

## "The Essence of Marriage": The Very Idea; Reflection on H. Cyr

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[Aller au sommaire du numéro](#)

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# OPINION

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## **“The Essence of Marriage” : The Very Idea; Reflection on H. Cyr**

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### **TABLE OF CONTENTS**

1. Jurisdiction.....	494
2. Cyr’s Argument : Status and Type .....	496
3. Status as Gendered.....	498
4. Type as Conjugal.....	501
5. Institution as Status and Type.....	503
6. Diversity as Entrenched.....	505
7. Essentialism.....	508

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1. This study of marriage deals with its legal character. That character is discerned within the Canadian legal system; and so its setting is the question of how the legal authority regarding marriage is shared between two jurisdictions, federal and provincial. The particular angle for coming at this is the current debate over the legitimacy of proposals for samesex marriage. The singular entry point is the insights and arguments of a Université du Québec à Montréal jurist, Prof. Hugo Cyr. He has written in favour of samesex marriage both in terms of the equality rights, as I have done against;<sup>1</sup> and has

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1. H. CYR, “La conjugalité dans tous ses états : la validité constitutionnelle de l’union civile’ sous l’angle du partage des compétences,” in P.-C. LAFOND, B. LEFEBVRE

spoken for it in terms of private international law before the Parliamentary commission, as I have against.<sup>2</sup> Any philosophical relevance of this inquiry lies in the conceptual development of the categories of status and institution.

2. Professor Cyr's surrounding scholarship at philosophy and expertise at technical doctrine are demonstrated elsewhere.<sup>3</sup> The present inquiry focuses these, instead, toward the technical point of law, and its philosophical adequacy, focused by his query "Does marriage have an essence?"<sup>4</sup> The argument Cyr develops there regards the Quebec institution of civil union, but relates to marriage because of civil unions' competition with marriage in terms of legal jurisdiction. If the answer is yes, civil unions are out; if no, they survive.

## 1. Jurisdiction

3. The jurisdictional situation is the following. Under the Canadian Constitution, legal authority regarding marriage extends to the conditions for its formation federally, and to the conditions for its celebration provincially.<sup>5</sup> Intrusion by one of these authorities upon the jurisdiction of the other can be implicit, as well as open, as when one legislates over the sub-

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(dir.), *L'union civile : Nouveaux modèles de conjugalité et de parentalité au XXI<sup>e</sup> siècle*, Cowansville, Québec, Éditions Yvon Blais, 2003, 193-241; C.B. GRAY, "Marriage, the Law, and Same Sex Unions", (1999/2000) 30 *Revue générale de droit* 583.

2. PERMANENT COMMITTEE ON JUSTICE AND HUMAN RIGHTS, House of Commons, Briefs by: H. CYR, "Pourquoi les règles du partage des compétences législatives sur le mariage et le divorce militent en faveur de la reconnaissance du mariage entre personnes du même sexe", presented in Montreal, 8 April 2003; C.B. GRAY, "You Can't Get There From Here"; Conflict of Laws (PIL) and Alternatives to Marriage", presented in Ottawa, 19 Feb. 2003.

3. H. CYR, "L'interprétation constitutionnelle, un exemple de postpluralisme", (1998) 43 *McGill Law Journal* 565; F. CHEVRETTE, H. CYR (dir.), *Traité général de preuve et de procédure pénales*, 7<sup>e</sup> éd, Montréal, Éditions Thémis, 2000.

4. This original main title, "Le mariage a-t-il une essence?", is replaced by early 2003 with "La conjugalité dans tous ses états" as in note 1.

5. *Constitution Act of 1867*, 30 & 31 Vict., U.K., c. 3, sec. 91 (26): "[T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ... 26. Marriage and Divorce..."; sec. 92 (12): "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, ... 12. The Solemnization of Marriage in the Province ..."

ject matter of the other while calling it by a different name. Civil union in the province of Quebec provides nearly all the rights and obligations of marriage to all couples who register for it (C.C.Q., sections 521.1; 6-9). The Quebec bar among others argued that this institution should be available for same-sex participants only, and not for differently sexed couples, lest provincial civil union appear to duplicate federal marriage and, as well, alter the conditions requisite to undertake it. Instead, Quebec civil union was made available to both homo. and heterosexual couples. In no suit yet has this been alleged to be an infringement upon the constitutionally protected federal jurisdiction, but the worry remains.

