage, Parliament would leave both faith communities and other communities to define the non-legal incidents of marriage for themselves. The social acceptance which flows from freely accepting rights and obligations to another person would be available to all on a basis that would be neutral to their own conceptions of marriage.

20. In its recent Report, *Beyond Conjugality*, the Law Commission of Canada noted the advantage of a registration model in these terms:

> Governments... should...provide Canadians with appropriate tools to define for themselves the terms of their relationships.
>
> It is in that context that governments should look at a system that would affirm the capacity of people to establish for themselves the terms of their relationships while providing models for doing so. Registration models would serve that purpose.
>
> ...
>
> *A registration scheme could play an important role in broadening the range of options available for people (conjugal and non-conjugal alike) to voluntarily assume rights and responsibilities.* The ability to formalize a relationship through a public declaration of commitment is important to Canadians. A registration scheme provides a way in which individuals in close personal relationships can choose to make such a public declaration of commitment, which would then be respected by government.
>
> *A registration system may also promote the values of equality and autonomy within relationships without compromising the value of privacy.* The ascription model ["common-law marriage"] described above, if it were to use more functional definitions, would require that governments examine individual relationships to decide whether they fit the definition. It is an approach that necessarily involves some degree of invasion of privacy. A registration scheme, on the other hand, by leaving the choice entirely up to the individuals within relationships and then respecting that choice, provides a way of recognizing conjugal and non-conjugal relationships without compromising the values of autonomy and privacy. *Within a registration scheme there would be no uncertainty about the legal status of the close personal relationship and no reason for the government to subject the relationship to scrutiny.*
>
> Law Commission of Canada, *Beyond Conjugality, Recognizing and supporting close personal adult relationships, Law Commission of Canada* (Ottawa: Minister of Public Works and Government Services, 2001), pp. 116-118 [emphasis added]

21. The Law Commission correctly recognises the conflict that exists between diverse conceptions of marriage in a pluralistic society. Even religious conceptions of marriage are very diverse. However, the disagreements which arise from differing conceptions of marriage will not be erased by giving legal effect to a definition which is same-sex inclusive. Indeed, in the context of society at large this proposal is partial as between those contested viewpoints.

22. In conclusion, this Court should, if it determines that the present law of marriage is either discriminatory or has failed to keep in contact with the realities of contemporary Canadian life, plainly state that a civil union structure is a constitutionally available answer to the present controversy and one that would provide true substantive equality under the law for all Canadians in relation to their domestic arrangements and intimate relationships.

PART IV– NATURE OF ORDER SOUGHT

23. In this Court's answers to the Reference questions, and in particular to question 4, this Court should state that a civil union regime would be neutral and be consistent with the Charter's goals and objectives for substantive equality in the law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

D. Geoffrey Cowper, Q.C.

Dated: May 11, 2004

PART I - LIST OF AUTHORITIES