Submission on
Bill C-38 – *Civil Marriage Act*

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 34,000 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 National Constitutional and Human Rights Law Section, the Standing Committee on Equity, the National Family Law Section and the Sexual Orientation and Gender Identity Conference (SOGIC) of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association is a national professional association committed to the rule of law, and a staunch advocate of the constitutional values fundamental to Canadian society. The CBA promotes fair justice systems, facilitates effective law reform, advocates for equality in the legal profession and is devoted to eliminating discrimination, including discrimination on the basis of sexual orientation.

Our demonstrated commitment to equality on the basis of sexual orientation leads the CBA to fully support the expeditious passage of Bill C-38, *Civil Marriage Act* without amendment. This legislation would create a consistent definition of marriage across Canada, ensuring equality for same-sex couples across the country and removing substantial legal difficulties arising from inconsistent definitions of marriage in different jurisdictions, while offering full recognition of, and protection for religious freedom.

The CBA's initiatives to eliminate discrimination and promote equality in the legal profession have included promoting equality within its own diverse membership. 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 (SOGIC).

The CBA has supported legislative initiatives aimed at eliminating discrimination based on sexual orientation. Examples include the *Criminal Code* sentencing provisions covering hate crimes against gays and lesbians, the addition of sexual

orientation to the hate speech provisions of the *Criminal Code* and amendments to 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*,[1] which determined that the exclusion of sexual orientation from that province's *Individual's Rights Protection Act* was unconstitutional. CBA's governing Council has passed resolutions calling on legislatures to prohibit discrimination on the basis of sexual orientation and urging the federal government to expedite its review of federal legislation and policies that discriminate against those in same-sex conjugal relationships.

In 2002, the CBA supported passage of the *Modernization of Benefits and Obligations Act*, concerning federal benefits and obligations for both opposite and same-sex common-law partners. In 2003, the CBA responded to Justice Canada's Discussion Paper, entitled *Marriage and the Legal Recognition of Same-Sex Unions*,[2] saying that equal recognition of same-sex marriage was the only sustainable option under the *Charter*. The CBA called for a federal statute expressly stating that same-sex couples are entitled to marry, on the same grounds and with the same rights and recognition as opposite-sex couples enjoy.

Most recently, the CBA intervened before the Supreme Court of Canada in the *Same-Sex Marriage Reference*,[3] arguing in support of the federal government's constitutional jurisdiction to define civil marriage, discussing the practical impact of inconsistent treatment of marriage and divorce throughout Canada, and stressing that an opposite-sex definition of marriage violates equality guarantees under the *Charter.*

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

2 Ottawa: Justice Canada, 2002.

3 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

II. CONTEXT FOR BILL C-38

A. Bill C-38 is required by the *Charter of Rights and Freedoms*

Beginning in 2002, courts have held that restricting the definition of marriage to opposite-sex couples violates equality rights guaranteed under section 15 of the *Charter*, and cannot be justified under *Charter* section 1. Courts in Ontario, Quebec, British Columbia, the Yukon, Manitoba, Nova Scotia, Saskatchewan, and Newfoundland and Labrador have come to this conclusion.[4] Same-sex couples in those provinces and territories now have the right to marry civilly, and thousands of same-sex couples across the country have taken advantage of that right.
No similar legal challenge has been brought in Alberta, Prince Edward Island or Nunavut, though equal marriage litigation is now pending in the Northwest Territories and New Brunswick.[5] Same-sex couples continue to be denied access to civil marriage in those remaining jurisdictions.

The result is a lack of consistency across Canada as to who may marry. Bill C-38 would address this problem. It would also clarify the corresponding right to divorce. To date, only in Ontario has a court found that the *Divorce Act* extends to same-sex couples.[6]

Without federal legislation, same-sex couples wishing access to civil marriage in the jurisdictions where equal marriage cases have not been judicially decided are forced to bring court actions to challenge the opposite-sex definition of marriage.