4. The worry might appear to be moot, since the courts of three provincial jurisdictions have decided that civil unions and other provincial arrangements alternative to federal marriage are unconstitutional, although only as violations of equality rights.<sup>6</sup> The federal government, however, asked the SCC to add a fourth question to its reference case on the constitutionality of its legislative proposal to remove the same-sex impediment to marriage.<sup>7</sup> The added question asks the court whether the opposite sex definition of marriage is constitutionally valid, and thus whether the alternatives to it are, in turn. If the opposite sex definition of marriage is upheld, then civil unions may

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6. *Halpern v. Canada (A.G.)*, Ont. S.C. (Div.Ct.), 5-9 Nov 2001, [2002] O.J., no. 2714, [2002] D.L.R. (4<sup>th</sup>) 22, court file no. 39/2001, per Smith, Blair, LaForme JJ. [paragraph numberings restart with each Justice's opinion]; conf. Ont. C.A., 10 June 2003, docket no. C39172, C39174, per McMurtry, MacPherson, Gilese JJ.; *Egale Canada (and Barbeau) v. Canada (A.G.)*, B.C.C.A., 2 Nov. 2001, docket L002698, B.C.J. No. 1995, (2001, 95 B.C.L.R. (3d) 122, per Pitfield J.; inf. B.C.C.A., 5 Jan. 2003, docket no. CA029017, CA029048, 2003 B.C.C.A. 0251, per Prouse, MacKensie, Low JJ.; *Hendricks v. Canada (A.G.)*, Qué. S.C., Montréal, 6 Sept. 2002, no. 500-05-059656-007, [2002] R.J.Q. 2506, per Lemelin J.; appeal by intervenor refused by Qué. C.A. 19 March 2004, no. 500-09-012719-027. Hereafter in text: ONSC, ONCA, BCSC, BCCA, QCSC, QCCA.

7. O.C. 2004-1055, 26 Jan. 2004, amending the questions in O.C. 2003-1055, 16 July 2003, to read: "1. Is the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive competence of the Parliament of Canada: In the negative, in what way and to what extent? 2. If the reply to question 1 is affirmative, is article 1 of the proposal, which gives persons of the same sex the capacity to marry each other, conformed to the *Canadian Charter of Rights and Freedoms*? If negative, in what way and to what extent? 3. Does freedom of religion as protected by line 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being required to marry two persons of the same sex contrary to their religious beliefs? 4. Is the requirement that only two persons of the

still be challenged jurisdictionally. If invalid, then civil unions are secure, although diminished in attractiveness.

## 2. Cyr's Argument : Status and Type

5. The way in which Cyr deals with this question is in terms of the technical term "status". The federal authority, he claims, concerns not a type of union, namely a conjugal union, but concerns instead the status of being married. Since federal authority does not concern the type — conjugal union — that federal authority is not entrenched upon when a provincial authority also concerns itself with that type — conjugal union — as for instance by inaugurating civil unions. Nor, in turn, is the federal authority displaced when the province legislates that the condition for entering civil union is sexually indiscriminate, while the condition for entering marriage remains sexual difference.

6. What is needed in order to test this solution is greater focus upon the terms being differentiated : status and type of union. The latter is not a term of legal art, whereas the former is. "Type" has no peculiarly jural specificity, although Cyr's title means type when he queries the "essence" of law. Any type at large has all of the variability involved in the "post-pluralist" holism Cyr develops elsewhere; as any concept, it is a part defined by whatever whole it goes to make up, along with the whole's other parts, and vice-versa. No more is the term "union" a technical term, in specifying the union as a conjugal union. While the term "union" is used in statutory and judicial texts, these uses specify the meaning no more, than as belonging to legal agents, to persons, not to the inanimates. Even "conjugal" union, though absent from both the province's civil union legislation, and from the fed-

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opposite sex can marry each other for civil purposes, as provided by the common law and in Quebec by article 5 of Act no. 1 harmonising federal law with civil law, conformed to the *Canadian Charter of Rights and Freedoms*? If negative, in what way and to what extent?" The Proposal in question reads : "1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others. 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs."

