Submission on Marriage and the Legal Recognition of Same-Sex Unions

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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 Family Law Section, the Constitutional and Human Rights Law Section, the Standing Committee on Equality and the Sexual Orientation and Gender Identification 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

Submission on Marriage and the Legal Recognition of Same-Sex Unions

I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to respond to the November 2002 Discussion Paper of the Minister of Justice and Attorney General of Canada entitled *Marriage and the Legal Recognition of Same-sex Unions* (the Discussion Paper).[1]

Marriage is an important and fundamental civil right in a constitutional democracy. The CBA recognizes that the concept of what that civil right entails and, in particular, who may become part of the institution of marriage has historically been characterized as a moral, religious question resulting in passionate debate. In a society ruled by laws, the CBA submits that the question of marriage of same-sex couples must be fully informed by a contextual analysis of equality, as mandated by the *Charter of Rights and Freedoms*.[2] To that end, the CBA supports the full, legal recognition of equal marriage for gays and lesbians as the only constitutionally sound position.

The CBA recommends that the institution of marriage as it is currently structured be redefined to include same-sex couples. There should be a federal statute setting out in express language that same-sex couples are entitled to marry. Relevant federal, provincial and territorial legislation should be amended to be

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1 Department of Justice, *Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper*, November 2002.

2 *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, Schedule B of the *Canada Act 1982*, (U.K.) 1982, c. 11.

consistent with the new Act. In the CBA's view, equal marriage for gays and lesbians is not barred either at common law or by statute. The century-old common law definition relied upon by those who oppose the inclusion of same-sex relationships under the rubric of marriage does not, in the CBA's view, preclude marriage of same-sex couples but can and must evolve to include gays and lesbians lest it be held to be constitutionally inoperative. No federal statute has ever been enacted to specifically define marriage and the interpretive clause in the *Modernization of Benefits and Obligations Act* (the *MBOA*), specifically introduced not to deal with marriage but with "fairness and tolerance", cannot be relied upon to assert a statutory bar.

Equal marriage for gays and lesbians is, thus, a matter of equality under the *Charter*. In the three cases dealing with marriage of same-sex couples at present before the courts, all three courts have agreed that the exclusion of lesbians and gays from marriage is contrary to the equality provisions of the *Charter*. Only one court believed that the discrimination was justifiable in a free and democratic society. The CBA believes that such discrimination is not justifiable and that this must be a paramount consideration for Parliament if its desire is to resolve the issue of lesbian and gay civil rights and bring to an end decades of equality litigation which has brought about legal reform on an *ad hoc*, piecemeal basis. Given this legal framework, in the CBA's view, the government is compelled to recognize equal marriage for gays and lesbians.

This conclusion builds on past CBA resolutions and submissions on related topics such as sexual orientation as a prohibited ground for discrimination and benefits and obligations in same-sex relationships. It also demonstrates that providing legal sanction for marriage of same-sex couples represents a logical and appropriate extension of existing federal, provincial and territorial legislation conferring responsibilities and benefits in relation to, among other things, income tax, pensions and employment insurance.

The other two approaches identified in the Discussion Paper fail to respond to the

legitimate aspirations of many same-sex couples to marry. Further, they create new problems for opposite-sex couples. The first approach, leaving marriage as an institution only for opposite-sex couples and legally recognizing same-sex unions through creation of a separate civil registry, effectively relegates same-sex partnerships to a second-class form of relationship. The third approach, leaving marriage to individuals and their religious institutions and creating a registration system for all conjugal relationships, undermines the traditional concept of marriage, by denying opposite-sex couples the benefit of marriage. The inadequacy of these options and associated difficulties are discussed in this submission.