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4 BC: *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472, 2003 B.C.C.A. 251;
Ont.: *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161;
Quebec: *Ligue catholique pour les droits de l'homme c. Hendricks* (2004), 238 D.L.R. (4th) 577;
Yukon: *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL), 2004 YK.S.C. 54;
Manitoba: *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL) (Q.B.);
Nova Scotia: *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL) (S.C.);
Saskatchewan: *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL), 2004 SK.Q.B. 434;
Newfoundland: *Pottle et al v. Attorney General of Canada et al,* [2004] 01T3964 S.C.N.L. (December 21, 2004) (unreported) (An appeal has been filed by the limited intervenor, Pastor Gordon Young, and is opposed. Hearing dates have not been set).

5 Hearings now scheduled for June, 2005 for both cases: *Harrison, Leavitt et al v. The Attorney General of Canada and Province of New Brunswick (AG)*, Court File No.: MM0022-05 (Q.B. N.B.T.D. – Moncton); and *Perrino v. The Attorney General of Canada*, NWT Court File No.: S-0001-CV2005 000 131.

6 *M.M. v. J.H.* (2004), 247 D.L.R. (4th) 361 (Ont.S.C.J.).

While likely to be successful given existing precedent, it is unjust to require same-sex couples to use time and resources fighting through the courts for equal access to civil marriage, or divorce. As we have previously said,

> [L]itigation 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.[7]

Lack of national consistency can also lead to unequal treatment of legally married same-sex couples. The valid marriage of a couple married in Nova Scotia would not be recognized if they moved to PEI. The impact could range from the mundane, such as being unable to change the name on a driver's license, to the serious, such as ineligibility for intestate benefits or divorce.

Further, the lack of consistent access to civil marriage for same-sex couples creates immigration problems. Canada accepts immigrants from all over the world, including from nations where same-sex marriages are presently valid or where they will soon be a legal reality. If a married same-sex couple decides to immigrate to Canada, they have a legitimate expectation that their relationship will be legally recognized wherever they choose to live, since both marriage and immigration are federal issues.

Bill C-38 should be passed without substantive amendment or delay to resolve these issues by extending an inclusive definition of civil marriage to same-sex couples across Canada.

Opponents of equal marriage for gays and lesbians assert that the common law definition of marriage requires "one man and one woman, to the exclusion of all others." In our view, this is not a proper interpretation or application of the common law, and courts have agreed that it is constitutionally inoperative.[8] Any amendment to Bill C-38 that would attempt to revert to an exclusively

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7 Submission on Bill C-23, *Modernization of Benefits and Obligations Act* (Ottawa: CBA, 2000) at 5.

8 *Supra*, note 4.

opposite-sex definition of civil marriage would fly in the face of court decisions in seven provinces and one territory. In the majority of these cases, the court was dealing with the common law definition of civil marriage; in *Hendricks v. Quebec (Procureur general),*[9] the court was dealing with a statutory definition of civil marriage. The courts have held that the opposite-sex definition of civil marriage violates section15 of the *Charter*, and cannot be justified under section 1.

An opposite-sex definition of civil marriage could not be re-introduced by Parliament without invoking section 33 of the *Charter*, the so-called "notwithstanding clause". Using the notwithstanding clause to override equality rights would be an unprecedented move by Parliament, furthering no legitimate and pressing purpose, and reaffirming the intolerant view that same-sex couples deserve less respect and dignity than other couples.

We have earlier stated,

> A law defining marriage as "a union of one man and one woman" would need the notwithstanding clause to give it effect, either preemptively or after a court decision striking it down. Those who want to make marriage an exclusive institution for heterosexuals would have to pass another law to wipe out the marriages of those gay and lesbian couples who have married in good faith and according to the law. Again, the notwithstanding clause would have to be invoked.
>
> By using the notwithstanding clause, Parliament would be deciding to pass an unconstitutional law with no good reason for limiting its citizens' rights. Those laws would have to be revisited every five years for Parliament to confirm its intent to continue infringing the equality rights of Canadians.[10]

The CBA believes that use of the notwithstanding clause on this issue would be nothing short of an assault on core values of modern Canadian society as reflected in, and guaranteed by our *Charter of Rights and Freedoms*.

9 [2002] R.J.Q. 2506.

