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Mr. Marcel Proulx

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• (1545)

[English]

The Chair (Mr. Marcel Proulx (Hull—Aylmer, Lib.)): Order.

Good afternoon, Minister. Welcome to the Legislative Committee on Bill C-38. We appreciate your accepting our invitation to our first official meeting. I understand you'll be with us for one hour?

Hon. Irwin Cotler (Minister of Justice): A little less now, because I was held up at the domestic affairs committee. I'll try to stay close to the hour.

The Chair: Maybe we can recuperate your 20 minutes on *their* time, and see how it ends at the end of the day.

Hon. Irwin Cotler: Fine.

The Chair: Good.

We have 10 minutes for you, Minister Cotler, and then we will proceed with questions—and potentially answers.

[Translation]

Minister, you have the floor.

Hon. Irwin Cotler: Thank you, Mr. Chairman

[English]

It is a pleasure for me to appear before you today as you begin your review of Bill C-38, the Civil Marriage Act. In my remarks this afternoon, I would like to set out first some of the contextual factors and related concerns that have underpinned this bill, in a related discussion, and then go quickly through some of the major provisions.

[Translation]

I have brought with me a clause-by-clause book for your use, which contains a short explanation of each provision, as well as relevant reference documents. As you know, the bill, which is reproduced at tab 1, is a relatively short one with two main substantive provisions.

[English]

These two substantive provisions are themselves organized around two foundational principles under the charter: the equality principle, and within that, extending equal access to civil marriage to same-sex couples; and the religious freedom principle, acknowledging respect for religious freedom. Together, these two principles represent the culmination of a process that was set in motion in 1982, when Parliament first introduced the Canadian Charter of Rights and Freedoms.

Mr. Chairman, indeed, the hearings of this legislative committee on this *projet de loi C-38* can only be understood against the backdrop of the Constitutional Act, 1982, and its centrepiece, the Canadian Charter of Rights and Freedoms, without which we would not even be here today discussing Bill C-38. This bill, in effect, is one of the many human rights advances that have emerged from the equality revolution that has taken place in our country since the introduction of the charter as part of our fundamental law, which has had a transformative impact on not only our laws but also, I would say, our lives.

In effect, Mr. Chairman, we have moved from being a parliamentary democracy to being a constitutional democracy. Judges have moved from being arbiters of legal federalism, which they still are, to judges being guarantors of rights entrenched in the charter, because we, Parliament, invested in them that authority by the adoption of the Charter of Rights and Freedoms. Individuals and groups now have rights and remedies, a panoply of rights and remedies, which they did not have prior to the adoption of the Charter of Rights and Freedoms.

I realize, Mr. Chairman, that with this rather transformative, even revolutionary, change—in fact, former Chief Justice Antonio Lamer spoke of it as being a revolution comparable to the discoveries of Pasteur in science—it is difficult for some of us to come to terms with this revolution. We remain attached to the more traditional notion of parliamentary supremacy, and the notion of the will of the majority in that context. But if we take a look at the first 115 years of our constitutional history, I think we will understand why we feel so linked to this notion of parliamentary supremacy. The first 115 years of our constitutional history reveal a preoccupation with the division of powers between the federal government and the provinces as distinct from limitation on the exercise of power, whether federal or provincial—in other words, a preoccupation with legal federalism rather than with civil liberties.

So when you had a civil liberties issue, if any question ever came before a court, as the late Chief Justice Bora Laskin put it, the question always was this: Is the denial of civil liberties within the legislative jurisdiction of the denying government? Or, as he otherwise put it, which of the two levels of government has the power to work the injustice—not whether the injustice itself should in fact be prevented?

The result, Mr. Chairman, was that we had a disturbing narrative, in our history, of discrimination—against aboriginals, against women, against racial and religious minorities, against the disabled, against refugees, against the aged—so long as we did not have entrenched rights and remedies. Admittedly, we had certain protections that arose from the common law, that arose from the Canadian Bill of Rights, that even arose from the vicissitudes of using legal federalism in the matter of a constitutional trespass to protect human rights. On the whole, though, there were no entrenched rights and remedies.

The dramatic nature of the 1982 Constitution Act and the charter resulted in the fact that we have a situation now where all these groups that were discriminated against not only have a panoply of rights and remedies that they never had before; these issues are now justiciable before the courts. We can come before Parliament and discuss matters that previously these individuals and groups would not even have had standing to go to the courts to address; nor would a bill such as we are now discussing ever have seen the light of day in that pre-1982 period.

• (1550)

I think we need to understand that transformative revolutionary backdrop, the context, to what we are in fact discussing here today.