In issuing the Discussion Paper, the government has embarked on an unprecedented public debate about minority rights. Minority communities have been given legal recognition and protection under the *Charter because of the historical discrimination experienced by them.* No other minority community has, heretofore, been subjected to a public process designed to define the nature and extent of their civil rights. The historical record of civil rights in Canada and, notably, in the United States is replete with examples of minority communities requiring the protection of the courts from unjust laws. The CBA is mindful of the dissenting opinions which have been expressed publicly as a result of the issuance of the Discussion Paper and is concerned that the treatment of an unpopular minority by the democratic majority may well result in constitutionally inoperative legislative solutions. For this reason, the CBA participates in this process not as a moral or ethical exercise but in order to facilitate a reasoned discussion about the legality of any legislative options Parliament – the maker of laws – may choose to consider.

II. CBA POLICY ON SAME-SEX RELATIONSHIPS: EQUALITY AND LEADERSHIP

The CBA is a professional, voluntary organization representing over 38,000 lawyers, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA. The CBA promotes fair justice systems, facilitates effective law reform, promotes equality in the legal profession and is devoted to the elimination of discrimination, including discrimination on the basis of sexual orientation. The CBA is committed to the rule of law and is a staunch advocate of the constitutional values that are fundamental in Canadian society.

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 in a manner consistent with the *Charter* and human rights legislation. 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 Sexual Orientation and Gender Identity Conference (SOGIC). The CBA's Branches in Alberta, British Columbia, Manitoba, New Brunswick Nova Scotia and Ontario, 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*, which determined that the exclusion of sexual orientation from

that province's *Individual's Rights Protection Act* was unconstitutional.[3]

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".*[4]

In 2000, the CBA prepared a submission in support of Bill C-23, the *Modernization of Benefits and Obligations Act* (the *MBOA*), concerning federal benefits and obligations for heterosexual and same-sex common-law partners.[5] The CBA urged the Justice and Human Rights Committee to pass the *MBOA* without substantial amendment on the basis of the constitutional imperatives that, in the CBA's view, mandated the full inclusion of gays and lesbians in Canadian society.

The CBA submission described the exclusion of same-sex couples from full responsibilities and benefits in relation to, among other things, income tax, pension and employment insurance as "neither fair nor tolerable". This situation, moreover, was seen as detracting from the dignity and self-worth of this community.

Thus, the CBA supported the Bill, which sought to confer these rights and responsibilities on same-sex couples and heterosexual common-law partners. This was to be accomplished by creating a definition of "common law partner", applicable to both opposite-sex and same-sex conjugal relationships (the term "spouse" would be reserved for married heterosexual couples).

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3 *Vriend v. Alberta (Attorney General),* {1998} 1 S.C.R. 493.

4 Canadian Bar Association, Resolutions 94-06.1-M, 94-06-A, 96-09-A and 99-03-A.

5 Canadian Bar Association, *Bill C-23 – Modernization of Benefits and Obligations Act,* March 2000.

Prior to the *MBOA*, the jurisprudence had clearly established that gays and lesbians were "spouses" pursuant to both the *Charter* and human rights legislation. At that time and since that time, many provinces were enacting or had enacted legislation to confer rights and obligations on same-sex spouses and were simply joining 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. The *MBOA* was, in effect, "catching up" to the Canadian public.

The CBA also advised the Committee that the nearly two decades of litigation over the issue of civil rights for gays and lesbians had imposed law reform on an *ad hoc*, piecemeal basis. The CBA, therefore, urged the federal government to take a leadership role that would create legal reform consistent with these constitutional imperatives. To that end, the CBA identified the omissions in the *MBOA* (immigration, *Evidence Act* and spousal compellability, marital exemption for age of consent under the *Criminal Code*) and called upon the government to quickly address those omissions. To date, these omissions have not been remedied by the government. In the case of immigration, the new requirement in the *Immigration and Refugee Protection Regulations*[6] that common law partners, including same-sex couples, cohabit for one year has perpetuated the discrimination of same-sex couples who may not be able to cohabit for a variety of reason (including fear of persecution in some countries where homosexual activity is still illegal) and stands in stark contrast to the immigration provisions for married heterosexual couples.

