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# Legislative Committee on Bill C-38

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## Thursday, June 2, 2005

## Chair

**Mr. Marcel Proulx**

# Legislative Committee on Bill C-38

**Thursday, June 2, 2005**

● (1805)

[*English*]

**The Chair (Mr. Marcel Proulx (Hull—Aylmer, Lib.)):** Good evening, and welcome to the legislative committee on Bill C-38.

[*Translation*]

Good evening and welcome to the Special Legislative Committee on Bill C-38.

[*English*]

Thank you, to the witnesses, for being here tonight. We appreciate your cooperation. We appreciate your being here.

There is of course translation. You're probably familiar with the system.

As you well know, you are allowed a 10-minute presentation. Then we move to question and answer rounds. The first round is seven minutes to each party for questions and answers, and thereafter the rounds are five minutes.

We have the Canadian Psychological Association, the Canadian Islamic Congress, the Pentecostal Assemblies of Canada, and as an individual, Mr. Brown.

We will start off with Mrs. Cohen, from the Canadian Psychological Association. Thank you.

**Ms. Karen Cohen (Associate Executive Director and Registrar, Canadian Psychological Association):** Thank you.

Good evening. The Canadian Psychological Association thanks chairperson Proulx and the honourable members of the committee for giving us this opportunity to present to you today on this important piece of legislation, Bill C-38.

[*Translation*]

I will be making my presentation in English, but I will be pleased to answer your questions in French if there are any.

[*English*]

I would like to preface my presentation to the committee by summarizing the history and nature of the involvement of the Canadian Psychological Association, or CPA, in the national debate on same-sex marriage.

As many of you may know, the CPA is the national professional association of psychologists. There are approximately 14,000 psychologists in Canada whose science and practice activities concern themselves with the biological, social, and psychological determinants of human behaviour.

In 1984, and then in 1986, the CPA issued two policy statements that bear directly on our stance in support of Bill C-38. The first, in 1984, prohibits the use of scientific information to promote discrimination, and the second, in 1996, opposes discrimination on the basis of sexual orientation.

In the fall of 2003, the CPA issued a press release refuting claims about homosexual persons' fitness to parent and the effects of homosexual unions on children that had been made by individuals and groups opposed to same-sex marriage. The CPA took a public position on the issue of same-sex marriage and, by extension, gay and lesbian parenting because it is an issue that we know something about.

Homosexuality, in and of itself, is not a psychological problem or disorder and has not been considered so by the professional mental health community for some 30 years. Further, the available scientific evidence indicates that children of gay and lesbian parents do not differ significantly from the children of heterosexual parents with regard to psycho-social and gender development and identity.

As has also been publicly cited by our colleagues of the American Psychological Association, psychological research shows that gay men and lesbians value committed relationships. Same-sex couples score comparably to heterosexual couples on measures of relationship quality. Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. The development of sexual identity, personality, and social relationships develop similarly in children of homosexual and heterosexual parents.

Although the sexual orientation of their parents does not result in psychological impairment in children, the stigma and isolation these families may experience as the result of public and systemic prejudice and discrimination may in fact cause distress.

Beliefs that gay and lesbian adults are not fit parents or that the psychosocial development of the children of gay and lesbian parents is compromised have no basis in science. Our position is based on a review representing approximately 50 empirical studies and at least another 50 articles and book chapters and does not rest on the results of any one study. These articles appear in such journals as: *Developmental Psychology*; *Journal of Child Psychology and Psychiatry*; *American Psychologist*; *Marriage & Family Review*; the *American Journal of Orthopsychiatry*; and the journals of family relations, sex roles, and social work.

An annotated bibliography, in fact, on the topic can be found on the website of the American Psychological Association.

In summary, the CPA publicly voices its support of same-sex marriage. This stance in support is based on our commitment to the fair and non-discriminatory treatment of persons in all spheres of society and to our opposition to the misuse of knowledge to justify discriminatory treatment of persons.

There is no evidence in the psychological literature that gay and lesbian persons are less fit to parent than are heterosexual persons. There is no evidence in the psychological literature that the psychosocial and gender identity and development of children is compromised by the sexual orientation of their parents.

Once again, we thank you, honourable members of the committee, for the opportunity to present to you today on this legislation of tremendous social importance, and for your work and commitment to ensure the fair treatment of all Canadians under the law.

Thank you.

**The Chair:** Thank you.

We now move to the Canadian Islamic Congress, Mr. Awan, 10 minutes.

**Mr. Khurrum Awan (Member, Canadian Islamic Congress):** Thank you.

Mr. Chairman and members of the committee, good evening. My name is Khurrum Awan, and I am here today representing the Canadian Islamic Congress.

The Canadian Islamic Congress represents the interests and concerns of tens of thousands of Canadian Muslims who draw from a variety of backgrounds, nationalities, and ethnicities. We are here to represent, on behalf of our community, our concern over what we regard as a distortion of the word marriage, which historically and currently, across all languages and cultures, indicates the union between a man and a woman. The word "marriage" has represented and continues to universally represent this fundamental concept. Legislation such as Bill C-38 would have profound social implications, maybe even making the use of such common words as husband and wife politically incorrect.

We would like to emphasize here that the Canadian Islamic Congress supports the minority and human rights of all groups, including the gay and lesbian communities of Canada. However, in our view, an attempt to distort the meaning of the word and institution that has universal meaning and broad social recognition goes beyond the content of minority rights.

We do not object to a civil contract between two adults for the purpose of cohabitation where the arrangement is defined by terminology such as civil union or any term other than marriage, a word that, in our view, has been copyrighted through its historical and present use as indicating a union between a man and a woman. Therefore, we would like to see Bill C-38 amended to reflect such terminology.

We are deeply concerned that Bill C-38 does not provide an explicit legal guarantee that there can be no prosecution under human rights codes if religious institutions or their staff refuse civil union or married certification services to same-sex couples. We would like to see such a guarantee made explicit in Bill C-38 to ensure that freedom of religion and freedom of conscience are protected. Any ambiguities in this regard must be removed completely.

