

**RESPONSE TO THE DEPARTMENT OF JUSTICE CANADA  
DISCUSSION PAPER**

**“Marriage and Legal Recognition of Same-sex Unions”**

**A STUDENT PERSPECTIVE**

**FOR PRESENTATION TO THE HOUSE OF COMMONS  
STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS**

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**PRESENTED BY**

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[1] University tuition fees are on the rise. “From 1990/91 to 2000/01, average undergraduate fees rose 135.4%, more than six times faster than the 20.6% increase in inflation as measured by the Consumer Price Index.”<sup>1</sup> Tuition fees for graduate programmes are rising more rapidly than undergraduate fees. Students in professional programmes pay the highest tuition of all.<sup>2</sup>

[2] Rising tuition carries serious consequences. “Students from low and middle income families are already less than half as likely as other Canadians to access post secondary education, and increased tuition fees are widening that gap.”<sup>3</sup> Low accessibility to higher education affects the growth and development of human capital.<sup>4</sup> From a national perspective, an impact upon human capital growth consequentially impacts the future development and role of Canada in a knowledge-based society.<sup>5</sup>

[3] In a social-welfare state such as Canada, there are never enough financial resources to completely fund all activities and initiatives that better the social fabric. As such, government must act responsibly in their allocation. When government acts irresponsibly, the lives of Canadians and the future of the country are adversely affected.

[4] In order for a responsible allocation to occur, it is necessary that government adhere to the requirements set forth in the Constitution<sup>6</sup> and the *Canadian Charter of Rights and Freedoms*.<sup>7</sup> Government must also do so in accordance with the constitutional principles of democracy and the separation of powers.

[5] With respect to controversial issues, Parliament and the Canadian government have not proactively adhered to the requirements of the Constitution and the *Charter*. Cloaked by a mask of legal arguments, complex and multi-faceted issues have been consistently diverted to the Courts. Examples of Parliamentary and government inaction include the approach to abortion,<sup>8</sup> Aboriginal rights<sup>9</sup> and the potential secession of Québec.<sup>10</sup> Such issues involve much broader “moral and political considerations which [are] not within the province of the courts to assess.”<sup>11</sup> The Courts are an inadequate venue for the effective determination of politically controversial issues.

[6] The consequences of such inaction are twofold. First, this approach acts as a threat to democracy and the separation of powers; appointed judges are required to make decisions best left for the elected bodies of the nation. Second, there are drastic legal costs associated with the litigation of such issues through the Canadian court system. This manner of financial allocation is irresponsible because its purpose does not adhere to the requirements of the Constitution and the *Charter* in a manner that respects the principles of democracy and the separation of powers.

[7] The question of same-sex marriage is controversial. It also has “many aspects – social, religious, emotional and financial, among others.”<sup>12</sup> It is imperative that Parliament proactively respond in the manner that most clearly and conclusively adheres to the requirements of the Constitution and the *Charter* in accordance with the principles of democracy and the separation of powers. In doing so, the Canadian government can more responsibly allocate funds to activities and initiatives that better the social fabric. This carries the potential for increased funding by the federal government for post-secondary education. As a result, this will have a positive impact upon the development and growth of human capital in Canada.

[8] It is within this framework that the three approaches put forth by the Department of Justice Canada on the question of same-sex marriage shall be assessed.

**Marriage could remain an opposite-sex institution**<sup>13</sup>

[9] Under this approach, Parliament would enact legislation that explicitly defines marriage as the “union of one man and one woman.”<sup>14</sup> To address equality concerns, Parliament “could enact a new federal statute creating a new registry that would be deemed equivalent to marriage for the purposes of federal laws and programs.”<sup>15</sup>