The CBA also warned the government that, in its view, the segregation of same-sex relationship into the category of "common law partner" while reserving the term "spouse" for married, opposite-sex couples both ignored the existing jurisprudence and invited constitutional scrutiny because of the denial of marriage

6 SOR 2002-227, s. 1(1). *Canada Gazette Part II, Vol. 136 Extra.* While s. 1(2) states that an individual in a conjugal relationship for at least one year is unable to cohabit with the person due to persecution or any form of penal control shall be considered a common-law partner, this places the onus on the same-sex couple to show they would have cohabited but for the fear of persecution etc.

to same-sex spouses. Stated succinctly, the CBA considered the "separate but equal" regime of the *MBOA* to be a political compromise at odds with the Federal Court ruling in *Moore and Ackerstrom* v. *Canada* and a compromise with the potential to violate section 15 of the *Charter*.[7]

When, subsequent to our appearance before the Justice and Human Rights Committee, the "marriage amendment" (section 1.1) was added to the MBOA, the CBA made submissions to the Senate Standing Committee on Legal and Constitutional Affairs.[8] The CBA recommended against the amendment, which "might weaken the existing legislation or utilize language suggesting the superiority of the heterosexual relationships". The CBA stated the following to the Senate Committee:

> Given the existing *Charter* jurisprudence, the inclusion of same-sex 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 same-sex relationships). In effect, it segregates those in same-sex relationships into a separate category.
>
> The "marriage amendment" explicitly excludes same-sex couples. It thus exacerbates the compromise and will likely lead to further litigation.
>
> *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 same-sex couples. [emphasis added]*

Thus, the CBA presciently advised Parliament that the question of equal marriage for gays and lesbians would, as a result of the marriage amendment and the segregated regime of the *MBOA* (along with its omissions), need to be resolved by reference to the constitutional imperatives of Canadian society.

No such requirement exists for married couples.

7 *Moore and Ackerstrom v. Canada (Attorney General),* [1998] 4 F.C. 585.

8 Canadian Bar Association, Letter to Senate Committee: *Bill C-23- Modernization of Benefits and Obligations Act*, May 2000.

The CBA also said that Bill C-23 should not contain language suggesting the superiority of heterosexual relationships. It recommended that the interpretative section proposed to Bill C-23, to the effect that marriage means the union of a man and a woman to the exclusion of all others, be removed. Defining marriage in the context of Bill C-23 was considered unnecessary.

III. RECOMMENDED APPROACH: GIVE SAME-SEX COUPLES THE LEGAL CAPACITY TO MARRY

The second approach in the Discussion Paper, and the only one supported in this submission, is legislating the possibility of equal marriage for gays and lesbians. This would require both a federal statute setting out expressly that same-sex couples are entitled to marry, and amendments to related federal legislation (such as the *MBOA*) and provincial and territorial legislation, to provide for consistency with the new Act.

The main attraction of this approach is that it treats same-sex couples as substantively equal to opposite-sex couples. Both would be able to enter into marriage, on the same grounds and with the same rights and recognition.

A. Constitutional Imperatives of the Secular Society: Common Law, the *Charter* and Marriage

Since the enactment of the *MBOA* there have been three cases decided in British Columbia, Ontario and Quebec concerning the constitutionality of equal marriage for gays and lesbians: *Halpern v. Canada (Attorney General), Hendricks v.Quebec (Attorney General)* and *EGALE Canada Inc. v. Canada (Attorney General)*.[9] The government has asserted that these cases have produced conflicting results. In the CBA's view, however, the important ratio of all three cases is that the exclusion of gays and lesbians from marriage is discriminatory

9 *Halpern v. Canada (Attorney General),* [2002] O.J. No. 2714; *Hendricks v. Quebec (Attorney General),* [2002] J.Q. 3816; *EGALE Canada*

pursuant to section 15 of the *Charter*. That commonality is critical to understanding that while the results of the cases may appear to be in conflict, it has been clearly established as a matter of law that the discrimination exists. The CBA strongly urges the government to end the discrimination and to do so in a constitutionally permissible manner.

