Submission on Bill C-23

Modernization of Benefits and Obligations Act

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CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Sexual Orientation and Gender Identity Conference of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the CBA's National Office. Bill C-23 was distributed to all interested constituencies within the CBA for comment: National Aboriginal Law Section, National Business Law Section, National Bankruptcy and Insolvency Section, National Labour and Employment Law Section, National Real Property Section, National Sales and Commodity Tax Section, National Charities and Non-Profit Law Section, National Criminal Justice Section, National Family Law Section, National Taxation Law Section, National Wills, Estates and Trusts Section, National Citizenship and Immigration Law Section, National Insurance Law Section and the Standing Committee on Pensions for Judges' Spouses and Judges' Salaries. Comments received were incorporated into the submission.

The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association supports the introduction of Bill C-23, *Modernization of Benefits and Obligations Act* and urges the House of Commons Standing Committee on Justice and Human Rights to approve it without substantive amendments.

In a comprehensive fashion, this Bill seeks to include lesbian and gay and heterosexual common-law partners in Canadian society by conferring legislated responsibilities and benefits in relation to, among other things, income tax, pension, and employment insurance. With respect to gays and lesbians, this recognizes that their exclusion from full responsibilities and benefits in this country is neither fair nor tolerable. Moreover, it affirms the dignity and self-worth of this community.

The principal focus of this submission is on the extension of benefits and responsibilities to those in lesbian and gay relationships. However, the CBA also supports the full inclusion of those in heterosexual common-law relationships. Most legislation has already been extended to include this group. However, for those statutes which are still limited to those in married relationships, it is a step forward for the federal government to recognize non-traditional family forms. It is also consistent with the jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*.[1]

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1 *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Rossu v. Taylor*, Court File No. 96-16793, June 16, 1998 (Alta C.A.).

The introduction of Bill C-23 is part of a legislative trend across Canada. The legislation is consistent with jurisprudence under the *Charter*, which has recognized that sexual orientation is an analogous ground of discrimination and that the exclusion of gays and lesbians from legislation conferring benefits and responsibilities on spouses is unjustifiable discrimination. Other provincial and territorial governments – British Columbia, Ontario, Quebec and, to a limited extent, the Yukon – have already enacted legislation in this regard, and the CBA is pleased that the federal government is now a part of this movement to promote the equality of all its citizens. These governments have joined the rising number of private sector employers who have voluntarily recognized the value of their gay and lesbian employees by extending spousal benefits to them. In effect, the Bill is "catching up" to the Canadian public and to human rights legislation which, in every jurisdiction other than the Northwest Territories and Nunavut, prohibits discrimination based on sexual orientation.

II. THE CBA: LEADERSHIP AND EQUALITY

The CBA is a professional, voluntary organization which represents over 36,000 lawyers, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA, which is the preeminent provider of personal and professional development and support to all members of the legal profession. The CBA promotes fair justice systems, facilitates effective law reform, promotes equality in the legal profession and is devoted to the elimination of discrimination. We are a leading-edge organization committed to enhancing the professional and commercial interests of a diverse membership and to protecting the independence of the judiciary and the Bar.

Consistent with its mandate to promote equality in the legal profession and to eliminate discrimination, the CBA has taken, and continues to take, a strong leadership role in the promotion of equality of all its diverse members. To that end, the CBA is the first – and

to date, the only – professional organization in Canada to recognize its gay, lesbian, bi-sexual and transgendered members through its national Sexual Orientation and Gender Identity Conference. The CBA's branch organizations in Ontario, British Columbia, Manitoba, Alberta, New Brunswick and Nova Scotia have also established similar committees dedicated to the inclusion of gay, lesbian, bi-sexual and transgendered members of the legal profession.

The CBA has historically supported federal legislative initiatives aimed at eliminating discrimination based on sexual orientation. These include the sentencing provisions of Bill C-41 covering hate crimes against gays and lesbians and Bill S-2, which amended the *Canadian Human Rights Act* to include sexual orientation as a prohibited ground of discrimination. In 1998, the CBA's Alberta branch intervened at the Supreme Court of Canada in favour of the claimant in *Vriend v. Alberta*,[2] which determined that the exclusion of sexual orientation from that province's *Individual's Rights Protection Act* was unconstitutional.