Although Bill C-38 states that nothing in the act affects the guarantee of freedom of conscience or freedom of religion, the substance of this statement is unclear, because jurisdiction over the solemnization of marriage is assigned to the provinces under the Constitution Act of 1867. This view was also adopted by the Supreme Court in the reference regarding same-sex marriage.

Therefore, besides inserting an explicit guarantee within Bill C-38, we strongly encourage the government to pursue cooperative federalism with the provinces to ensure that an explicit guarantee is provided within provincial legislation that protects the rights of religious officials, institutions, and civil marriage commissioners to freedom of religion and freedom of conscience.

Among other changes we would like to see made to Bill C-38, we would like to see it amended in order to provide an explicit differentiation in the age limit for traditional marriage and same-sex civil unions. In our view, the current age limit of 16, which applies to civil unions, is inadequate, since due to biological and social realities, it usually takes longer for individuals to define and grow comfortable in their sexuality away from the heterosexual norm.

In terms of formal democratic processes, we would like to see a free vote on this legislation. We are concerned about attempts by individual party heads to require the members of their party to vote one way or the other on this legislation. To require so would in our view be contrary to the essence of parliamentary democracy and a serious oppression of the freedom of expression of not just individual parliamentarians but, through them, the Canadians those parliamentarians represent. In our view, the citizens of Canada elect individuals to Parliament to represent their interests, not to represent the dictates of individual heads of parties.

We would like to remind the distinguished parliamentarians before us today that the provincial courts of appeal and the Supreme Court of Canada provide legal answers to legal questions. However, there is a much larger social question that must be addressed when we discuss the institution of marriage. The larger social question is in the hands of our parliamentarians, in accordance with the division of powers in the Canadian constitutional system. It is they, not the courts, who represent the people of Canada and who possess the tools and mandate to consider broader social and policy considerations not accounted for by the courts.

Therefore, our parliamentarians must fulfill their responsibility to debate the social questions properly and completely rather than hide behind the court system. We also observe that the Supreme Court refused to answer question four of the reference regarding same-sex marriage that the Government of Canada put before it. Question four in effect asked the court to hold the current opposite-sex requirement for marriage to be unconstitutional.

In its reasons for refusing to answer question four of the reference, the court suggested that the government seemed to have adopted the decisions of the lower provincial courts on same-sex marriage, decisions that we submit do not account for all the social dimensions of this issue. It is the job and mandate of the legislature to address these other social dimensions. It is inappropriate, in our view, for the government or any party to adopt the view of the courts without debating the social and religious dimensions of this issue, which is also its constitutional and democratic obligation.

● (1810)

Our final submission today relates to the view that preserving the traditional definition of marriage may require the use of section 33, also known as the override or notwithstanding power provided in the Charter of Rights and Freedoms. The preamble to Bill C-38, in fact, explicitly precludes the use of section 33 to preserve the traditional definition of marriage. We observe that some political parties have suggested that amending the bill to restore the traditional common law definition of marriage and establishing a parallel regime for same-sex couples would withstand charter scrutiny, so that the use of section 33 would not be required. While acknowledging this view as potentially viable, we would also like to examine critically the explicit refusal to use section 33 of the charter, as provided in the preamble to Bill C-38.

So what then is our view of the fact that preserving the traditional definition of marriage may require the use of section 33? The answer to this question, in our view, requires an examination of the relationship between the courts and the legislative branch of government in the Canadian constitutional system.

A theory examining this relationship in light of the charter was advanced by Professor Peter Hogg, one of the premier constitutional scholars in the country. This theory, known as the dialogue theory, was subsequently endorsed by the Supreme Court in the case of Vriend v. Alberta. According to the dialogue theory, judicial review is, in essence, a dialogue between the courts and the legislatures, rather than a monologue in which the courts dictate to the legislatures what they should or should not do. This dialogue then determines how best to reconcile the individualistic values of the charter with the protection and enhancement of the social values of the community.

Under the charter, the courts are assigned a corrective role over the legislatures and will, for example, suggest corrective measures to the legislatures if and when they strike down laws. The legislatures are then free to adopt those changes and re-enact the laws. Similarly, the charter has assigned a corrective role to the legislatures over the courts through section 33. In fact, the dialogue theory views the existence of section 33 as one of the main features facilitating dialogue between the legislature and the courts, and one of the principal justifications for assigning a great amount of power to unelected courts over elected legislatures.

If and when the courts fail to consider the broader social considerations of the issue, such as the issue at hand, it should be open to the legislature to consider the use of section 33. Therefore, in our view, the exercise of the corrective role assigned to the legislature under section 33 of the charter may be justified, particularly where broader social issues beyond the competence of the courts need to be addressed. The same-sex marriage issue is, in our view, exactly such a case, because the courts have provided a legal answer to a legal question without examining all the social dimensions of the issue. Considering these social dimensions is Parliament's responsibility, and Parliament should be prepared, after considering the opinions of Canadians, to use the corrective role assigned to it under the Constitution of Canada, just as the courts have been exercising their corrective role over the elected legislatures under the Constitution. Therefore, we submit that the preamble to Bill C-38 should be amended to remove the explicit preclusion of the use of section 33 of the charter.

With that, I conclude the submission of the Canadian Islamic Congress, and I would like to thank you for the opportunity to present before you today.

● (1815)

**The Chair:** Thank you.

We will now move to the Pentecostal Assemblies of Canada.

Mr. Seres.

**Mr. Ted Seres (National Coordinator, Specialized Ministries, Pentecostal Assemblies of Canada):** Thank you.

In recognition of the democratic process that exists in Canada and the privilege that is afforded to interest groups to offer opinion to Parliament and its authorized agencies and committees, the Pentecostal Assemblies of Canada, PAOC, representing 1,100 congregations across all regions of Canada serving approximately 250,000 Canadians, hereby makes its submission to the Legislative Committee on Bill C-38.

I must note that I have submitted a written submission. However, you likely won't get it in time after the translation is done because of the recent developments of the government.

While PAOC's understanding of the scriptures does not allow us to sanction homosexual and lesbian relationships, the scriptures also command us towards justice in everyday life and practice, so it's not the intent of this submission to advance a morality towards those who do not subscribe to our faith and practice. As responsible citizens in a pluralistic society, we offer our position in hopes the common good of Canadian society will be accomplished.