In *Reference re Same-Sex Marriage*, 2004 SCC 79, 9 Dec. 2004, the court refused to answer the fourth question, while answering the first two affirmatively, at para. 73. It found samesex marriage to be conformed to the Charter, and has not found diversely sexed marriage only not to be conformed to the Charter.

eral government's proposal for alternatives to marriage, is hardly more a term of legal art. For its purpose, while distinguishing a sexually intimate relationship from a relationship of commerce, kinship or friendship among others, is not to specify any one mode of sexuality; indeed, its purpose is to suppress any such specificity. It does imply, however, that sexuality does define that union.

7. Cyr's holism also demands that type cannot be so fluid as to evacuate meaning and install intellectual anarchy. Nonetheless that type cannot have the permanence of an empirical or an ideal product.

8. Status, on the other hand, is filled with technique, as well as expanding beyond legal technique. In sociological terms, status refers to the position of a party to a human relationship, position meaning the perceptions and expectations, the cognitions and affects, which the party holds, and receives from others. This may be described factually in a way similar to role, social role.<sup>8</sup> It may be described in terms of social stratification; reference to a person's status in this way is familiar.

9. Neither of these uses makes up the legal sense of status.<sup>9</sup> Legal status is the situation of having relevance for rights and duties. The legal person's status is the person's state (*état*) of legal reality.<sup>10</sup> The fundamental state is that of being a legal person, for being a legal person means to enjoy and perhaps exercise rights and duties. In this sense there are only two acts of civil status: acts of birth and acts of death.

10. In a derivative sense status means to be capable of enjoying and exercising rights and duties. Thereby a person can take on rights and duties which do not come simply with legal personhood. So, then, status usually means one's singular set of rights and duties. While not as particular a situation as

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8. A.-J. ARNAUD, "Role", in C.B. GRAY (ed.), *The Philosophy of Law: An Encyclopedia*, vol. 2, New York, Garland, 1999, pp. 758-60.

9. P. A. FRENCH, "Status", *ibid.*, 2, 839-41.

10. P.-A. CRÉPEAU (dir.), *Dictionnaire de droit privé*, 2<sup>e</sup> éd., Cowansville, Québec, Éditions Yvon Blais, 1999, s.v. "status" as "the ensemble of rules governing the legal situation of a person or a thing"; and 'personal status' as "the state (*état*) and capacity to make contracts" (transl.; see CYR, "La conjugalité", n. 106).

what is one's "standing"<sup>11</sup>, or the capacity to be heard by a court in relation to a particular proceeding, one's civil status is one's acquired set of rights and duties : of majority, not minor; of owner, not bankrupt; heir, not legatee; and finally : married, not single or divorced, an error as shall appear.

11. It is this last status, which Cyr has in mind when saying that federal authority in regard to marriage is authority in regard to status, not in regard to a type of union. Because the type, conjugality of union, does not define federal powers, the federal authority can fill the status of married with whatever requirements of capacity it will, even allowing sameness of sex, since that lies within its constitutional jurisdiction. On the other hand, the provincial authority can create conjugal unions other than marriage, even other sexed, with the same abandon as it creates commercial and syndical and educational unions. It can also create the statuses that issue from them and the "incidents" that attach to these their rights and duties.

12. The problematic features of this resolution by Cyr are (1) that the status is not of married, but of husband and of wife; (2) that the type of union as conjugal is specified to man and woman; and (3) that the distinction between status and type of union collapses into institution, with the consequence that federal authority to define capacity for marriage does encompass the conjugal union, so that provincial legislation on the capacity for conjugal union does infringe upon federal authority. The federal exercise is also, therefore, (4) disabled from changing sexual diversity as condition for the capacity to marry, except by constitutional amendment.