At present, it is asserted by the government in the three marriage cases that the common law definition of marriage excludes same-sex couples and/or that the exclusion is justifiable in a free and democratic society. The CBA submits that the position is not constitutionally sustainable for the following reasons:

(1) The common law does not preclude equal marriage for gays and lesbians;

(2) A common law definition of marriage that would exclude equal marriage for gays and lesbians is constitutionally inoperative;

(3) The segregation of same-sex relationships into a category other than marriage would not survive *Charter* scrutiny and would lead to further litigation.

Recent case law has set forth arguments that support legislating equal marriage for gays and lesbians. The court stated in *Halpern*, *Hendricks*, and *EGALE* that:

- The institution of marriage in modern-day Canada does not exist solely to further a purpose, (which the Court viewed as being uniquely heterosexual), namely, the procreation of children. Rather, the modern institution of marriage serves the purpose of acknowledging a committed personal relationship involving obligations and offerings of mutual care and support, companionship, shared shelter and shared economies.

- The denial of the institution of equal marriage for gays and lesbians would be to deny same-sex couples the social approbation enjoyed by opposite-sex couples who marry, based purely on sexual orientation.[10]

B. Common Law No Bar to Equal Marriage for Gays and Lesbians or a Constitutionally Inoperative Bar

Those who oppose equal marriage for gays and lesbians assert that the common law defines marriage is "one man and one woman to the exclusion of all others". In the CBA's view, this is not a proper interpretation or application of the common law and one that all three courts in the marriage cases have agreed is constitutionally inoperative.

The common law definition of marriage that excludes same-sex relationships is, in the CBA's view, based on antiquated law over a century ago that did not address the germane point of equal marriage for gays and lesbians. The oft-cited 1866 English decision in *Hyde* v. *Hyde* addressed the question of whether a couple married polygamously could divorce. *Hyde* did not revolve around the nature of marriage generally.[11] The specific issue was whether, for purposes of construing the word "wife" in the *Divorce Act, 1857*, the status of a woman married polygamously resembles that of the Christian "wife". It was held that it did not because "in Christendom" – as opposed to colonies in which polygamous marriages were considered to be valid – marriage is the "union of two people who promise to go through life together" which was then restated using gendered terms corresponding with those used in the statute "one man and one woman for life."

The ratio in *Hyde* relates to the definition of wife in the *Divorce Act, 1857* as governed by the application of Christian ecclesiastical law, and not to some

10 Ibid.

11 *Hyde v. Hyde* (1866), L.R. 1 P&D 130

global or common law ruling on the definition or nature of marriage as requiring the two parties to be man and woman. The case simply was not about same-sex relationships. In any event, however it is read, the case does not represent the law for heterosexual couples anymore.

The 1970 English decision in *Corbett v. Corbett*, has also been relied upon to assert the common law definition of marriage.[12] *Corbett* was an application for nullity of marriage on the grounds of non-consummation and transsexualism. The court recognized that the specific legal issue before it was, as in *Hyde*, whether one of the spouses – in *Corbett*, a male-to-female transsexual – could be considered to be a woman in the context of marriage. The court relied upon *Hyde* to conclude that marriage is essentially heterosexual. It is clear from reading that reference to *Hyde* in context that the connotation of essentially was not that it was absolutely required that the spouses be one man and one woman, but that the court was simply recognizing that marriage was generally thought of as heterosexual.

Thus the court felt that it had to decide whether a transsexual person could function as a woman, and made the assumption that biological evidence would resolve the factual question. In the end, Ormrod J. did not actually base his *ratio* on the supposed definition of marriage in *Hyde* or on the biological-medical evidence. Instead, he held the marriage to be void *ab initio* by analogy to "meretricious marriage", which in canon law are treated as void, and are not merely voidable.

Hyde and *Corbett* have been relied upon in the Canadian authorities *Vogel*, *Re North et. al. and Matheson, Layland v. Ontario (Minister of Consumer and Commercial Relations)* and *EGALE*.[13] *Re North* essentially dealt with the solemnization of a marriage between two gay men pre-*Charter*. *Layland*

12 *Corbett v. Corbett,* [1970] 2 All E.R. 33.