[*Translation*]

In short, we moved from a division of powers process to a rights process where individuals and groups of Canadians are now rights holders, and rights claimants. Before the adoption of the Charter, groups such as women, aboriginal peoples, racial or religious minorities, children's groups or same-sex couples would not even have had the standing in many instances to bring their concerns before the courts.

[*English*]

Today, then, we are here as part of the culmination of a constitutional drama that was initiated by Parliament, inspired by the charter, advanced by individuals and groups, and sanctioned by the courts, and that has now returned to Parliament for this last stage in the decision-making process.

During this period, all aspects of this bill have been discussed in depth in this House; earlier in the standing committee that travelled across Canada and that heard from over 300 witnesses, and I'm pleased that this committee has incorporated, by reference, the testimony from that earlier inquiry; in the hearings before the courts and decisions in eight provinces and territories; before the Supreme Court of Canada in the reference hearing; in the media; and in other public fora.

[*Translation*]

The Supreme Court heard testimony from some 28 groups and individuals as well as the federal government and two provincial governments, and rendered its decision in December of last year. In that decision, the Supreme Court of Canada affirmed the constitutionality of the government's approach. In the words of the court, extending equal access to civil marriage to gay and lesbian Canadians is not only consistent with the Charter, but flows from the rights and freedoms set out in the Charter.

[*English*]

Mr. Chairman, we had the unanimous decision of the Supreme Court, but some Canadians have admittedly put the argument that the Supreme Court did not answer the fourth question, the question as to whether the opposite-sex requirement for marriage was constitutional. From that, they inferred that the court left open the possibility that limiting marriage to opposite-sex couples is still possible.

I think it's important to appreciate that we put that fourth question in order to permit groups who took that position—not a position we supported—to be able to argue that position before the courts. Indeed, intervenors were admitted in order to in fact argue that position.

What needs to be appreciated is that the court did not directly answer that fourth question, because it effectively had answered that question in the earlier part of the judgment. Indeed, as the court put it, by the time they got to that fourth question, the answer was effectively moot, and to have then answered it was unprecedented. It was moot because, as I said, the court had answered the question by holding that extending civil marriage to gays and lesbians was constitutional, and arguably, therefore, an opposite-sex requirement could no longer obtain.

More importantly, we had judgments of courts in eight jurisdictions that expressly held that the opposite-sex requirement for marriage was unconstitutional, a matter affirmed and referenced by the Supreme Court of Canada. Thousands of gay couples had already married, whose protection was at this point required. And as the court was engaging in this issue, it was an advisory opinion. Therefore, they could not direct us as to what we could do. What they could do is provide us the constitutional framework, in respect of which we could exercise the appropriate policy option. The court affirmed unanimously the constitutionality of that policy option of extending civil marriage to gays and lesbians as being not only consistent with the charter but indeed as flowing necessarily from it.

In the matter of religious freedom, the Supreme Court of Canada made some of the strongest statements to date on the nature of religious freedom, and confirmed the government's position that the bill does not affect religious freedom. In fact, the court reiterates on a number of occasions in its judgment that what we're dealing with here is civil marriage and not religious marriage, that the conferral of rights on one minority—in this instance, gays and lesbians—does not take away the rights of any other group, be it opposite-sex couples or be it any religious group or institution.

The court ruled that the state cannot compel religious officials to perform marriage ceremonies that would be against their religious beliefs, or compel religious institutions to provide their sacred spaces. Faith communities, therefore, are able to decide for themselves, as they were before, whether or not any specific marriage would meet the criteria of their religions. Religious groups have always had the ability to set additional qualifications, such as refusing to marry divorced persons and the like.

If more specific protections are desired, then those would have to be—

•(1555)

The Chair: Minister, excuse me.

Mr. Vic Toews (Provencher, CPC): On a point of order, Mr. Chair, the bells are ringing. We have a vote.

The Chair: Yes. The vote is at 4:20 p.m. The minister still has about a minute in his speech.

Mr. Vic Toews: I don't mind the minister finishing, but I assume that he will then be called back at another time, when we—

The Chair: We will talk with the minister about that now. The minister was already 20 minutes late.

Hon. Irwin Cotler: Not through my own wishes.

The Chair: No, no, it's just that we're trying to look at our timetable here.

Mr. Vic Toews: The minister had to be in the House. I'm not faulting him there.

The Chair: No, no.

Will you be available to come back after the vote, Minister?

Hon. Irwin Cotler: Well, that's when I'm already before the cabinet domestic affairs committee. I have to tell you that nearly all the items, in what is intended to be close to a five-hour meeting, are items that I have to present to that committee.

The Chair: Are you available tomorrow morning at 11 o'clock, Minister? Maybe your staff can look at this. We have a time slot open.

Hon. Irwin Cotler: We can look into it, but I want to tell you that tomorrow morning, one, it's cabinet, full cabinet; and two, I'm also testifying—I'll have to squeeze it in—on the impaired driving bill.