[10] From a constitutional ‘division of powers’ perspective, this approach raises a valid question of legislative authority. Parliament has exclusive authority to legislate on matters of “Marriage and Divorce.”<sup>16</sup> The provincial legislatures have exclusive authority to legislate on “The Solemnization of Marriage in the Province”<sup>17</sup> and “Property and Civil Rights in the Province.”<sup>18</sup> A federal registry deemed equivalent to marriage is not marriage. It is unclear

whether Parliament can validly enact such legislation under section 91(26). It is also unclear whether the provinces have authority over such legislation under section 92(12) or (13). There is a strong potential for litigation when a valid question of constitutional authority is raised. Should any province disagree with the legislative response by Parliament, this question would be pursued through the court system. Given the apprehension of Alberta to recognise sexual orientation in their provincial human rights legislation,<sup>19</sup> it is likely that Alberta would launch a constitutional challenge against the federal registry legislation. This likelihood is strengthened by Alberta's recent use of the section 33 *Charter* notwithstanding clause in their *Marriage Act*.<sup>20</sup>

[11] From a *Charter* perspective, it is debateable whether this approach adheres to the equality demands of section 15. Access to a federal registry system is not access to marriage. "It would not be viewed by all as fully addressing equality concerns under s. 15 of the Charter, and so it would likely be challenged under the Charter as discriminatory."<sup>21</sup> Though such equality concerns could be avoided if Parliament uses the section 33 *Charter* notwithstanding clause, this clause requires that "the issue ... be debated against in five years' time."<sup>22</sup>

[12] This approach carries a strong potential for future litigation on valid questions of constitutional authority and accordance with the *Charter*. Even if Parliament relies upon section 33 of the *Charter*, this approach will not conclusively settle the issue of same-sex marriage. Subject to the absence of a more financially responsible alternative, this approach should be avoided.

**Marriage could be changed to also include same-sex couples**<sup>23</sup>

[13] Under this approach, Parliament would "choose to legislate to change marriage to give same-sex couples the legal capacity to marry."<sup>24</sup>

[14] From a constitutional 'division of powers' perspective, this approach does not raise any questions. Section 91(26) accords legislative authority to Parliament over the definition of marriage.

[15] From a *Charter* perspective, this approach does not raise any valid questions with respect to section 15. “This would fully address equality concerns.”<sup>25</sup> Though section 15 claims may be launched against provincial legislation that prohibits the solemnization of same-sex marriage, this potential arises independently of an inclusive federal definition of marriage and is solely a matter of provincial concern.

[16] This approach does not raise any valid questions with respect to freedom of religion as protected under section 2(a) of the *Charter*. Consistent with the logic of the Supreme Court of Canada in the case of *Trinity Western University v. British Columbia*,<sup>26</sup> “[b]oth the Ontario and Quebec decisions suggest that the Charter would not require religious officials to conduct marriage ceremonies that were contrary to their religious beliefs.”<sup>27</sup> Though some religious organizations might be offended by the idea of same-sex marriage, this is not sufficient to warrant a *Charter* challenge under section 2(a).

[17] This approach carries little to no potential for future litigation on questions of constitutional authority and accordance with the *Charter*. This approach is the most financially responsible and should be pursued.

**With the cooperation of the provinces and the territories, Parliament could leave marriage to the religions**<sup>28</sup>

[18] Under this approach, “Parliament could repeal all federal law on marriage and all references in federal law and programs to marriage. These would be replaced with a new registry for opposite-sex and same-sex couples using neutral language, for example, registered partner.”<sup>29</sup>

[19] From a constitutional ‘division of powers’ perspective, this approach raises the same question discussed in paragraph 10. It is unclear whether Parliament can validly enact federal registry legislation under section 91(26). As is indicated by the Department of Justice Canada, “[t]his approach would work *only with the full cooperation of all provinces and territories* as the new registry would replace provincial and territorial marriage registries and civil union and

domestic partner registries.”<sup>30</sup> Should any province disagree with this approach to the issue of same-sex marriage, it is likely such cooperation will be withheld. Apprehensive provinces might likely go so far as to challenge the legislative authority of Parliament to enact a federal registry system in this context. With or without cooperation, it is questionable whether the provinces can delegate legislative authority and/or deference to Parliament on this issue.<sup>31</sup>