### 3. Status as Gendered

13. (1) The bisexual definition of marriage being of common law origin rather than statutory, the search must begin there. The English *Hyde* case a year before Confederation concerning the possibility for polygamous marriage is acknowledged by caselaw as the point of origin for articulation of the Canadian requirement for sexual diversity. The passage cited

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11. A.R. MABE, "Standing", *The Philosophy of Law*, 2, 833-34.

repeatedly from Hyde's case, and cited by Cyr for the sake of his claim, locates only the status of husband and of wife as the relevant statuses for marriage. Lord Penzance said there :

Marriage has been well said to be something more than a contract, either religious or civil — to be an Institution. It creates mutual rights and obligations as all contracts do, but beyond that it defines a status. The position or status of “husband” and “wife” is a recognised one throughout Christendom : the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable feature? If it be of common acceptance and existence, it must needs (however varied in different countries and its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

And elsewhere :

Alimentary and custody provisions in divorce are inseparable from [Parliament's] competence to promulgate laws governing the change in status resulting from the dissolution of a marriage.<sup>12</sup>

14. Hyde's identification of the status within marriage as the sexually bimorphic one of husband and of wife, and the fact that legal incidents of rights and duties are attached to it, follows the treatment Cyr set out. But what this implies is that federal jurisdiction over marriage as defined for Canada in Hyde is not jurisdiction over a status indifferent to sexual identity. Instead, the federal jurisdiction governs a status

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12. *Hyde v. Hyde and Woodmansee*, (1866), L.R. 1 P.&D. 130; also *Zacks v. Zacks*, [1973] S.C.R. 891 at p. 900. BCSC #75 cites the whole passage; so does Prowse J. in BCCA #50, although her colleague Mackenzie J. cites none. Nor do Smith and Blair JJ. in ONSC; LaForme J. there cites only the final sentence at #56, as does the Ontario appeal at #36. Lemelin J. at QCSC #87 cites the passage without the first two sentences.



which mutually defines the institution as gendered. The rights and duties which are its incidents are usually but not always the same depending on the gender of a participant; but that points only to the law's support for equality of partners, not to any absence of sexuality from the notion. To this extent, Cyr's conclusion that the limited federal authority as to status allows civil unions not to intrude upon that authority, is correct. But the concession is no longer won at the cost of neutering the marital roles.

15. The fact that governmental forms ask one to check off "married/single" has no precedential authority. In the French texts as well, while the term *marié/e* is of course found, the name is *époux/se* for participants in the status following upon marriage, again identifying the status within marital union in sexually bimorphic terms. After the Supreme Court sought to evade this by declaring earlier that the definition of "spouse" in the *Ontario Family Law Act* was of no force, for being sexually diverse, the federal government responded by section 1.1 of the *Modernisation of Benefits Act* that marriage is "lawful union of one man and one woman to the exclusion of all others."<sup>13</sup> This was the claim in the Ontario case, that judicial authority recognizes the nature of the status conferred by marriage as being heterosexual, "husband and wife", as well as "bride" and "bridegroom" in the provincial marriage statute, by the intervening Interfaith Coalition and the province (ONSC #47). So "the definitions of 'spouse' and 'marital status' were not changed but were reserved for a man and a woman." (Ib.) Federal jurisdiction governs that sort of gendered legal status, regardless of the "social status" for the "state or union" which marriage also confers and which is "accompanied by immediate community recognition." (QCSC #152; BCSC #128). The sex is "an issue of capacity"; that "status or capacity" is what is wholly federal, as both governments argued (ONSC #32-35). This is what "confers a status distinct from other forms of union. This remains true even after civil unions have come into force." (QCSC #181)

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13. *M. v. H.*, [1999] 2 S.C.R. 3, as noted by BCCA #43.

#### 4. Type as Conjugal

16. (2) It seems the case that, currently, the acceptance of common law unions and civilian *unions de fait* as deserving the legal benefits of marriage makes these belong to the type, which is conjugal. In fact this is not so: the common law participants are partners, not spouses, just as in civil unions; and the partners in *unions de fait* have no more of a legal name for their own, only *partenaires*. Their name *conjointes*, as well, has no derivation from *conjugal*.