13 *Vogel v. Manitoba,* [1995] M.J. No. 235 (C.A.); *Re North et. al. and Matheson* (1974), 52.D.L.R. (3d) 280 (Man. Co. Ct.); *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.); *EGALE, supra*, note 8.

preceded the *Vriend* and *M.* v. *H.* decisions of the Supreme Court of Canada, which articulate the constitutional status of lesbian and gay families in Canada.[14] In the CBA's view, the dissent written by Madam Justice Greer in *Layland* is more consistent with our *Charter* context in 2003:

> [T]he common law must grow to meet society's expanding needs. It is clear from the supporting materials submitted by the applicants and the intervener Church, that gays and lesbians have been, for many decades, entering into permanent relationships which are sanctified by their Church.[15]

As a matter of common law interpretation, the CBA submits that the principles underlying the common law and its evolution must flow from *Charter* values and that where the law can be interpreted so as to avoid a constitutional conflict it ought to be so interpreted.

Moreover, same-sex couples should have the choice of whether to marry or not. They should be able to intertwine their lives socially, financially and formally. Same-sex couples should be equated with common law cohabiting couples, who have the option to marry. It is the choice of marriage that is important. As stated by the Supreme Court of Canada recently, in *Walsh v. Bona*, wherein it was held to be constitutionally permissible to exclude common law heterosexual couples from the *Marital Property Act* in Nova Scotia, choice must be paramount.[16] The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual.? *Walsh* v. *Bona* clearly establishes, as well, an additional constitutional imperative vis-a-vis marriage as the ability and choice to marry was recognized as an important civil liberty.

C. The Charter

Even in the event that the courts ultimately hold that a common law bar exists to

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14 *Vriend*, *supra,* note 3; *M. v. H.* [1999] 2 S.C.R. 3.

15 *Layland*, *supra,* note 13 at 678.

16 *Nova Scotia (Attorney General) v. Walsh,* [2002] SCC 83, File No. 28179.

equal marriage for gays and lesbians, it is clear that such a bar is contrary to section 15 of the *Charter*. All three courts agreed on this point with the court in B.C. diverging only on the issue of whether the discrimination was justified under section 1 of the *Charter*.

In the CBA's view, the decisions in Quebec and Ontario that the discrimination was not justified are more constitutionally sound analyses on this issue. As discussed under the section addressing the various options, the primary basis for justifying the discrimination – procreation and raising of children – is simply definitional exclusion that ignores the reality of gay and lesbian families and overlooks the reality of opposite-sex couples who are permitted to marry irrespective of their capacity or decision to raise children, some of whom avail themselves of the very reproductive technologies or adoption procedures used by same-sex couples to bring children into their families.

Moreover, the federal government has publicly stated its commitment to legislation and funding to ensure that the best interests of children are met. Many children are living with gay or lesbian parents. Often those gay or lesbian parents are involved in serious and committed relationships. These children should not be discriminated against because their parents are unmarried. They should be able to feel the stability of a publicly recognized union. Indeed, all of society should be comforted by the desire and need of these partners to create stable, committed unions.

D. No Statutory Bar to Equal Marriage for Gays and Lesbians

The only federal statutory reference to the capacity to marry can be found in section 1.1 of the *MBOA,* an interpretive clause stating that the meaning of "marriage" is unaffected by the passage of the Act. The then Minister of Justice stated that *MBOA* was not an Act about marriage, but was offered as legislation about "fairness and tolerance". Thus, in the CBA's view, the *MBOA* was designed to avoid or forestall the complex question of equal marriage for gays and lesbians and cannot be relied upon as a statutory bar.

Another argument in support of the marriage approach is that the exclusion of same-sex couples from the institution of marriage signals that same-sex unions do not deserve the same interest, the same respect and the same consideration as opposite-sex unions, perpetuates the underprivileged status of gays and lesbians, and touches their sense of dignity at its core.

