

**Submission of  
West Coast Legal Education and Action Fund**

**To the  
House of Standing Committee on Justice and Human Rights**

**In response to  
“Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper”**

This submission is in response to “Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper” presented by the House of Commons Standing Committee on Justice and Human Rights in November of 2002.

West Coast LEAF Association (“WCLEAF”) is the British Columbia branch of the national Women’s Legal Education and Action Fund (“LEAF”). West Coast LEAF is a charitable, non-profit society that was founded in 1987 to secure equal rights for British Columbian and Canadian women as guaranteed by the *Canadian Charter of Rights and Freedoms* (the “Charter”). To this end, LEAF and West Coast LEAF engage in litigation, equality research, law reform and public legal education. Through such endeavors, the organization has developed particular expertise with respect to the interaction between equality among persons and laws having a particular impact on women. This submission represents the views of West Coast LEAF.

The issue before this committee is whether or not the federal government should recognize same-sex marriages. West Coast LEAF submits that the law answers this question succinctly. The answer in law is in the affirmative: the federal government, and provincial governments, must provide same-sex couples with the same opportunity and right to marry as is enjoyed by heterosexual couples. Section 15 of the *Charter of Rights and Freedoms* mandates it. As long as there are legal and social benefits attached to marriage, there is an obligation in law to ensure that those benefits are available to both opposite sex and same-sex

couples. Notwithstanding arguments about section 15, the government must recognize same sex marriages because it affirms and upholds the Canadian values of democracy, cultural diversity and justice.

In addition, this issue raises other questions that West Coast LEAF hopes the government will commit itself to exploring in the future. Some of these questions are: the impact of the recent case of *Nova Scotia v. Walsh* [2002 SCC 83] and distinctions between marriage and common law relationships; the series of cases regarding the 'spouse in the house' rules and the government's assumptions about relationships and dependencies; the areas of vulnerability that traditional heterosexual marriage has created for women and children in the past; and, the importance of defining the freedom of religious, minority and marginalized people to self-define their political and social values. We will touch on these questions briefly below.

## **1. The Legal Obligation to Include Same-Sex Couples**

In response to the suggestions raised in the discussion paper, West Coast LEAF submits that the law in Canada requires same-sex couples be given the legal right to marry.

- A. Provincial family law legislation cannot discriminate against same-sex couples by excluding them: *M. v. H.* [1999] 2 S.C.R. 3
- B. The Charter creates an obligation on the government to take special measures to ensure a disadvantaged group is able to equally access the benefits the majority enjoy: *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624
- C. Government inaction is subject to scrutiny under Section 15 of the Charter: *Vriend v. Alberta*, [1998] 1 S.C.R. 493

- D. Section 15 requires lawmakers to determine whether a reasonable person in would find that the legislation which imposes the differential treatment has the effect of demeaning the dignity of same-sex couples, having regard to the individual's or group's traits, history, and circumstances: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
- E. There remain very clear rights and protections for heterosexual couples when they exercise their ability to choose legal marriage that same-sex couples do not have. Provincial rules about the division of property on the dissolution of marriage do not have to be extended to common law couples according to the recent case of *Walsh v. Bona*, because “they are free to marry anytime”. *Nova Scotia (Attorney General) v Walsh* [2002] S.C.J. No. 84

In the recent case of *Gosselin v. the Attorney General of Quebec*, Chief Justice Beverly MacLachlin speaking for the majority said this:

*Section 15's purpose of protecting equal membership and full participation in Canadian society runs like a leitmotif through our s. 15 jurisprudence. Corbiere addressed the participation of off-reserve Aboriginal band members in band governance. Eaton and Eldridge spoke of the harms of excluding disabled individuals from the larger society: Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624. Vriend dealt with a legislature's exclusion of the ground of sexual orientation from a human rights statute protecting individuals from discrimination based on a range of other grounds: Vriend v. Alberta, [1998] 1 S.C.R. 493. Granovsky resonated with the language of belonging: "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself": Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 30.*

Belonging and being accepted as worthy members of Canadian society is a central reason for recognizing same-sex marriages in the law. State recognition of same-sex domestic unions is important to ensure economic benefits are

available to everyone, but equally important because it is essential to the dignity and sense of personhood of those couples and their children. The exclusion created by the unjustified prohibition against same-sex marriage goes beyond the individuals who want to marry and extends to any children they are raising and extended family members they care for. The government is required by the values articulated in our *Charter of Rights and Freedoms* to recognize in law the existence of family units created by the relationship of two intimate partners of the same sex. In our respectful submission, there is no legally defensible reason to continue their exclusion from the economic, legal and social benefits of marriage, nor is there any valid political or social reason for such discriminatory exclusion.

West Coast LEAF submits that differential treatment of same sex couples under federal laws governing marriage is discriminatory because it treats some families as being undeserving of the respect, consideration, and social and economic benefits other families in Canada enjoy, solely on the basis that these families are headed by partners of the same sex.