Twice in 1994 and then again in 1996, the CBA's Council passed resolutions calling on legislatures to prohibit discrimination on the basis of sexual orientation. At its annual conference in August 1999, the CBA passed a resolution which called upon the federal government

> to expedite its review of federal legislation and policies which discriminate against those in same-sex conjugal relationships and to make any amendments forthwith which will ensure such legislation and policies are consistent with section 15 of the *Charter*[3]

III. HUMAN RIGHTS, *CHARTER* JURISPRUDENCE AND DEFINITION OF "SPOUSE"

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2 [1998] 1 S.C.R. 493.

3 See Appendix.

The legal status of gays and lesbians[4] has been the subject of litigation for over two decades. Initially, these cases were brought under human rights legislation. Following the enactment of the *Charter*, gays and lesbians sought equality rights pursuant to section 15. Bill C-23 is the first legislative initiative which seeks to include lesbian and gay couples in federal legislation by incorporating them under a definition of "common law partner" applicable to both opposite-sex and lesbian and gay conjugal relationships. The term "spouse" is reserved for opposite sex couples who are married.

Lesbian and gay relationships have been traditionally excluded from interpretations of the definitions of "family status"[5] and "marital status"[6] in human rights legislation. In 1995, the Supreme Court held that the "opposite-sex" definition of "spouse" or "cohabitant" in the Canada Pension Plan and Old Age Security legislation discriminated against gays and lesbians but found that discrimination to be "demonstrably justifiable" under section 1 of the *Charter*.[7] While "sexual orientation" was found to be an analogous ground of discrimination pursuant to section 15 of the *Charter*, the Court, nonetheless, held that it was justified under section 1 to exclude gays and lesbians from the federal legislation at issue.

The full inclusion of lesbian and gay couples in federal law began in earnest in the Ontario Court of Appeal's 1998 decision, *Rosenberg v. Canada (Attorney General)*.[8] The

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4 The use of the term gay and lesbian, rather than the more inclusive, gay, lesbian, bi-sexual, and transgendered, is due to the virtual invisibility and exclusion of bi-sexuals and transgendered persons from the jurisprudence.

5 *Canada v. Mossop*, [1993] 1 S.C.R. 554.

6 *Leshner v. Ontario* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.). In *Leshner*, the Board of Inquiry found the opposite-sex definition of "marital status" to violate section 15 of the *Charter*.

7 *Egan v. Canada*, [1995] 2 S.C.R. 513.

8 (1998), 38 O.R. (3d) 577 (C.A.).

Court of Appeal in *Rosenberg* read in the words "or same sex" into the definition of "spouse" contained in section 252(4) of the *Income Tax Act*, thereby permitting the registration of pension plans and amendments to registered pension plans where survivor benefits were paid to a lesbian or gay surviving spouse. In 1999, the Supreme Court of Canada in *M. v. H.* held that the opposite-sex definition of spouse in the spousal support provisions of the Ontario *Family Law Act* discriminated against gays and lesbians.[9] Unlike *Egan*, the discrimination was not found to be "demonstrably justifiable" under section 1 of the *Charter*. Finally, in *Moore and Ackerstrom v. Canada*,[10] the Federal Court Trial Division rejected the federal government's attempt to create a new category of "same-sex partner" to resolve a human rights complaint, holding that the "separate but equal" scheme constituted a discriminatory practice under section 7 of the *Canadian Human Rights Act* on the basis of sexual orientation.

These cases, along with similar decisions in the lower courts of the provinces, demonstrate that recognition of lesbian and gay relationships is a constitutional imperative. Governments should now take the lead in amending legislation consistent with this requirement. Otherwise, these statutes will continue to be successfully challenged in the courts on a case-by-case basis. Litigation is expensive and time-consuming and imposes an unfair and unnecessary burden on claimants to enforce their constitutional rights. It is also an expensive proposition for the Canadian taxpayer, who must pay the costs of government continuing to defend these cases. Litigation also imposes reform on an *ad hoc* and piecemeal basis, which the CBA believes is not appropriate.