Let me talk briefly about the uniqueness of marriage. The contribution of both sexes creates a family environment in which both husband and wife fulfill their roles in a complementary way. A healthy understanding of the distinctiveness of both sexes makes for healthy families, producing healthy citizens. Many studies have revealed the disadvantage of children coming from homes where the family structure has been altered, and what they must contend with.

Same-sex unions cannot offer a family venue based on sexual difference. Including same-sex relations in the definition of marriage would send a clear message to Canadians that sexual difference makes little or no difference in the formation of family and society at large. It would also in effect say there is nothing unique about the community and families men and women create.

Let me comment briefly on monogamy in marriage. Marriage reflects the monogamous model of a relationship of cohabitation. Marital fidelity is what is most common in traditional marriage and in fact is foundational to the maintenance of the relationship. To a large extent, fidelity is not present in homosexual relationships.

Consider the following. In their study of the sexual profiles of over 2,500 older homosexuals published in the *Journal of Sex Research*, Paul Van de Ven found that the modal range for the number of sexual partners was 101:500. In addition, 10.2% to 15.7% had between 501 and 1,000 partners, and a further 10.2% to 15.7% reported having over 1,000 lifetime sexual partners.

In his study of male homosexuality and western sexuality practice and precept in past and present times, Mr. Pollak found that few homosexual relationships lasted longer than two years, with many men reporting hundreds of partners in their lifetime.

Even when we limit the study of homosexual couples to those who consider themselves to be in a committed relationship, we see the numbers are not significantly different. With respect to the male couple, authors McWhirter and Mattison report in a study of 156 males in homosexual relationships lasting from one to 37 years that only seven couples had a totally exclusive sexual relationship, and these men all had been together for less than five years. Stated another way, all couples with a relationship lasting more than five years have incorporated some provision for outside sexual activity in their relationships. Most of them understood sexual relations outside the relationship to be the norm and viewed adopting monogamous standards as an act of oppression.

In *Male and Female Homosexuality: A Comprehensive Investigation* by M. Saghir and E. Robins found the average male homosexual live-in relationship lasts between two and three years. In the *Journal of Sex Research*, again, Van de Ven found that 22.7% of older homosexuals had only one sexual partner in their lifetime. Compare that fidelity rate to that of heterosexual couples, between 75% and 90% of whom report having a monogamous relationship for a lifetime. This indicates that even committed homosexual relationships display a fundamental incapacity for the faithfulness and commitment axiomatic for the institution of marriage.

I've said all that to say this. Given the above information, marriage inclusive of same-sex couples would appear to undermine the monogamous characteristic marriage has depended upon. If marriage is currently defined as a monogamous relationship, Bill C-38 would in essence redefine marriage as something far less than a loving relationship exclusively between two people. This would by definition rob marriage of one of its distinguishing characteristics. It would redefine Canadian families as an unstable unit. This is not the common good Canadians envision. Canada would suffer as a nation.

Let me comment about children. It is likely that the most overlooked group of individuals in this debate is children. The consequential effects on children have not been considered. It is irresponsible for a government to consider legislation that in effect redefines the nature of the family without first studying the effect of legislation on children.

● (1820)

The most common argument against same-sex marriage as it relates to children, supported by the UN Convention on the Rights of the Child, is the child's right to be brought up by his or her biological parents. Through current developments in reproductive technology, it would be possible for same-sex couples to bring children into their marriages. In fact, it would immediately become a right to do so by virtue of Bill C-38. At the expense of children, in their inability to be parented by natural parents, it is these ones, without voice, who will suffer the most harm for the following reasons.

Children belonging to same-sex marriages will not experience the bonding that occurs with biological parents.

Given the homosexual lifestyle as articulated above, children belong to same-sex marriages will not have the privilege of a stable environment where parents are loyal to each other. In fact, it is likely these children will be forced to adjust to numerous changes in their family relationship.

Children belonging to same-sex marriages will be in marriages of non-monogamous relationships and will likely carry this predisposition into their future marital relationship.

Children belonging to same-sex marriages will be denied the complementary nature of opposite sexes in their overall development.

Research study after research study has shown that children navigate the development stages more easily and are more solid in their gender identity and perform better academic tasks at school, have fewer emotional disorders, and become better functioning adults when they are reared by dual-gendered parents.

In addition, after studying 49 studies purporting that same-sex relationships has no affect on children in these homes, Drs. Lerner and Nagai conclude the following:

> Numerous studies are routinely offered to show that sexual orientation of a couple makes “no difference” to the well-being of children. ... Does the research supporting it stand up to scientific scrutiny? These are the questions discussed in our study. Our approach to this question concentrates on the analysis of the methodologies used to carry out existing same-sex parenting studies. We conclude that the methods used in these studies are so flawed that these studies prove nothing. ... Their claims have no basis.

Cameron and Cameron, in *Children of Homosexual Parents Report Childhood Difficulties*, coming from the Family Research Institute:

> Referenced as both supporting and weakening the case for parenting by homosexuals, 57 life-story narratives of children with homosexual parents published by Rafkin in 1990 and Saffron in 1996 were subjected to content analysis. Children mentioned one or more problems/concerns in 48 (92%) of 52 families. Of the 213 scored problems, 201 (94%) were attributed to the homosexual parent(s). ... These findings are inconsistent with propositions that children of homosexuals do not differ appreciably from those who live with married parents...

Also, given the high-risk behaviour of same-sex couples, as stated above, children in such homes would be exposed to these dangers and health risks by virtue of their proximity and intimacy between them and their parents.

Let me just comment somewhat on freedom of expression.

Of great concern to the faith community is that the current legislation offers no guarantees to the members of the clergy and faith communities that they would be immune to civil action should they refuse to perform a marriage of a same-sex couple. Despite provision in Bill C-38, the Supreme Court of Canada has clearly articulated that it is not in the jurisdiction of the federal Parliament to offer such protections. While religious freedoms are enshrined in the charter, this has little comfort to faith practitioners in light of recent rulings of various provincial courts and human rights tribunals.