10 Letter from CBA President Susan McGrath to the Leaders of all Parties (Ottawa: CBA, April 11, 2005).

B. Broader Context

Bill C-38 is a proper legislative response to recent court decisions affirming the right for same-sex couples to marry. However, in our view, Bill C-38 should be enacted regardless of these court decisions. Extending the definition of civil marriage to same-sex couples is the best way for Parliament to meet its responsibility to further the substantive equality of Canadian citizens, and respect the rights and freedoms contained in the *Charter*.

i. Extending Civil Marriage to Same-Sex Couples is Just and Equitable

In Canada in 2005, civil marriage has many purposes. It allows couples to share intimacy and companionship, permits societal recognition of relationships, distributes economic benefits and responsibilities, blends families, and supports procreation and childrearing.[11] Civil marriage does not attempt to coerce or require every married couple to fulfill each of these purposes; certainly couples of the opposite sex who are not able to have children, or choose not to do so may still marry civilly. Same-sex relationships, in fact, share in all of these purposes, including procreation and the rearing of children, and it is discriminatory to presume otherwise. As then Madame Justice L'Heureux-Dubé stated,

> 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]

Some rely on an 1866 case, *Hyde v. Hyde*,[13] which described "marriage, as understood in Christendom" as the "voluntary union for life of one man and one woman, to the exclusion of all others". First, that case was not about same-sex relationships. Further, social values, including religious values, have changed significantly since the time of *Hyde.* Many religious communities support same-

11 See *Halpern v. Canada* (Attorney-General) (2003), 65 O.R. (3d) 161 at para. 94.

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

13 (1866), L.R. 1 P & D 130.

sex relationships and the right of same-sex couples to marry. The CBA believes that the opposite-sex definition of civil marriage no longer reflects the nature of Canada as a diverse, multicultural and multi-faith society.

Excluding same-sex couples from civil marriage undermines the dignity and equality of such relationships, and the individuals in such relationships. In our view, opening civil marriage to same-sex couples would strengthen the institution of marriage by ensuring its consistency with modern Canadian values.

ii. Civil Unions are an Unacceptable Alternative

Some suggest that rather than extend civil marriage to same-sex couples, Parliament should enact an alternative "civil union" arrangement for same-sex couples.[14] There are good reasons why this is not a viable alternative.

As stated in the Preamble to Bill C-38:

> … the Parliament of Canada has legislative jurisdiction over marriage, but does not have the jurisdiction to establish an institution other than marriage for couples of the same-sex.

Any attempt by Parliament to enact a civil union arrangement would contravene the division of powers in sections 91 and 92 of the *Constitution Act, 1867*. The Supreme Court of Canada has recently confirmed that such arrangements are exclusively the jurisdiction of the provinces.[15]

The Bill's Preamble also states that:

> … civil union, as an institution other than marriage, would not offer [same-sex couples] equal access and would violate their human dignity, in breach of the Canadian *Charter* of Rights and Freedoms.

A separate legal status that has the same formal rights and obligations of marriage but which is not "marriage" according to the prevailing understanding of that word would not offer equality to same-sex couples. A regime that would be effective only in this narrow respect is a completely inadequate response to the current

14 *Supra*, note 2 - Discussion paper. See, option number 1, for example.

15 *Supra*, note 3 at para. 33.

violation of equal rights for gays and lesbians. The "separate but equal" argument is reminiscent of the historic segregation of African-Americans in certain schools,[16] and has been judicially characterized as an "appalling" and "loathsome artifact".[17]

Such a proposal perpetuates and legitimizes bigoted notions that same-sex relationships are worth less than opposite-sex relationships. The CBA sees this as intolerant and intolerable.

III. ANALYSIS OF SPECIFIC SECTIONS OF BILL C-38

Sections 2 and 4 of the Bill state that:

> 2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
> 4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same-sex.

These sections affirm the current state of the law that includes same-sex couples in civil marriage in most Canadian jurisdictions, and extend that inclusion to the rest of the country. This provides consistency of marriage for civil purposes across the country, and affirms the value and dignity of all couples equally, as required by the *Charter*. We support these sections as drafted.

Section 3 states that:

> 3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

This is consistent with the recent statement of the Supreme Court of Canada, that:

> [T]he guarantee of religious freedom in s. 2 (a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.[18]

16 *Brown v. Board of Education,* 347 U.S. 483 (1954). See also, dissenting opinion of Linden J.A. in *Egan v. Canada* (1993), 103 D.L.R. (4th) 336 (Fed.C.A.).