So where I can do it, I'll do it.

The Chair: You'll understand, Minister, that members of the committee want to be able to have an exchange with you.

Hon. Irwin Cotler: I understand. I'm prepared to come to an evening hearing, even.

Mr. Vic Toews: All I'm saying is that as long as the minister is making the commitment that he will come back, that's fine with me. We can break up the presentation; that's fine. He can finish his presentation now. We should go to the vote after the presentation.

The Chair: We'll have to.

Mr. Vic Toews: Yes.

The Chair: Thank you.

Hon. Irwin Cotler: I just want to say that I am prepared to come back even if it's an evening session. I'll do my best to accommodate this committee whenever it chooses to invite me.

Now, if more specific protections are desired, those would have to be included in provincial and territorial legislation, although it is clear that if existing provincial and territorial legislation is interpreted and applied, the Supreme Court has said that it must be interpreted and applied in the light of charter religious freedom guarantees, which have been very expansive, not only in the same-sex reference case but throughout the history of Canadian jurisprudence in these subject matters of religious liberty.

I've already encouraged my provincial and territorial counterparts to consider any additional protections they could make in legislation. Ontario has already responded with a bill, and others have indicated a willingness to do so over the next few months. Quebec has included specific protections in the civil code for some time.

•(1600)

[*Translation*]

I fully understand that some faith communities are still uncertain about the effect of this bill, but with respect, the same has been true with every prior amendment to the civil law of marriage or divorce.

Hansard shows that certain faith communities were uncomfortable about the effect on religious practice of the introduction of civil divorce in the 1960s, or the change in the prohibited degrees of consanguinity to allow first cousins to marry in the 1980s, as well as other changes of this kind.

[*English*]

With respect, the faith communities cannot really have any stronger guarantees than what the Supreme Court of Canada has said about the expansive nature of the guarantees, the protection of freedom of religion throughout Canadian jurisprudence, as I've indicated, and the repeated assurance of this government that it will seek to uphold these guarantees.

Mr. Chairman, I've spent a great deal of time discussing this issue with members of various faith communities, including my own. I realize that these concerns run very deep indeed, and the Government of Canada takes these concerns very seriously. At the same time, in our democratic and pluralistic society, the government has a responsibility to ensure that marriage laws serve all Canadians equally, without discrimination. And part of this is ensuring that marriage is available civilly where couples do not wish to marry religiously or where they do not meet the qualifications set by their own religion.

[*Translation*]

So here we are today, with the House having approved in principle the extension of access to civil marriage to same-sex couples while respecting religious freedom. You now have the important task of reviewing the bill to ensure that it accomplishes all that it can to fully respect the Charter guarantees of equality and religious freedom.

[*English*]

Let me briefly touch on one last issue before I turn to a quick review of the major provisions of the bill, which I suspect I'll have to return to on another occasion.

I would reinforce for the committee the special challenge you will be facing with this bill in that you must ensure that it is consistent with the Canadian legal framework—

The Chair: Minister, I apologize, but we have to go and vote.

Now, you will not be able to return here this afternoon. Ms. Hitch, your official, can be here, and Mr. MacCallum of course.

Would members want to come back to exchange with Ms. Hitch and Mr. MacCallum, or would you rather we cancel and reschedule when the minister can attend?

Hon. Irwin Cotler: Let me just say one thing, if I may, Mr. Chairman. You may not know that Ms. Hitch is *the* departmental expert. I think if she is here, you might get better answers than I might have shared with you. I'll still come back, but I'd use this opportunity as well.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Can't you cancel your committee meeting? It seems to me that if the government wants this bill, it should...

[*English*]

The Chair: Hold on a second.

Minister, I apologize, but they want to talk to the minister.

Hon. Irwin Cotler: Okay.

The Chair: Secondly, members of the subcommittee, would you please come back after the vote. Let's face it, as far as today is concerned, this is the end of the meeting. So if the members of the subcommittee would come back, please, we will do the in camera meeting with regard to....

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Point of order, Mr. Chairman. I'm a bit surprised at this turn of events.

The Chair: So am I.

Mr. Réal Ménard: It's a government bill. It seems to me that the minister should cancel his cabinet appearance and come back.

The Chair: Mr. Ménard, I asked the minister that question, and he said no.

Mr. Réal Ménard: Can't the minister make an extra effort?

Hon. Irwin Cotler: I am willing to make every effort. The only thing I cannot do is miss today's cabinet meeting because all of the items on today's agenda have to do with my files. I am basically the only witness before the cabinet committee today. That is the problem.

The Chair: I have to adjourn the meeting. I would ask that members of the subcommittee come back for the in-camera meeting. Thank you.

The meeting is adjourned.

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