E. Potential Legal Challenges to Marriage Approach

To be sure, choice of the marriage option could lead to constitutional and human rights challenges in the courts. As with the option of instituting a separate registry for same-sex civil unions, discussed below, some provinces or territories might refuse to administer marriage of same-sex couples, or refuse to amend legislation prohibiting the solemnization of marriage of same-sex couples, despite any federal legislation redefining marriage to include same-sex couples.

Litigation might ensue between the federal and provincial governments regarding the division of constitutional powers and any use of the notwithstanding clause. Same-sex couples not able to marry because their province does not administer vows or amend restricting legislation would likely bring challenges under section 15 of the *Charter*.

In many provinces, marriages are administered by clergy empowered to give both legal and religious effect to unions. If marriage is legislated to include same-sex unions, some clergy may refuse to administer vows to give legal effect to same-sex unions based on their religious beliefs. In the CBA's view, as discussed in the *Halpern* decision, this is likely a constitutionally permissible form of discrimination on the basis of religious freedoms guaranteed by the *Charter*.[17] It is important to note, as well, that the applicants in the three marriage cases have not taken the position that any church can or should be required by the state to marry any couple who does not conform the church's religious beliefs. Any legislation exempting clergy, who are empowered to administer marriage vows

sanctioned by the state, may be challenged by same-sex couples who are refused such services as being a violation of their equality right under the *Charter*.

In spite of these potential legal roadblocks, we believe that even greater legal action will result if marriage is not redefined to include same-sex couples. Providing such couples with the legal capacity to marry is consistent with the values of equality, fairness, inclusiveness and openness that have come to characterize Canadian society. It represents the next logical legal step in the recognition of rights and obligations for same-sex couples. In no way would the fabric of society be undermined by allowing same-sex couples to enter into the special relationship of marriage.

IV. PROBLEMS WITH SEPARATE REGISTRY AND REGISTRY FOR ALL UNIONS

On a substantive level, the two options involving the creation of new registries to publicly recognize the importance of relationships other than opposite-sex marriage relationships undermine the constitutional imperatives of the marriage debate. A registration system should not abrogate existing rights of persons engaging in intimate relationships, such as property rights defined by the doctrine of constructive trusts, or rights and obligations flowing to persons engaging in "common law" relationships and cannot constitutionally be used to further exclude gays and lesbians from the institution of marriage.

A. Separate Registry

The first approach in the Discussion Paper is to leave the legal institution of marriage to opposite-sex couples, i.e. one man and one woman. Same-sex unions would be given legal recognition by the creation of a separate civil registry. Same-sex couples and common law couples could register their unions in these registries.

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17 *Supra* note 9.

Creating a separate registry for same-sex unions would not, however, substantively address the inequality suffered by same-sex couples legally unable to marry. While same-sex couples might be given, along with opposite-sex couples, the legal right to register their unions in a separate registry, same-sex couples would not be given access to the legal institution of marriage.

The legal institution of marriage is not simply a civil relationship involving certain rights and obligations. Marriage represents, in the words of Blair J. of the Ontario Divisional Court in *Halpern* "society's highest acceptance of the self-worth and the wholeness of a couple's relationship". [18]

One of the legal consequences that will certainly flow from the implementation of a separate registry for same-sex unions is a challenge under section 15 of the *Charter*. In the recent cases of *Halpern* and *Hendricks*, the courts recognized arguments pursuant to which a separate civil registry might violate equality rights under s.15 of the *Charter*[19] Specifically, the Court indicated that it anticipated that arguments made in any section 15 *Charter* challenge would mirror those made by the plaintiffs in *Halpern* and *EGALE*.[20]

A separate registry for same-sex couples would be particularly vulnerable to the charge of perpetuating the stereotype that same-sex relationships are of lesser value than heterosexual relationships. The "separate but equal" doctrine was notably likened by LaForme J. in *Halpern* to the historic segregation of African-Americans on buses in the United States.[21] It was described by Linden J.A. in *Egan v. Canada* as a "loathsome artifact," and an "appalling" doctrine.[22]

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18 *Ibid*.