17. Even if it were the case that the terminology did cover both, this would not extend conjugality beyond them, to samesex unions of either sort, nor a fortiori turn these marital. Activation of primary sex organs does not suffice to make a union conjugal, perhaps not even sexual, even if long term. Many different things can be done alone with primary sexual organs, which are not sexual, even less conjugal. Many of the same can be done with others — not just with doorknobs or with small livestock, but with other humans — and still lack the same attributions, even if done habitually, long term. Taking relief or satisfaction from the behaviours does not change this. Only one set of behaviours with sexual organs is sexual, and potentially conjugal: behaviours which are of the sort which can become fertile, even if in a given case or at a given time they fail to be. As Gonthier dissenting in *M. v. H.* said, “birth in a same sex union must of necessity involve a third person.” (ONSC #69)

18. Whether or not this is the reason why only the term *vie commune* appears and not the term *vie conjugale*, first in the *unions de fait* legislation and then in the civil unions legislative discourse, that fact at least highlights this lack of attribution.

19. The reason Cyr takes pains to exclude the federal control over a the legislative “kind” is that this is what appears to underlie the only court judgment running contrary not only to his conclusion, but to its more important stake. Pitfield J affirmed that “Parliament was given exclusive legislative jurisdiction over marriage, a specific kind of legal relationship” (BCSC #10). While he did not suggest that civil unions are in jeopardy from that interpretation, this did become a

premise in his denial of legal validity to same-sex marriage. If otherwise, it would be the case “that Parliament is empowered to enact legislation to define a head of power as opposed to enacting legislation under the authority of a head of power. This distinction is important” (#101), even if not so important that the Quebec judge could recognize that the legislature has some room to define its own jurisdiction to legislate: “This article shows a degree of latitude on the part of Parliament to define for itself the object of its competence” (QCSC #119).

20. The issue is not that, as one applicant put it, “Marriage goes further than conjugality” (QCSC #17), but whether conjugality goes further than marriage. Is the federal authority over marriage exhaustive of the full scope of conjugal relations, such that provinces have no room in them and that, in turn, later, no room in the federal jurisdiction for same sex marriage remains? One summary statement runs:

Section 91 (26) “Marriage and Divorce” merely sets out a head of power and there is no definition of either term .... The purpose of sec. 91 was not to entrench a particular set of rules, but rather it was to confer jurisdiction to make rules, including the jurisdiction to fix the qualifying factors for and the incidents of the status of marriage. (ONSC #105)

And it is amplified that marriage is “interpreted as describing a subject for legislation, not a definite object.”

21. The courts have been wary here to contrast a particular set of rules, an object of legislation, with the jurisdiction to make rules, a subject for legislation, a mere head of power. The former pole of the contrast would limit federal lawmaking by firmly setting limits on its power, namely, this would limit lawmaking to legislation for the legal status in question along with its gendering, the status of husband and of wife. The object is that status; the rules are stable insofar as they maintain that status. This is avoided. But the consequence appears to give federal lawmaking power a *carte blanche*, a “type” of lawmaking power that is unbounded within its category. This “subject” or “head” of power, then, exhausts the range of unions which are conjugal, and leaves no room for provincial enterprise. Conjugal union is com-

pletely occupied by federal authority, and no room for civil unions is left available. Civil unions exceed provincial authority.

22. A plausible solution is the quite traditional one, that the federal authority does concern a “kind” of activity, a certain “essence”, namely conjugal union; but that this authority does not exhaust that kind since it governs only the essence, that is to say, its definition and the capacity pursuant to it, but not the incidents which attach to it. The status of husband and wife is federally established and is not open to provincial legislation, any more than is the “type” of marriage. The same is true of the capacity for that status, namely, being man or being woman. But the mutual alimentary obligation, as one incident which attaches to the status of husband and of wife in marriage, is open to be legislated provincially, unless it is necessarily incidental to a federal power, e.g., over divorce. The type is not exhausted by its being the capacitor of status, more than just a head of power; and both the type and the status remain available for provincial elaboration of legal incidents within its own limits.