17 See, for example, LaForme J. in the trial decision in *Halpern*, *supra*, note 11.

18 S*upra*, note 3 at para. 60.

In our view, section 3 addresses any genuine concerns that the civil recognition of same-sex marriage could potentially undermine the right of religious groups to determine their own definition of marriage. It stresses the separate roles of church and state with respect to marriage.

Just as the recognition of the equality of same-sex relationships is an important aspect of *Charter* values, freedom of religion is also guaranteed in the *Charter* and represents values that are integral to modern Canadian society.

This principle was upheld by the Ontario Court of Appeal in *Halpern*.[19] The Metropolitan Community Church of Toronto (MCCT), a church that affirms religious marriages for same-sex couples, intervened in that case, arguing that an exclusively opposite-sex definition of civil marriage violated its freedom of religion by infringing its ability to define marriage consistent with its own religious principles.

While the reverse of current arguments from some religious groups, MCCT's argument was based on the same concern: the legislated definition of civil marriage might undermine the rights of religious groups to define marriage for religious purposes in accordance with their own fundamental tenets.

The Court of Appeal rejected MCCT's argument on this point, and affirmed the separate roles of church and state with respect to marriage. It stated:

> In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage. …
>
> We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only.

19 *Supra*, note 11.

> … the common law definition of marriage does not oblige MCCT to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common law definition of marriage that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there is nothing in the common law definition of marriage that obliges MCCT to perform only heterosexual marriages.[20]

This case amended the definition of civil marriage to include same-sex couples, and at the same time affirmed that the civil definition of marriage has no impact on the rights of religious groups to hold and act on their own beliefs with respect to the religious definition of marriage.

Freedom of religion is a cornerstone of Canadian society and a core *Charter* value important to Canadians. As we oppose any attempt to violate equality guarantees under the *Charter* by excluding same-sex couples from civil marriage, we vigorously oppose any attempt to force religious officials to celebrate any marriage that is inconsistent with their religious beliefs.

The rights of same-sex couples do not conflict with the rights of religious groups. Neither are these competing rights. Both are affirmed and protected by the *Charter* and, in our view, by Bill C-38.

The consequential amendments in sections 5 through 15 of the Bill would ensure that other federal statutes are brought in line with the definition of civil marriage in section 2 of the Bill. We note that the consequential amendments omit certain relevant federal statutory provisions,[21] but this does not justify delaying passage of Bill C-38. We recommend that following passage of Bill C-38, a thorough review should be conducted to ensure that all necessary amendments are made to federal statutes, policies and regulations. The CBA also recommends that the future review include a new section in the *Interpretation Act*, for greater clarity:

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20 *Ibid.*, at paras. 53-57.

21 For example, the *Canada Evidence Act* contains express references to “husband” and “”wife” in section 4(2).

> s.33(4) A reference to "marriage" shall be interpreted to include a same-sex marriage, and a reference to "husband", "wife", or "spouse" shall be interpreted to include a spouse in a same-sex marriage.

IV. CONCLUSION

Bill C-38 represents an important step towards a goal that the CBA strongly supports, full equality for same-sex couples. The Bill would affirm the dignity of same-sex couples, and create a consistent regime for civil marriage across Canada.

Bill C-38 would fulfill Parliament's responsibility to recognize the substantive equality of all Canadians, while respecting the *Charter of Rights and Freedoms*. It would strengthen the civil institution of marriage by ensuring it continues to accord with modern Canadian values. It would further equality between same-sex and opposite-sex couples. It would ensure that same-sex couples have continued access to the institution of civil marriage in those provinces and territories where marriage of same-sex couples is currently legal, and would create such access where the definition of civil marriage has not yet been amended. Moreover, the Bill would respect and affirm *Charter* guarantees by recognizing that religious officials are free to define marriage for religious purposes in a manner consistent with their religious beliefs.

The CBA supports passage of Bill C-38 as drafted. Bill C-38 allows the full expression of both equality rights and freedom of religion. Its speedy passage would improve Canada's law and demonstrate Canada's strong commitment to equality and justice for all.