Furthermore, we are beginning to see the effects in the provinces where courts have ruled in favour of same-sex marriages. In British Columbia, Manitoba, Saskatchewan, and Newfoundland, marriage commissioners have already been advised that they must solemnize same-sex marriage or lose their licence to marry. The Knights of Columbus club in Port Coquitlam, B.C., has now been facing human rights complaints because they refused to rent their hall to a same-sex couple for a wedding reception.

Another concern centres around chaplains who are employed or contracted by the federal government. That would be chaplains within our Canadian armed forces and Correctional Service Canada. Is there adequate protection for these individuals if they refuse, on the basis of conscience, to marry same-sex couples? At the very least, Bill C-38 must be amended to protect charitable status for organizations and federal chaplains who are religiously opposed to same-sex marriage.

There were previous experiments done in the world. During the 1920s the Soviet Union experimented with redefining marriage, making it a less repressive institution. This was made possible by relaxing the divorce laws, eliminating legal distinctions between cohabitation and marriage, and reconstituting marriage under a civil union designed, among other things.... Consequently, family life was destabilized within a matter of years. There were higher divorce rates, declining marriage rates, declining birth rates, and more significantly, more children ending up in broken homes and on the streets. So severe were these consequences that by 1936 the government began to reverse some of the previous legislation.

Now that similar reforms have happened in Sweden, Holland, and Canada, we're finding similar results: declining marriage rates, declining birth rates, rising divorce rates, more couples in ever more temporary forms of cohabitation, and more people struggling as single parents and the attendant consequences for children.

● (1825)

In conclusion, the PAOC affirms the institution of marriage as the permanent union of one man and one woman. This is the most favoured context in which families can be raised. It is the complementary nature of male and female living in intimacy that gives marriage its unique status in society. By definition, it cannot include other types of relationships.

In recognition of recent challenges to the institution of marriage, we encourage the Parliament of Canada to ensure that the status of marriage as presently defined be protected in legislation for the common good of Canadian society. Issues of equality for other couples, including non-conjugal dependent relations, obviously need to be addressed, but not at the expense of the institution of marriage.

The Pentecostal Assemblies of Canada therefore ask, for the common good of Canadians, that Parliament seriously consider the full ramifications of enacting Bill C-38. This legislation will rob marriage of one of its core values, i.e., monogamy. It will communicate that having multiple sexual partners is well within the parameters of marriage. It will also undermine the complementary nature both sexes bring to the marriage. It will cause irreparable damage in those without a voice, who are perhaps the least considered in this debate, the children. It will also place clergy and faith groups in a position where there may be little or no protection of their religious convictions.

To ensure that the institution of marriage and family is protected for all Canadians, we recommend in this order of preference: one, that Bill C-38 be withdrawn; two, that a national referendum be held allowing Canadians to decide if the civil definition of marriage should include same-sex couples; three, that a civil registry be initiated to include dependent relationships that fall outside the parameters of the definition of marriage as a union of one man and one woman; four, that Bill C-38 be amended to offer protection of charitable status to faith groups that oppose same-sex marriage, and that Bill C-38 be amended to protect the religious freedom of federal chaplins and clergy either directly employed by the Canadian government or employed on a contractual basis; and five, that the passing of Bill C-38 be suspended until such time as legislation can be enacted to protect religious freedom of clergy, faith groups, and those appointed to solemnize marriage in all provinces and territories.

I add that before you enact any kind of legislation, please consider the children. They are the ones who are probably most vulnerable to anything when we start redefining family in any way. The children are the ones without voice, who will likely suffer the most.

Thank you for this opportunity.

**The Chair:** Thank you.

Mr. Brown, go ahead, please.

**Mr. David Brown (Barrister and Solicitor, As an Individual):** Thank you, Mr. Chair.

I thank the committee for inviting me. When I got a phone call from the clerk yesterday, he said the Conservatives had put me on the list as a witness. So I thank the Conservative Party, but want to make it clear at the beginning I appear here as an individual citizen. I'm non-partisan. I've probably given the same amount of money to two of the parties here over the last five years. My apologies to Monsieur Ménard and Mr. Siksay: I don't think I've seen the light of day to give money to their parties yet, but hope springs eternal.

I'm a practising lawyer. You would call me a Bay Street lawyer. I practise with one of the large Canadian firms. I'm basically an establishment lawyer. I have a commercial litigation and energy law practice. However, over the last 20 years, I have been involved every year in some sort of constitutional law case. They've accumulated in such a way that I think I can hold myself out as a lawyer who has as much experience as anyone else in two areas. The first is constitutional cases dealing with same-sex rights. I've been involved in M v. H, the marriage reference, the Halpern cases, and a few others. The second has to do with issues of religious liberty.

I've been involved in those cases since the mid-1980s, when I juniored for my boss, who then became Mr. Justice Sopinka at the Supreme Court of Canada. I've written extensively on religious liberty issues. I've got an article forthcoming in the*National Journal of Constitution Law* and one in *The Supreme Court Law Review*. I'm an adjunct professor at the Osgoode Hall Law School.

All of this is to give you a bit of the flavour of my background, and therefore the assistance that I can bring to this committee. I am coming here as an individual citizen who is trying to provide some assistance to the committee. I have my own view of the bill. I think it's bad law, but I've made my pitch before the courts and they haven't accepted it. I'm cognizant of Mr. Boudria's comments with the previous panel, to the effect that this bill has received second reading.

I have prepared a brief, which I imagine you will get after the final vote on this thing has been done. In the brief, I raise what I call three big-picture legal implications of Bill C-38. Two of them deal with equality analysis. Briefly stated, I think by passing Bill C-38, Parliament is buying into a view of marriage and a certain equality analysis that essentially will render marriage meaningless. There will be no limits to marriage.

Indeed, in the recent same-sex marriage reference, the Supreme Court of Canada, in its decision, said quite explicitly that it was not prepared to say what marriage is. And that's a constant theme. One of the lawyers on the other side in the marriage reference described marriage as an empty vessel into which you can pour any meaning. That will be the consequence of Bill C-38 and the equality analysis that underpins it.

The second big legal implication is that by passing this bill and by buying into the concept of equality that underpins the bill, you're going to shackle your legislative hands over the next two decades. The courts have made it clear that procreation is no longer an essential component of marriage, and they have indicated that procreation cannot be a legitimate basis for distinction.