## 5. Institution as Status and Type

23. (3) If authority over status is not what the conceptual type in the constitutional texts controls, what is it authority over? It is authority over an institution, instead. Institution is a legal whole, whereas statuses and states simply refer to such a legal whole in order for them to be understood. Institution does not reduce to statuses, even when the statuses are relative, not absolute. It is not the case that marriage supervenes as a derivative level of discourse, upon statuses within it as the principal level of discourse and reference. Legal institution is originary, rather than morcelated into explanatory parts; at any rate, the marriage institution is.

24. That marriage as institution is more than the individualized contract has many versions. In its cultural version by affiant John Witte Jr. (ONSC #50):

Marriage is a *contract*, formed by the united consent of the married couple. Marriage is a spiritual *association*, subject to the creed, code, cult and canons of the religious community.

Marriage is a social *estate*, subject to the special state laws of property, inheritance, and evidence, and to the expectations of the local community. Marriage is also a natural *institution*, subject to the laws of nature communicated in Scripture, reason and conscience, and reflected in tradition, custom and experience.

And, in its juridical version, needed because of Witte's explicitly non-legal presentation (QCSC #149) :

Marriage is an exclusive, intimate and lasting relationship of two persons who agree to live together [*vie commune*] and to support each other. Marriage is celebrated publicly and with a certain solemnity. More than a contract, it is an institution that one may not leave without observing certain specific conditions and without obtaining the judgment of a court.

25. While including one replacement for the Hyde definition of marriage, the latter also points up some of the distinctive features of institution. Contrasting with contract, which may also be exclusive, intimate and lasting, with agreement to cohabit and to mutually support, for the institution there is (1) a public and solemn inauguration, and (2) equally public and solemn determination, that is, on condition and under court judgment. The sorts of formalities or procedures which characterise institutions illustrate the claim that privatization of marriage has come to "greater institutional expression": prenuptial agreements, no-fault divorce, no parental consent and witnesses, no differentiation in the rights of married and unmarried (BCCA #86 Prowse quoting ONSC #56 Blair quoting affiant Witte #61) — features which, while they more closely assimilate marriage to contract, point out its continuing institutional character by the very need to determine these publicly and to itemize them.

26. One may claim that, institution though it is, "[m]arriage is not a simple civil institution" because "it draws its origin from culture and religious history"; thus Parliament is "not the author of an institution which antedates our laws" (QCSC #67 by A.G. Canada). Even in its purely civil character, however, an institution needs public recognition for its achievement, if not for its commencement. The institution may or may not be one which has members but it always has sta-

tuses, that is, positions filled with legal incidents; and it always has attachment between the institution and the status through the kind of reality it has.<sup>14</sup>

27. The legal upshot for our purposes is that husband and wife (statuses) enjoy their marriage (institution) by exercising their kind of relationship (conjugal) in its rights and duties (incidents). The several moments constitute this whole inseparably.<sup>15</sup> There could not be federal jurisdiction over the marital institution unless it had jurisdiction also over conjugal type (as a head of power) and the sexually diverse status. Its incidents would follow federally, too, in the normal course; but Section 92 separates these off for the provinces as matters of property and civil rights in the province.

## 6. Diversity as Entrenched

28. (4) The analysis to this point shows a conceptual relation among idea, status and institution which has shown Cyr's foreground claim to be insufficiently grounded, that sexually indiscriminate civil unions in the province do not intrude upon federal jurisdiction; and the same for the claim in the background, that similar marriages are within federal jurisdiction to legislate. It does not show, however, that this must be so, that this cannot change; nor does it show the incorrectness of the ultimate background claim, that to affirm otherwise is inadmissible as conceptualist essentialism. It is "the essence of marriage" which returns to us.

