OFFICE OF THE PRESIDENT
CABINET DE LA PRÉSIDENTE

April 11, 2005

The Right Honourable Paul Martin
Prime Minister of Canada
80 Wellington Street
Ottawa, Ontario K1A 0A2

The Honourable Stephen Harper
Leader of the Official Opposition
House of Commons
Ottawa, Ontario K1A 0A6

Mr. Gilles Duceppe
Leader of the Bloc Québécois
House of Commons
Suite 533-S, édifice du Centre
Ottawa, Ontario K1A 0A6

Mr. Jack Layton
Leader of the New Democratic Party
House of Commons
Ottawa, Ontario K1A 0A6

Dear Prime Minister and Sirs:

RE: Bill C-38 — Civil Marriage Act

I am writing on behalf of the Canadian Bar Association to urge you and your respective caucuses to reject a Conservative Party motion now before the House, which reads:

> That this House declines to give second reading to Bill C-38, since the principle of the Bill fails to define marriage as the union of one man and one woman to the exclusion of all others and fails to recognize and extend to other civil unions established under the laws of a province the same rights, benefits and obligations as married persons.

Let's be very clear about the effect of this motion to defeat the *Civil Marriage Act*. The courts in eight Canadian jurisdictions have already held that denying same-sex couples the right to marry is unconstitutional. Those same courts have said that relegating same-sex conjugal relationships to a second-class status called civil unions does not meet constitutional muster. The constitutionality of same-sex marriage is the law of the land. Period. To change this, Parliament must invoke the notwithstanding clause and override the *Charter of Rights*.

Opponents of the *Civil Marriage Act* have made much of the Supreme Court of Canada declining to comment on the reference question, "Is the traditional definition of marriage, between one man and one woman also constitutional." We respectfully disagree with any assertion that, because of the Court's ruling, the constitutionality of an opposite-sex requirement for marriage passed by Parliament is an open question.

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An unconstitutional definition of marriage will not be upheld by the courts simply because it has been enshrined in a statute. Court pronouncements did not turn on the fact that the definition of marriage had its origin in the common law, but rather on the finding that an opposite-sex requirement for marriage is fundamentally offensive to the notion of equality in the *Charter*. For example, the Ontario Court of Appeal stated:

> In this case, same-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

It is disingenuous to say that the ruling would have been different if the common law definition of marriage had been statutorily prescribed. When the same-sex marriage cases were decided, there *was* legislation in place confirming the common law definition of marriage: the federal *Modernization of Benefits and Obligations Act*. The judges considered this *Act* as a statement of Parliamentary intent, and still found an opposite-sex requirement to be unconstitutional. The Quebec Superior Court specifically found that, to the extent it operated as a bar to same-sex marriage, the *Act* contravened s.15 of the *Charter*.

The addition of a regime for civil unions that, by constitutional necessity, would be limited only to rights and benefits under federal jurisdiction cannot turn this unconstitutional lemon into a constitutional Cadillac.

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.

The Canadian Bar Association wants our lawmakers to have an accurate understanding of the Supreme Court decision and the implications of passing the Conservative motion. We encourage you and your colleagues to take a principled stand, defeat the motion, and adopt the *Civil Marriage Act* without further delay.

Yours sincerely,

(Original signed by Susan T. McGrath)

Susan T. McGrath

cc Honourable Irwin Cotler, P.C., M.P, Minister of Justice
cc Joe Comartin, M.P., Justice Critic, National Democratic Party
cc Richard Marceau, M.P., Justice Critic, Bloc Québécois
cc Vic Toews, M.P. Justice Critic, Conservative Party