I think you've all seen the demographic reports. The population is not expanding at a rate that will replenish this country by about 2050, according to the UN report that came out a few months ago. I suspect that at some point over the next two decades you, as parliamentarians, might want to think about legislation that actually does distinguish between people on the basis of the ability to procreate. The equality analysis that underpins this piece of legislation will effectively prevent you from doing that, or make it very difficult for you to do it, because you'll be adopting a contradictory view of equality.

I've made those points in some detail in my brief and I'm not going to go any further. I want to try to be of some practical help. This I can offer in what I would style as the third big legal implication: liberty of conscience, religious liberty and freedom of conscience.

It's my submission that Bill C-38 provides no legal protection to persons who oppose same-sex marriage, and therefore provides them with no protection against the increasing legal efforts to compel religious groups and others, non-religious people, to change their views on marriage. I have argued in cases, very recently before the B.C. Court of Appeal and elsewhere, that when you look at the Canadian community today, we're essentially divided into two in terms of views on sexual morality. There is one community or group of Canadians that has the view that there is a right and a wrong in matters of sexual morality or sexual conduct, and there's another school that essentially says, well, there is no wrong. You can't talk about sexual practices as wrong or right; the only distinction is, if a sexual practice actually harms somebody, then you're going over the line.

● (1830)

Those are two very fundamentally different communities that you have in Canada today. This bill simply highlights, I think, the division between those communities.

That raises the very practical issue of how you, as legislators, are going to accommodate those two communities as you go about your work. There is a word, and the word is “tolerance” which people have suggested as the operative principle by which these two groups can live together. One of the trends in courts these days is to move towards viewing tolerance not as the ability to agree to disagree, but really as the mandated acceptance of what the other side thinks. Mr. Justice Gonthier and his dissent on the Chamberlain decision of about two years, I think, nicely encapsulated that divide, and I've reproduced it for you in my brief.

This issue of tolerance, I think, raises a key question of what sort of legal protection you can build into Bill C-38 that will give real life, legally enforceable protection, to those who disagree with a change in the definition of marriage. As the bill is now drafted, it offers no protection whatsoever. Clause 2 of the old bill, which dealt with the clergy, and which is very similar in language to clause 3 of the current bill, was declared ultra vires of Parliament's legislative competence when the Supreme Court answered the first question. Put bluntly, clause 3 of the current bill is not worth the paper it's written on. It's simply legally useless. Quite frankly, I'm not sure why you still have it in the bill, given that the Supreme Court has already told you that you don't have the jurisdiction to enforce it.

Having said that, although I believe it is legally useless, I do agree with the sentiment that underpins clause 3 of the bill. There's obviously a sentiment amongst members on both sides of the House that the bill should incorporate some protection for those who take a different view. I think that's an admirable consensus to have in this House. The question is, how can you do it in a practical, legally enforceable way?

So I have a suggestion. I think there is an amendment that is open to be put into the bill that will provide real legal protection. You need the legal protection because the federal government has some extraordinary constitutional powers. First of all, your spending power is probably the biggest scope of legislative activity you have. You spend in every area there is. You even spend in provincial areas such as health. The courts have said you're free to spend it there, and the provinces don't have to accept your money, but you can put conditions on who gets your money and how you're going to spend it. You have jurisdiction in the area of federal human rights. You have a special federal statute. You have jurisdiction in taxation, and of course that attracts the issue of exemptions, specifically for charities. There are various contractual benefits and services that you ask people to tender on, and you choose whether or not to accept their tenders.

Against that very broad background of federal power, I would recommend that you include in the bill a clause. This clause should be an operative clause. It should not be in the preamble—preambles are useless—and it should not be an interpretive clause, since interpretive clauses are useless, as was the case in the modernization of the benefits bill, clause 1.1. The Supreme Court, in every court I appeared before, gave that absolutely no weight. So you should take out the current clause 3 and put in a new clause 3. This is the way I would recommend that clause 3 should read: one, that no person will be deprived of any benefit under federal law by reason of their practices and beliefs relating to the definition of marriage; and two, that no person will be subject to any burdens under federal law by reason of their practices and beliefs relating to the definition of marriage.

So you're covering both the benefits of federal law and the burdens of federal law. I think that is a general kind of operative section that would allow people who espouse an opposition to the bill for religious and non-religious reasons to come out of this process thinking, well, I don't agree with what's happened, but at least I'm not going to suffer, I'm not going to be deprived of federal benefits because of the views I take, nor will I be subject to any burden because of the views that I take. I think, given your broad jurisdiction under spending power, taxation and human rights, this is a clause that would work and could withstand a challenge in the court.

● (1835)

I would urge you to consider an amendment along that line. I think it would provide real teeth and real protection. As I've said, I think I'm speaking to a committee where on both sides there is a desire to include some protection in the bill.

Those are my submissions, Mr. Chair.

**The Chair:** Thank you.

We're now at the first round of questions and answers. We will start with the Conservative Party.

Mr. Moore, you have seven minutes.

● (1840)

**Mr. Rob Moore (Fundy Royal, CPC):** Thank you, and thank you to all the witnesses who have appeared today, and perhaps on short notice. We appreciate it.

My question is for Mr. Brown.

Thank you for that substantive help on an amendment. I think it's useful, and it's instructive also that you mention clause 3 now is basically legally useless.

I'd like you to expand on a couple of things. We had the Canadian Bar Association here prior to your being here. Some of the things they said were troubling to me in their argument. I actually told them they don't speak for all lawyers by taking a position on what, in my opinion, is a social policy decision, but they've done so anyway.

One of their comments was a blanket comment that "[t]he 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".

You've already stated that the clause purporting to set out protections for religious freedoms has basically been ruled unconstitutional.

I asked them to comment on this, and I admit I took a lot of time with the question and they didn't get a chance to comment. Could you speak specifically to some of the cases we've seen, such as those of Bishop Fred Henry in Calgary or the Knights of Columbus in British Columbia, where we have seen what I would call a collision between the rights of those holding religious views and the rights of same-sex couples.