Much has been said concerning the use of "spouse" in the context of lesbian and gay relationships. Those who would argue that the term "spouse" does not include gay and lesbian couples ignore the existing jurisprudence which has held that the terminology must

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9 [1999] 2 S.C.R. 3.

10 [1998] 4 F.C. 585.

be expanded in accordance with the equality values entrenched in the *Charter* to include lesbian and gay spouses. In *Rosenberg*, the Ontario Court of Appeal specifically held that the appropriate remedy pursuant to section 52 of the *Charter* was to expand the definition of spouse to include "or same-sex". Consistent with this jurisprudence, both the Quebec and British Columbia provincial governments legislated gay and lesbian spousal benefits/obligations by expanding the definition of "spouse". Stated succinctly, the law has already recognized gay and lesbian spouses and, in the *Moore* case, rejected a "separate but equal" category based on sexual orientation.

Bill C-23 seeks to include lesbian and gay couples in almost all federal legislation under the rubric of "common law partner" while reserving the term "spouse" for married heterosexual couples. Many members of the community affected by this legislation believe their relationships to be spousal in nature and want the legislation to reflect this. The semantic differentiation of "spouse" and "common law partner" suggests a different level of recognition and worthiness. However, the CBA believes that it is laudable to confer additional rights and responsibilities on lesbian and gay couples and heterosexual unmarried couples.

Concerns have been expressed on two fronts with respect to the use of the word "conjugal". First, there is a concern that benefits are being based solely on sexual activity. We note, however, that this terminology is not new in law. Most legislation currently defines heterosexual common-law spouses in terms of whether there is a "conjugal" relationship. We would also suggest that a "conjugal" relationship has been defined by the courts to include more than just sexual activity.[11] Second, some have questioned why benefits are not being granted to those cohabiting in non-sexual familial relationships. However, this Bill is principally intended to remedy the government's failure to extend rights and obligations to gay and lesbian couples living in conjugal relationships when it

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11 See note 13, below.

extended such rights and obligations to heterosexual couples living in similar relationships. Governments may wish to discuss extending rights and benefits to non-sexual relationships, but that is an entirely different question. The CBA has no position on whether benefits should be extended in this manner. However, it does believe that this Bill should pass now, with consideration being given to extended family relationships after thorough consultations on the public policy implications.

The CBA urges the Committee against any amendments which might weaken the existing legislation or utilize language suggesting the superiority of heterosexual relationships. In suggesting this approach, the CBA is mindful of Madam Justice L'Heureux-Dubé's description of being "pro-family" in a modern society:

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.[12]

IV. TECHNICAL ASSISTANCE OFFERED FOR BILL C-23

We have identified two areas where there may be technical concerns about the Bill. These are as follows.

A. *Bankruptcy and Insolvency Act*

Under the current *Bankruptcy and Insolvency Act* (*BIA*, married persons remain "related" to one another until they are divorced – normally at least one year after separation, and sometimes much longer. Under the Bill, it appears that common-law partners lose their relatedness as soon as cohabitation ends. This follows from the present tense utilized to define a common-law partnership, and the term "former common-law partner" in various other provisions. Thus, a common-law partner, but not a married

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12 *Mossop* v. *Canada*, [1993] 1 S.C.R. 554 at 634.

spouse, can vote in a bankruptcy as soon as he or she has ended cohabitation. If cohabitation ends the day before bankruptcy, a twelve month look-back period will apply to a married spouse but only a three-month period will apply to a "former" common-law partner. The CBA proposes that the rules be the same for spouses and common law partners.