19 *Supra,* note 9.

20 *Ibid*.

21 *Ibid*. at QL para. 363 and 450.

22 *Egan v. Canada (Attorney General)* (1993), 103 D.L.R. (4th) 336 (F.C.A.); affirmed [1995] 2 S.C.R. 513

The latter characterization of the doctrine was noted by the court in *Hendricks*, in reference to the fact of same-sex couples being denied access to marriage, notwithstanding their having rights and obligations similar to all couples.[23]

Another likely legal consequence is that certain provinces might refuse to implement a separate civil registry for same-sex and heterosexual common law couples. In that event, litigation could be instituted by either provincial governments or by the federal government over the meaning and the consequences of the division of constitutional powers regarding marriage, and any use of s.33 of the *Charter* (the notwithstanding clause). Same-sex or heterosexual common law couples in those provinces refusing to administer a civil registry, could argue that their right to equality under the *Charter* has been violated by such refusal.

The creation of a separate registry may have the effect of creating or entrenching the public perception that same-sex unions are somehow inferior to heterosexual unions because government has affirmed that same-sex couples do not deserve the right to marry.

B. Registry for All Unions

The third approach in the Discussion Paper is to dismantle marriage as a legal institution and create a registry for all couples to register their unions, in order to enable them to obtain the legal benefits and burdens consequential to their relationship.

This approach treats opposite-sex couples and same-sex couples in the same manner, in that marriage is not available to either group. Both groups may, however, avail themselves of a common form of civil union encompassing current marriages and other intimate relationships.

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23 *Supra,* note 9.

Abolishing marriage and creating a central registry system would require the cooperation of all provinces. There might be provinces which refuse to cease administering marriage, resulting in legal challenges between the federal and provincial governments regarding the constitutional division of powers and any use of the notwithstanding clause. In provinces where the solemnization of marriage would remain an entitlement of opposite-sex couples only, same-sex couples might bring equality challenges.

Further, if provinces refuse to administer state-sanctioned marriage, leaving only the religious institution of marriage, both same-sex and opposite-sex couples who do not wish a church-sanctioned marriage might claim discrimination on the grounds of religion under section 15 of the *Charter* as well as under human rights legislation.

In terms of non-legal consequences, abolishing marriage may not address the deeper social issue of same-sex couples and opposite-sex couples who want to "marry" and who view state-sanctioned marriage as an institution integral to the existence of family relationships. But one result might be the general acceptance of the new system of civil union as "the new marriage," making this option similar in result to the second approach of the government allowing same-sex couples to marry. The distinguishing consequence would be the relinquishment by the federal government of various responsibilities to the provinces.

V. CONCLUSIONS

Against the backdrop of growing legal recognition for diverse family forms and relationships, same-sex couples across Canada are seeking the freedom to marry the partner of their choice. Although there have been conflicting lower court decisions, in our submission, the extension of marriage to same-sex couples is inevitable.

The CBA supports the Marriage approach, which confers on same-sex couples the same benefits and responsibilities enjoyed by opposite-sex couples. The legal recognition of equal marriage for gays and lesbians is a fundamental civil right and a constitutional imperative. In the CBA's view, there is no common law or statutory impediment to equal marriage for gays and lesbians, and any common law interpretation or statutory provision barring equal marriage for gays and lesbians would be constitutionally inoperative. In the result, Parliament can and must provide the constitutionally sound legal remedy - full marriage rights for same-sex spouses. It is a matter of equality which the CBA fully supports and facilitates law reform in a comprehensive fashion consistent with our constitutional foundation.

In applying any of these approaches, consultation is key to providing gays, lesbians, bisexuals, transgendered persons or transsexual persons, and heterosexual common law couples with equal treatment, by recognizing the nature of the intimate relationships in which they engage.