**Mr. David Brown:** It's an interesting question, Mr. Moore. I had an article published two years ago in the *National Journal of Constitutional Law* on the competing rights. This competition between equality rights and religious liberty, to my mind, is going to be the focus of litigation over the next ten years. As a litigation lawyer I suppose I shouldn't complain, because it will be good business for me, but it raises some very critical issues.

I think you're going to see a collision of those two rights in two areas. One is primarily going to be in the area of provincial jurisdiction; that is, human rights legislation with respect to services. There was a case in Ontario a few years ago, the Brockie case; it was a question of a gay group wanting to get certain advertising materials or logo materials printed. A printer who was a Christian refused, and the matter went to court. That's one area where you're going to have that sort of conflict. I think the Knights of Columbus making services available for the public to use for parties and what not will be a paradigmatical kind of example.

The other area in which you're going to find a conflict is in the area of expression. Indeed, I just argued for an intervenor in the Kempling case in the B.C. Court of Appeal.

Canada, unlike a lot of other countries, has two things. It has a hate crime provision in the Criminal Code, and then most provincial —and I think also the federal—human rights legislation has hate speech provisions. Some of those provisions are very broadly written, so that if the comment is derogatory it attracts liability under the statute. Here's where you're going to find the issues these days: if a person expresses opposition to same-sex marriage, or expresses a view of morality that doesn't support same-sex partners, is that language going to be labelled discriminatory and therefore that person be shut down?

I think that will have profound implications for freedom of expression in this country. I think it raises the issue of how we are going to live together. We aren't going to persuade each other of our different points of view. The question then is how we can both live together, side by side, holding different views but with neither side really invoking the power of the state to shut the other side down.

I think those two areas—access to services and expression on issues of sexual morality—will be the battleground over the next ten years.

**Mr. Rob Moore:** Thank you.

You can correct me if I'm wrong, but the Supreme Court of Canada in the reference decision indicated that in these areas of provincial jurisdiction there was nothing—and I notice your amendment refers to federal law—under provincial jurisdiction that we could do as a federal Parliament. We're limited to the federal sphere. Some of these scenarios you have raised, I would think, would flow no matter what we do, short of not changing the definition of marriage.

There's one other part in that submission that I disagreed with and would like to hear your points on. The Canadian Bar Association say Bill C-38 is required by the Charter of Rights and Freedoms.

Can you comment on whether we're required by law to bring in this bill? We know in various jurisdictions courts have taken it upon themselves to change the definition of marriage, and I also know that the Supreme Court of Canada did not rule on the question of whether the common law or traditional definition of marriage was unconstitutional. What do you think of this assertion that we are somehow required by law to introduce this bill?

● (1845)

**Mr. David Brown:** Let me preface my answer by disclosing my bias.

I argued that section 15 should be interpreted in such a way that it wouldn't result in the man-woman union definition of marriage being ruled unconstitutional. Provincial appellate courts didn't uphold that. But where do we stand today? We don't know. The Supreme Court of Canada expressly declined to answer question four. What the Supreme Court has said is two things: first, we, the Supreme Court, are not going to say whether the definition of marriage as limited to man and woman is unconstitutional. We're going to remain silent on that. So we'll never know what the answer to that is. The second thing the Supreme Court did say, however, was that the federal government possesses the legislative competence to change the definition of marriage. But that is not the same thing as saying the charter requires that the definition of marriage be changed; it's simply that you have the legislative competence to change it.

So in terms of the submission of the bar association that the charter requires the definition to be changed, this is going to be a very unusual bill and piece of legislation when it passes, because the answer at the end of the day is that we will never know because the Supreme Court remained silent on question four. I've never seen that before in my legal practice, and it's just one of the unusual features about this particular issue.

**Mr. Rob Moore:** Do I have some time, Mr. Chair?

**The Chair:** You have 20 seconds.

**Mr. Rob Moore:** All right, 20 seconds.

Finally, on the refusal to answer that question four, there are those, including constitutional experts, who have suggested that a legislated definition of marriage could be introduced and would not necessarily.... Others say no, absolutely, we must have this definition of marriage. But other constitutional experts have said no, if we extend perhaps equal rights to same-sex couples while maintaining the traditional definition of marriage, that can be upheld under our charter, while others will say no, absolutely, the decision has already been made.

Can I get your comment on that?

**Mr. David Brown:** My personal view is that I think this is a valid argument that can be made in support of this kind of legislation. But in terms of where we stand today, we just don't know. The Supreme Court said, I think in a very deft institutional move, we ain't going to answer, and they punted the ball back to you. And on that question you're not left with any guidance from the highest court in the land.

**Mr. Rob Moore:** Thank you.

[*Translation*]

**The Chair:** Now over to the Bloc Québécois.

Mr. Ménard.

**Mr. Réal Ménard (Hochelaga, BQ):** Thank you, Mr. Chairman.

You will not be surprised to see me put my first questions to Ms. Cohen. I'm dying of impatience to read her brief. I will read it as soon as it's translated.

Although I give the impression of being a very strong and sturdy person, I'm actually a very sensitive man. Earlier, I was somewhat traumatized. I will recover, but I wanted to share that with you nonetheless, because as you know, it's nice to get things off one's chest.

REAL Women of Canada—the name of the association poses a bit of a problem, as though there were real women and false women, but that's another debate—expressed a peremptory and very conservative point of view that it made known before the committee with the utmost seriousness regarding psychogenesis. Psychogenesis is the study of the stages in a person's development, the study of children growing up within families...

Can you hear the interpretation?

[*English*]

Do you have translation? Would you like to cut my time?

[*Translation*]

**Ms. Karen Cohen:** I understood what you've just said, and I can now hear the interpretation.

**Mr. Réal Ménard:** Very well.

Therefore, REAL Women of Canada, which hovers on the cusp of homophobia, stated that children growing up in homosexual families, in homoparental families, cannot be normal children when it comes to their sexual identity, intelligence, and stages of development.

To your knowledge, in Canada and the United States, how many years have been spent on researching children from homoparental families? What can be rigorously concluded, setting aside all prejudices, truisms, and gratuitous generalizations that are too often being disseminated by certain right-wing groups that are not in the slightest concerned with scientific rigour?