Unlike married spouses with a marriage certificate, establishing the "common law partner" relationship does not depend on a state-recognized document. It may therefore be more difficult for those who administer the *BIA* to obtain conclusive proof that someone has been an insolvent person's "common-law partner" for the purpose of applying the rules against collusion. To ensure that the anti-collusion goals of the *BIA* are maintained, we suggest that indicia of relatedness be established, perhaps by regulation. This would include such matters as cohabitation, joint assets, sexual and personal behaviour, children, economic support, and social perception of the couple.[13]

B. *Section 145 Transitional Provision - Support Payments*

The transitional provision in section 145 requires some clarification. It appears to require the payer and recipient of taxable-deductible support payments under the *Income Tax Act* to file a joint election in the prescribed form within a set time period to have those provisions apply for the 2001 and following taxation years. This applies where the court order or agreement in question was made prior to the date that section 145 comes into force but does not seem to distinguish between those cases where paragraphs 56(1)(b) and 60(b) of the *Income Tax Act* already apply and those where they do not.

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13 This draws upon the test for a conjugal relationship approved by the Supreme Court of Canada in *M.* v. *H.*, *supra*, taken from *Molodowich* v. *Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). The Supreme Court recognizes that these elements may be present in varying degrees and not all are necessary for a determination that the relationship is conjugal. The weight to be given each factor will depend on the circumstances of each case.

It is unlikely that the intent of Bill C-23 was to change the status quo for payments which are currently governed by paragraphs 56(1(b and 60(b. Instead, the intent would seem to be that where there are existing orders or agreements between common law partners that did not fit within paragraphs 56(1(b and 60(b because both partners were of the same sex, those parties could opt for tax deductibility and income inclusion in 2001 and beyond if they jointly elect that treatment. This section, therefore, ought to be clarified to allow for this option.

V. OMISSIONS FROM BILL C-23

Bill C-23 does not address the exclusion of lesbian and gay couples and hereosexual common-law couples from certain pieces of federal legislation. The CBA understands these statutes have been omitted from the Bill because the government is considering them separately. We wish to raise these issues for future consideration.

A. *Immigration*

Currently, regulations pursuant to the *Immigration Act* rely on the opposite-sex definition of spouse and the requirement of cohabitation for one year. We understand that changes to the *Immigration Act* are forthcoming to address heterosexual and lesbian and gay common-law partners. A more inclusive definition of spouse is appropriate and consistent with Bill C-23. We urge the government to consider, in the future, the unique hardship imposed on lesbian and gay and heterosexual common-law couples if the one-year cohabitation rule is applied to them. This could be interpreted as too restrictive, especially for those involved in long-distance relationships or for those living in communities where cohabitation of lesbian and gay or heterosexual unmarried partners is frowned upon. Cohabitation of lesbian and gay and heterosexual common law partners can be impossible in many parts of the world due to illegality of homosexual acts, illegality of non- marriage "adulterous" acts, or cultural reasons such as careers and family obligations.

B. *Evidence Act And "Spousal Compellability"*

We understand that the government is currently considering whether to repeal the spousal compellability provisions of the *Evidence Act* and, for this reason, has not extended these provisions to common-law partners. In the event that these provisions are not repealed, the CBA would revisit these provisions.

C. *"Marital Exemption" For Age Of Consent Under the Criminal Code*

We understand that the higher age of consent for anal intercourse between unmarried persons has not been amended on the basis that the whole age of consent provisions are also under review.

VI. APPLICATION OF THE LEGISLATION TO CURRENT LITIGATION

There are currently a number of pending court and tribunal cases involving claimants who have been denied benefits under federal legislation because they are in lesbian and gay relationships. Although the Bill is not "retroactive", we urge the federal government to deal fairly with these claimants and others who have been excluded to date in violation of the *Charter*. They should not have to continue stressful and expensive litigation against the federal government. Instead, they should be treated as much as possible in a manner consistent with the intent of this Bill.

VII. CONCLUSION

Subject to the two technical issues identified – the *BIA* and section 145 – the CBA urges the passage of Bill C-23 without substantive amendments. Bill C-23 promotes the inclusion of lesbian and gay and heterosexual common-law couples in Canadian society in a manner consistent with *Charter* values and principles of human rights. It is part of the

growing trend across the country to legislate the recognition of lesbian and gay couples and catches up with private sector employers which have voluntarily extended benefits to their employees in lesbian and gay relationships. The CBA, therefore, strongly supports the Bill and the equality and dignity of Canadians who are gay, lesbian, bisexual and transgendered or who are living in unmarried common-law relationships.