29. The issue relates to the conceptual type of the marital institution: must it remain conjugal, that is to say, sexually diverse; or can that type be changed legislatively, without that legislation amounting to a deinstitutionalizing of marriage, and substitution of an alternative institution? All but

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14. J. BENGOTXEA, "Institutional Jurisprudence", *Philosophy of Law: An Encyclopedia*, 1, 416; C.B. GRAY, "Institutionalism, French," *ibid.*, 1, 418; M. LA TORRE, "Institutionalist Philosophy of Law," *ibid.*, 1, 420.

15. QCSC #35 cites the intervenor Association in a nice phrasing of this conjunction: "Many homosexuals live out a 'conjugal' relation [type]. Their exclusion from [the status of] marriage deprives them of the consequences [incidents] of the institution [sic], namely the rights and duties which marriage automatically gives rise to, such as the constituting of a family patrimony..." , despite disagreement herein with what that claim asserts.

the first (BCSC) of the courts hearing this opined the latter; all but the same one thought the federal legislature could perform this; and some, that they could do so themselves as courts, with a delay for recovery, or even instantly without awaiting expiry of the delays thereafter withdrawn.

30. The classic principle seems clearly to favour the change in the marital kind. Lord Sankey in *Edwards* said in 1930 of our own constitution that (BCSC #105) :

The British North America Act planted in Canada a living tree capable of growth and expansion *within its natural limits* .... [The duty of this board] is to give [the B.N.A. Act] a large and liberal interpretation so that the Dominion to a great extent, *but within certain fixed limits*, may be mistress in her own house, as the Provinces to a great extent, *but within certain limits*, are mistresses in theirs.<sup>16</sup>

While cited in every case, often the second sentence and the stressed proviso of the first “within its natural limits” are dropped, in using Lord Sankey’s words as the charter for changing constitutional meanings. The high court at home joins that abroad, however, in recognizing limits (BCSC #130), saying that purposive interpretation of the Charter is “generous rather than legalistic”, but “[a]t the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum ....”<sup>17</sup> Certainly use of the simple dictum (ONSC #31 and #66 Blair) that “the common law must grow with the development of the nation”, taken as it is from a 1924 sale of goods case, is inappropriate direction for a constitutional issue.<sup>18</sup>

31. Many terms in the heads of power for federal or provincial legislation have been expanded; and, so say their advocates, why not the term “marriage” in the federal “Marriage and Divorce” head of power? “Banking” has been extended to social-credit operations, “Criminal Law” to cover offenses beyond those known in England up to 1867, “Interprovincial Undertakings” to

16. *Edwards v. Canada (A.G.)*, [1930] A.C. 124, 136 (my emphasis).

17. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344.

18. J. MCCARDLE in *Prager v. Blatspiel, Stamp & Hancock Ltd.*, [1924] 1 K.B. 566, 570, All E.R. 524, quoted by Greer J. dissenting in *Layland v. Ontario*, (1993), 14 O.R. (3d) 658, 667.

regulate telephones once invented, and “Direct Taxation” to cover personal taxes unknown at Confederation (BCSC #108). Why not? Because the distinction which acknowledges that reality of change, while preserving marriage from it, is succinct that none of the above were legal relationships created by common law. As Judge Penfield says (BCSC #110) :

Indeed, “marriage” is the only word in either s. 91 or 92 that refers to a legally defined relationship or construct. The meaning and legal character of the word are not ambiguous. The word is not generic as would be, for instance, the word “family” had that word been used in s. 91 (26).

32. The favorite instances of change in the meaning of constitutional terms for heads of power, however, are “Indian” as changed by the *Indian Act* back and forth, and “Denominational Schools” as litigated in Manitoba. Nonetheless, “Indian” always referred to a determinate character, namely, aboriginal peoples of Canada; that character was not changed. What changed was the identity of persons among these people who could obtain benefits under the *Indian Act* because they met the criteria stated therein for benefits, such as that they had registered as Indians. That is far from trying to redefine who is and who is not an Indian (BCSC #111). The appeal judgment found this reply unconvincing because the cases on the meaning of “Indian” assumed that one of the two jurisdictions could change the meaning but disputed which one, which was not the case with the claim about “marriage” (BCCA #174; ONSC #113 LaForme). In denying any applicability at all of the analogy between “Indian” and “Marriage”, however, the appeal court forgets that those favouring the permanence of meaning for “Marriage” did not introduce it; it was introduced to rebut the permanence.