[*English*]

**Ms. Karen Cohen:** Research in the area has been going on for about twenty years in North America. There is no evidence to substantiate those claims. And I say that specifically because the purpose of science is to disprove a position or disprove a hypothesis, not necessarily prove or support a position. There may be views based on other systems of religious belief or other kinds of values, but in terms of what the scientific literature has to say to us, there is no evidence that the children of couples who are lesbian or homosexual have impairments in their psychological development—either gender identity, social development, or psychological development. And we can say that very firmly; we have for some few years now.

● (1850)

[*Translation*]

**Mr. Réal Ménard:** I know that Professor Danielle Julien, from UQAM, has published in the United States and in the Canada. I imagine that your brief contains scientific references that we can ask our clerk to get for us. However, can you share with this committee information you may have on scientific methodology? How can we reassure ourselves regarding the scientific method used to evaluate such a phenomenon?

[*English*]

**Ms. Karen Cohen:** Just to clarify, do you mean what is the methodology used by these studies in social science?

[*Translation*]

**Mr. Réal Ménard:** For example, Ms. Patterson's work in the United States, which dates back 25 years, focuses on a cohort of homosexual and heterosexual children. I've been made aware of a longitudinal study in which children are monitored from childhood to the age of 22 or 23.

As members of the committee, this is the type of study that we should be hearing about, rather than the huge falsehoods and other bits of nonsense that were served up earlier.

[*English*]

**Ms. Karen Cohen:** As I mentioned, there's an annotated bibliography on the website of the American Psychological Association, which, as I said, reviewed over a hundred studies and papers. The data that informs our position is not one study; it will always be possible to perhaps find one study that has different findings. The conclusions and the stances are based on the aggregate of the data, and we can make those available to you.

[*Translation*]

**Mr. Réal Ménard:** I don't know if I still have time left to ask one or two questions. Time does not go by so quickly.

**The Chair:** With you, yes.

**Mr. Réal Ménard:** You are much too kind, Mr. Chairman, in addition to being sweet. Now, don't go thinking I'm making a pass at you. I would never do such a thing.

I am from a family of five children. I have an identical twin, a homozygote, to use the scientific term. I am homosexual and my brother is not. In my family we all share the same cultural references. I am of the *Oraliens*, *Grujot et Délicat*, etc. generation. I attended a public elementary school. I was born in 1962.

I'm going to ask you a more personal question, which isn't very useful for testimony. Would you be more inclined to say that homosexuality is something acquired, or innate? I know that this is a very difficult question, but I sense that you are very strong, very sure of yourself.

[*English*]

**Ms. Karen Cohen:** I think the literature shows us that it's a complex or overdetermined thing and that there are many factors involved, but I think the current wisdom is that there's a very strong biological and genetic component. There are other factors, perhaps—social factors, psychological factors—but I think the understanding is that there is a strong biological one, so that it's not necessarily something that happens when you're 20.

[*Translation*]

**Mr. Réal Ménard:** If you had to define yourself professionally, would you say that you are more of a humanist, a behaviourist, a Freudian, or a post-Freudian? What school of thought do you subscribe to in your practice as a psychologist?

With respect to scientific data, do you believe that there is a professional or ideological school of thought that is more prominent in this area? Who did the most work on this issue? The Freudians, behaviourists, or the Rogerians? Which school of thought do you subscribe to yourself?

[*English*]

**Ms. Karen Cohen:** I'm one of the officers of the Canadian Psychological Association, so I'm not necessarily here as a practising psychologist or as an expert in the field of sexuality or sexual behaviour. I'm representing the views of our association. There are many members of our association, of course, who have specific knowledge and practice in this area, but that being said, I think psychologists are committed to evidence-based practice, to practising the kinds of behaviour and doing the kinds of science that can be substantiated.

I've spent most of my career working in health psychology, and if you want to know my personal belief, as a psychologist, I think there's a complex interaction between what we think and what we feel and our constitution. I think it's difficult to say it's 80% this and 20% that.

● (1855)

[*Translation*]

**Mr. Réal Ménard:** I will come back during the second round to talk about freedom of religion with Mr. Brown.

**The Chair:** Thank you.

[*English*]

We now go to the New Democratic Party.

Mr. Siksay, you have seven minutes.

**Mr. Bill Siksay (Burnaby—Douglas, NDP):** Thank you, Mr. Chair.

I want to thank all the witnesses for their presentations tonight. I think they've been helpful.

Mr. Brown started with a concern about the fact that his brief might not get to us in time, before the legislation passes. I'm wondering if there's any assurance we can have that this won't be the case, so we can reassure him that we'd have that information long before the legislation passes.

**The Chair:** My understanding is that all the briefs, all the presentations that we receive today, are already at translation. It's a question of days, if not hours, before we get them translated and distributed.

**Mr. Bill Siksay:** Thank you.

**Mr. David Brown:** I did bring 25 copies of an English-language version, which I've left with the clerk. So I may have killed too many trees, but he—

**Mr. Réal Ménard:** Well, don't send the bill to the committee.

**Mr. David Brown:** I haven't got the reimbursement for them yet, have I?

**Mr. Bill Siksay:** I have a question for Ms. Cohen.

In his presentation, Mr. Seres mentioned a couple of studies. He mentioned them by name. I think he mentioned Lerner and Nagai, Rafkin, Saffron, and Cameron and Cameron. I'm wondering if you're familiar with those studies. I know you've been critical of the way some data are used. You said something very different from what other witnesses have said today around the use of data and various studies. So I wonder if you could comment on those particular studies.

**Ms. Karen Cohen:** As I said, I'm not a content expert, necessarily, in this area, but I know we do have a position statement on one of the authors that Mr. Seres mentioned, that we don't support his positions based on the kind of work he has done. I'd be happy to provide you with a reference list.

I think the important thing to consider from our point of view is that we don't start out with a position and then try to find the data to support that position. Our view as scientists is really to find out what the data show us and use that to inform our position.

Can you make methodological arguments against this body of literature? Yes, but you can do that against any body of literature, any field of inquiry, into any health or behavioural problem.

**Mr. Bill Siksay:** You raised the whole question of how data are used and the misuse of knowledge. As a layperson, are there kinds of questions that I should be asking when I come to a study that would help me make a better judgment about what I'm reading? What sort of issues should I be looking for?