West Coast LEAF also submits that the creation of a “new registry that would be deemed equivalent to marriage for the purposes of laws and programs” would not meet the obligations under the *Charter of Rights and Freedoms* to recognize same-sex marriage in the law. This would only be sufficient if the registration of marriage was required by all couples that wished to be recognized in law as a family unit. Put another way, to eliminate the language of ‘marriage’ and create a civil covenant or registry would meet the government’s obligations to treat its citizen’s equally only if everyone were subject to it. To maintain two “equal but separate” legal structures for couples – allowing only heterosexual couples to choose marriage – would simply perpetuate and formalize the differential treatment.

Further, the suggestion that the federal government ‘get out of the business of marriage’ does not address its obligation to confer the benefits of its programs equally to same-sex couples. Removing the federal government’s authority over marriage would open the way for religious groups to have the ability to determine who can marry and, thereby, who is entitled to the benefits of marriage. As long as there are legal rights or benefits attached to the status of being married, the federal government cannot delegate its responsibility to non-elected bodies that can become the sole determinants of who should have those legal rights and benefits. Furthermore, the dissolution of marriage will remain an important area of legal obligations and entitlements, one that cannot be delegated to the provinces without amending our Constitution. In fact, West Coast LEAF takes this opportunity to urge the federal government to take more responsibility for the dissolution of marriage by ensuring adequate legal aid is available in family law matters.

## **2. The Institution of Marriage and its Place in Society**

This brings us to the other questions that are raised by this issue, questions that West Coast LEAF would like to raise in this submission, but which require fuller exploration and broader consultation. These questions cannot be resolved in this forum, and their resolution will not alter the need for government to recognize same-sex marriage. We share them here in an effort to highlight the needs of women any time a discussion of marriage is raised.

A. Traditional heterosexual marriage has been the source of women’s vulnerability for many centuries, particularly in the role it has played in enforcing women’s economic inequality, allowing women’s victimization by domestic violence, and the devaluing of the important work of care-giving. It has been used to control racial minorities and – in cultures around the world – as a way to control wealth, transfer property, ensure paternal lineage, and

manage the care of children and the infirm. The growth of common law relationships has emerged in the past century in response to the very unequal nature of traditional heterosexual marriage. Allowing lesbians and transgendered women to choose their partners without fear of invisibility or economic loss is an important way to change these inequalities.

- B. The decision in *Nova Scotia v. Walsh* (Ibid.) raises some very interesting questions about the distinctions between common law and married legal states. While the protections afforded to vulnerable common law couples by acknowledging their relationships are important, the automatic assumption of the government that two individuals living together in a conjugal relationship will be treated as the equivalent of a married couple is perceived as burdensome to some and coercive to others. For the government to demand that a certain woman complete her taxes as a married person when she and her partner have never made that kind of commitment gives the State an inappropriate role in the bedrooms of the nation. Government should not be making assumptions about people's relationships. (see *Falkiner et al v. The Queen*, Ont CA).
- C. The concern of religious institutions that recognizing same-sex marriages will force churches, synagogues and temples to marry same-sex couples must be considered separately. The issue of how and when religious groups, minorities and marginalized people are allowed to exclude other members of society is another question that requires serious consideration by the public and the lawmakers of Canada. But this question cannot be used to delay what is a current legal and moral imperative: the right of Canadians, regardless of sexual orientation, to choose to marry under Canadian law.

Ultimately, West Coast LEAF submits that the institution of marriage has benefits attached to it that must be equally available to all Canadians. In the discussion of these benefits, West Coast LEAF urges the government to address the

vulnerabilities experienced by women when traditional heterosexual marriage is held up as the only valid model for family relationships. There is some urgency to this, particularly here in B.C., in the face of massive cuts to social programs and legal aid. It is this urgency that prompts West Coast LEAF to include comment about them in our submission to you today.

The inequities for women created by traditional heterosexual marriage can be addressed in part by including same sex partners in the institution because then women would be free to choose their spouses without fear of losing the legal, economic and social benefits marriage brings for themselves and their children. By accepting and recognizing same-sex marriage the values of the institution will be affirmed as the celebration and commitment of two independent people choosing to form a long-term family relationship.

To preserve marriage as a social and legal institution in Canada, we recommend Parliament address not only the rights of same-sex couples to marry, but also the more general inequities created by the traditional heterosexual marriage. West Coast LEAF recommends:

1. that the federal government commit to the implementation a fully-funded, universal day-care system, and actively support the funding of other services and programs that support the raising of children in our diverse communities;
2. that the federal government fund and, where appropriate, insist that the provinces fund adequate family law services and legal aid to ensure women and children are able to assert their rights upon marriage breakdown;
3. that all governments in Canada implement the recommendations of the U.N Committee for the Elimination of Discrimination Against Women;
4. that all provincial and territorial governments that have not yet done so pass legislation recognizing the right of same-sex partners to adopt children;

5. that the federal and provincial governments cooperate to ensure that women victimized by domestic violence receive the services and support they need; and,
6. that federal and provincial governments recognize the dignity of same-sex couples by providing them with the legal right to marry and to register those marriages in the same ways that heterosexual couples marry and register their marriages.

Respectfully submitted, this 1<sup>st</sup> Day of April, 2003

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Alison Brewin, Program Director  
West Coast Legal Education and Action Fund.