

May 24, 2000

The Hon. Senator Lorna Milne  
Chair  
Standing Committee  
on Legal and Constitutional Affairs  
The Senate  
Ottawa ON K1A 0A4

Dear Senator Milne,

**Re: Submissions on Bill C-23, *Modernization of Benefits and Obligations Act***

The Canadian Bar Association welcomes the opportunity to present its views to the Senate Standing Committee on Legal and Constitutional Affairs on Bill C-23 *Modernization of Benefits and Obligations Act*. We will be relying on our brief submitted to the Standing Committee on Justice and Human Rights (the House Committee), which is enclosed, as well as the comments set out below. These comments address amendments to the Bill since our last appearance.

At the outset, we acknowledge the amendment made to clarify section 145 (transitional provision under the *Income Tax Act*). This amendment satisfies our concerns.

In our submissions to the House Committee, the CBA supported the introduction of Bill C-23 and urged approval without substantive amendment. We also recommended against any amendment which might weaken the existing legislation or utilize language suggesting the superiority of heterosexual relationships.

Since our attendance before the House Committee, Bill C-23 has been amended by section 1.1, an interpretive section which defines marriage as the “lawful union of one man and one woman to the exclusion of all others”. In line with our submission to the House Committee, the CBA recommends that this new provision be removed for the following reasons:

**1. Purpose of the Bill**

We suggest that the amendment is inconsistent with the purpose of the Bill. The Bill seeks to include, in a comprehensive fashion, lesbian and gay and common-law couples in Canadian society by conferring legislated responsibilities and benefits on them. In particular, the Bill addresses the historic exclusion of lesbian and gay couples from legislation and recognizes that their inclusion is required pursuant to the equality guarantees of the *Canadian Charter of Rights and Freedoms*.

As publicly represented by the Minister of Justice, Bill C-23 is not about the definition of marriage. It is about fairness and tolerance. Defining marriage in the context of Bill C-23 is unnecessary.

## **2. Definition of “Spouse” and the *Charter of Rights and Freedoms***

As discussed in the enclosed brief, the recognition of lesbian and gay relationships is a constitutional imperative. Bill C-23 seeks to include lesbian and gay couples under the rubric of “common law partner” while reserving the term “spouse” for married heterosexual couples.

Given the existing *Charter* jurisprudence,<sup>1</sup> the inclusion of gay and lesbian couples under the definition of “spouse” is constitutionally recognized. Before the House Committee, we expressed our concern that the creation of a separate category of “common law partners” rather than an inclusive definition of “spouses” was a political compromise which might attract *Charter* scrutiny due to this jurisprudence. The “marriage amendment” enhances this concern because it draws an explicit legislative boundary around those who can become spouses (those in heterosexual relationships) and excludes those who can't (those in gay and lesbian relationships). In effect, it segregates those in gay and lesbian relationships into a separate category.

The “marriage amendment” explicitly excludes gay and lesbian couples. It thus exacerbates the compromise and will likely lead to further litigation.

## **3. Law Reform Through Litigation**

For over two decades, the legal status of gays and lesbians in Canadian society has been litigated at great cost to personal litigants and taxpayers. A significant impetus for introducing Bill C-23 was to bring to an end the on going litigation. In our view, the piecemeal and *ad hoc* nature of litigation is simply not the appropriate mechanism for law reform.

The amendment may make the Bill, and the definition of marriage, more open to constitutional challenge, thereby perpetuating a litigious approach to law reform for lesbian and gay couples.

We therefore, urge the Senate to remove section 1.1 from Bill C-23 and to quickly adopt the balance of the Bill. A definition of marriage in Bill C-23 is superfluous, inconsistent with the purpose of the legislation, and an invitation to continue further litigation concerning the inclusion of gay and lesbian couples in Canadian society.

Yours very truly,

Eugene Meehan, Q.C.  
President

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<sup>1</sup> And particularly the *Rosenberg* and *Moore and Ackerstrom* cases, discussed at page 5 of our submission to the House Committee.