[20] Strictly speaking, this approach does not raise any questions from a *Charter* perspective. “This new registry would be difficult to challenge before the courts, because all couples would be treated the same way.”<sup>32</sup> However, the consequential effects of this approach are an insult to human dignity. The abolition of marriage as a state institution denies the ability of all persons to marry if they do not desire to marry in a religious setting. Marriage is more than a religious institution and has been since the separation of church and state. Further, the denial of non-religious marriage to opposite-sex couples may lead to increased discrimination against members of the LGBTQ community; persons may view their inability to marry as caused by the demand for same-sex marriage. Though not an actual violation of the *Charter*, this approach violates the value of human dignity lying at the core of the section 15 equality guarantees.<sup>33</sup>

[21] This approach carries a strong potential for future litigation on a valid question of constitutional authority. This approach does not present possible future litigation from a *Charter* perspective but adversely affects the value of human dignity underlying section 15. This approach should be avoided because there exists a more *Charter* friendly and financially responsible alternative.

## **RECOMMENDATION**

[22] For all of the reasons stated, it is recommended that Parliament legislate a definition of marriage that includes same-sex marriage. This approach most adequately and conclusively addresses the issue of same-sex marriage with respect to the requirements of the Constitution and the *Charter*. As such, this approach does not threaten the constitutional principles of democracy and the separation of powers. In doing so, the federal government will be spared the litigation expenses to be incurred if any other approach is adopted. As a result, the federal government can

more responsibly allocate financial resources to programmes and initiatives that better the social fabric. This includes increased federal funding for post-secondary education, thus increasing the development and growth of human capital among Canadians. In a world more continually driven by information and idea, this is necessary to preserve and improve the position of Canada within the global economy. To do otherwise is irresponsible.

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<sup>1</sup> Statistics Canada, The Daily, “University tuition fees” (21 August 2002).

<sup>2</sup> *Ibid.*

<sup>3</sup> Canadian Federation of Students, News Release, “Tuition fees increase 135% over last decade” (21 August 2002).

<sup>4</sup> See e.g. T. Lemieux, “Causal Effect of Education on Earnings in Canada” (Statistics Canada-WRNET-John Deutsch Institute Conference on Empirical Issues in Canadian Education, 19 November 2001).

<sup>5</sup> See e.g. M. Laroche, M. Mérette & G.C. Ruggeri, “On the Concept and Dimensions of Human-Capital in a Knowledge-Based Economy Context” (1998), online: National Library and Archives of Canada <[http://collection.nlc-bnc.ca/100/200/301/finance/working\\_papers-ef/1998/1998-01/98-01e.pdf](http://collection.nlc-bnc.ca/100/200/301/finance/working_papers-ef/1998/1998-01/98-01e.pdf)>.

<sup>6</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 & *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>7</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>8</sup> See *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

<sup>9</sup> See e.g. *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911.

<sup>10</sup> *Reference Re Secession of Québec*, [1998] 2 S.C.R. 217.

<sup>11</sup> *Operation Dismantle Inc. et al. v. The Queen in Right of Canada et al.*, [1985] 1 S.C.R. 441 at 465, Wilson J.

<sup>12</sup> Department of Justice Canada, *Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper* (Ottawa: November 2002) at 3.

<sup>13</sup> *Ibid.*, at 22.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Constitution Act, 1867*, *supra* note 6, s. 91(26).

<sup>17</sup> *Ibid.*, s. 92(12).

<sup>18</sup> *Ibid.*, s. 92(13).

<sup>19</sup> See *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>20</sup> See Department of Justice Canada, *supra* note 12 at 17.

<sup>21</sup> *Ibid.*, at 22.

<sup>22</sup> *Ibid.*, at 23.

<sup>23</sup> *Ibid.*, at 24.

<sup>24</sup> *Ibid.*

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<sup>25</sup> *Ibid.*

<sup>26</sup> [2001] 1 S.C.R. 772.

<sup>27</sup> Department of Justice Canada, *supra* note 12 at 25.

<sup>28</sup> *Ibid.*, at 26.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* [emphasis added].

<sup>31</sup> See e.g. *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1951] S.C.R. 31.

<sup>32</sup> Department of Justice Canada, *supra* note 12 at 27.

<sup>33</sup> See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 493.