33. The final and recurring example is the protection of denominational schools in section 93 of the *Constitution Act of 1867*, which was attacked in Manitoba as contravening freedom of religion once the Charter came into force. Whether it did so or not, however, the court found that one part of the constitution could not be used to invalidate another part.<sup>19</sup>

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19. *Reference Re Bill 30, An Act to Amend the Education Act*, [1987] 1 S.C.R. 1148, 1197.



This was the reason for permanence which was made relevant to the immunity from change in the meaning of "Marriage". The reasons, however, why this analogy for permanence were denied are remarkable. That denominational schools were a compromise essential to confederation occurring, while marriage was not (BCCA #110) could never sit easily in Cyr's mouth, because of the emphasis in his Parliamentary brief upon how essential to confederating the marital compromise was, an assurance repeated as the federal objective in the Quebec case: "that marriage stay essentially the same in all Canadian provinces" (QCSC #101). As well, the rationale that "marriage" in section 91 (26) could never have had same sex unions in contemplation so as to exclude them, since same sex behaviours even among married persons were criminalized until 1970 (Ib.), is startling: that confederating parties could not have thought of same sex unions, because they had already thought so vigorously about the behaviour as to put it beyond thought!

## 7. Essentialism

34. If sexual diversity in the meaning of marriage is secured in this pedestrian way, is it still liable to the charge of "essentialism" waved threateningly throughout the discussion of the issue? Is there an "essence" of marriage, and what does that mean? The classic recent statement by Judge LaForest (BCSC #120), also quoted ubiquitously, despite being a dissent and perhaps obiter, on this may appear as essentialist in the accusations.<sup>20</sup>

My colleague Gonthier J. [dissenting] in *Miron v. Trudel* has been at pains to discuss the fundamental importance of marriage as a *social institution*, and I need not repeat his analysis at length or refer to the authorities he cites. Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing

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20. *Egan v. Canada*, [1995] 2 S.C.R. 513, 536, per LaForest J. dissenting in a 5/4 decision including five sets of reasons concerning spousal benefits under the provincial *Old Age Security Act*; my emphasis.

philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social *realities* that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to *legally define* marriage to include homosexual couples, but this would not change the biological and social *realities that underlie* the traditional marriage.

The citing justice followed this with his own confirmation that “[a] differentiation between those who can legally marry and those who cannot must inevitably occur. The Charter cannot be used to override the reality of differentiation.” (BCSC #123)

35. Those quotes from judges dissenting and overruled have the tenour of classic essentialism. While I am far from disaffected from that by the waning fashion against it, one can look more closely at Judge LaForest’s closing remarks : it is always possible to change it; the only question is how : by the court? by the legislature? or only by constitutional amendment? In the racy words of Minister Anne McLellan introducing the *Modernisation Of Benefits Act* in 1999 (QCSC #59), that Act

does not deal with the institution of marriage. I suppose a Parliament can put any thing in. They could define marriage. They could define what a dog or cat is, or anything else. [The Act] deals with the definition of another set of relationships.

More soberly, the law is a construct; still, “the institution of marriage is not simply a legal construct, but rather it pre-existed the law” (ONSC #47 LaForme). Even if it must be constructed, it is still possible, even indispensable, for an institution to have a “universal or defining feature” (BCCA #42 Blair); such feature(s) may even be empirically evidenced, as shown in the research of Young & Nathanson from whose affidavit on their research this phrase comes. It may be sufficient to recognize there is something about marriage *en tant que tel* (QCSC #46 from Marx & Chevrette). That can be sufficient to ground the claims here, without making more strenuous metaphysical

assertions. At any rate, a criticism that “an argument that marriage is heterosexual because it ‘just is’ amounts to circular reasoning. It just sidesteps the entire section 15 analysis” (ONCA #71) suffers itself from the malaise it purports to diagnose.

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