**Ms. Karen Cohen:** I think what's really critical, if you want to use data to inform your opinion, at least if you want to use the psychological data to inform your opinion, is that it's more important what several studies repeatedly show, what several questions show, than what one or two studies show. For one thing, that's extremely important. It was important to us in informing this position that we were able to review the aggregate of data.

The difficulty with social science research, of course, is that it's not experimental research, because you don't make anyone anything. People are what they are, and then you observe what they are. That poses certain challenges in terms of the complex kinds of questions and making inference about how things start. But I think the first question to ask is, on what data is that opinion based? How many studies? How long did they follow these people?

For example, there's a whole literature on conversion therapies, as you may know, and some of the methodological arguments on those studies are really, well, who are the subjects? If it's somebody who is interested in changing their identity, that's going to have a very different outcome from someone who isn't.

So there are very complex kinds of methodological questions you need to ask, but I think the essential one is, how many studies have shown that?

**Mr. Bill Siksay:** Thank you.

Mr. Seres, you painted a very interesting picture of the lives of gay people like me. I can't say it's one that I particularly recognize personally, but it led me to wonder how the Pentecostal church in Canada would promote fidelity among homosexual people. Given a situation where there aren't any supports for our relationships, is it any surprise that there are problems with relationships? Given that our relationships aren't recognized, would it not be easy to assume that there might shorter relationships in a societal context like that?

Given the number of supports that heterosexual couples have for their relationships and given the societal acceptance of those relationships, there still is a fairly significant marital breakdown rate in our country. Are those things not related, that if there were more supports, we might do better in terms of the statistics?

I'm not saying I accept your statistics necessarily either, but is that not a logical statement?

● (1900)

**Mr. Ted Seres:** Explain to me what supports you're referring to. My understanding is that for most gay couples, short of being called a married couple, there have been great advances in giving them certainly supports and rights in other areas in terms of employment, in terms of recognition of their relationship, and survivor benefits. What flagrant differences in supports are there, other than being called married?

**Mr. Bill Siksay:** It seems to me that there is probably a fairly significant complex of social supports that are offered through, say, a church community to a very limited number of gay and lesbian Canadians as opposed to heterosexual Canadians, for instance.

**Mr. Ted Seres:** It's difficult when your faith and practice doesn't support the lifestyle. I might say, though, that representing over 3,000 credential holders, we would certainly welcome and offer support to any gay person. We're not opposed to gays, we're just opposed to their being married under our faith and practice.

I was asked the same question two years ago when I made a presentation to the House of Commons justice committee, which was addressing the same question. I thought it kind of interesting and I've reflected on it since. What comes first? Do the supports come first and then the action, or do the actions come first? In terms of what we're talking about, does marriage come and then the supports come out of it? My understanding in history is that marriage has always been there between a man and a woman and then the government came along to give it support because they saw the value it brought to society. The fact that the supports are in government now didn't bring about the institution of this monogamous relationship between a man and a woman.

I would contend that regardless of the supports you put in there, I just don't see how they're going to create this monogamous relationship you're referring to. That's my opinion.

**Mr. Bill Siksay:** Do you think men are inherently monogamous, heterosexual men?

**Mr. Ted Seres:** In marriage? Most.

**Mr. Bill Siksay:** No, outside of marriage.

You don't really have to answer that question.

**Mr. Ted Seres:** I understand your point.

**Mr. Bill Siksay:** I would think there might be some discussion of that.

I think those are all my questions, Mr. Chair.

**The Chair:** We're now moving to the Liberal Party. This is the first round.

Mr. Boudria.

**Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.):** Merci.

The questions I have are in the area of religious protection. The first thing is that we cannot, in my view, amend the bill to make it say—that's not just my view, parliamentary jurisprudence would dictate that—the opposite of what it says. That's how the board or the chair would recognize it. For instance, instead of passing this, we amend it to say that we use a notwithstanding clause. Well, maybe Parliament can do another piece of legislation at some point; I wouldn't agree with it, but technically it could. But you can't amend this bill to say that. This bill is a bill to recognize marriage, and we can amend the bill only. We cannot amend other legislation not covered by the bill or make the bill say the opposite.

That being said, and I believe it is true, I want to know what kinds of amendments you would see could assist in assuring that there's greater protection for the ministers, priests, and those who provide the services of marriage within religious communities? That would be very important for us, I think, to have as a committee.

Earlier today, the Canadian Bar Association told us the language there does it perfectly well. The Law Commission of Canada told us the same thing yesterday. The United Church said the same thing yesterday. Some said no, it must be improved. We'd like to hear what language could make that clearer, if there is such language. Saying that not passing the bill would be better or some such—you may be entitled to that view—is not going to change very much.

Do any of our witnesses, first of all, believe that the bill could better protect religious freedoms? And, of course, what would be the amendments?

Finally—I'm sorry to take so much time on this—recognizing, of course, that these marriages right now occur in seven provinces, there is no legislation right now that protects any minister, priest, and so on. So any protection presumably would be more than the one that is there now, because there isn't one, at least for 90%, probably, of all the marriages in Canada.

Would you react to that? You don't have to have the text here. You could send it to us later. That's okay too.

● (1905)

**Mr. David Brown:** I think I could help you out on that, Mr. Boudria.

First, in terms of what the federal Parliament can do to protect clergy in the solemnization of marriage, you can't do anything. You don't have the jurisdiction. That's under section 92 of the Constitution, not section 91. The court told you that in subsection (2) on question one in the same-sex marriage reference. You don't have the jurisdiction.

Now, some of the provinces have moved to provide that kind of protection. Ontario passed an act, I think within the last four weeks, and it amended provisions of the Marriage Act as well as the Ontario Human Rights Code, dealing specifically with that issue and giving protection to clergy. Protection to clergy with respect to solemnization of marriage is a matter of provincial jurisdiction, not federal. I can't recall whether you were in the room or not when I gave my submission, but clause 3 is useless. You don't have the power to pass clause 3, and it won't be upheld in a court.

However—and I take note of your remark—it appears that Parliament is going to change the definition. It will be a majority vote and that has to be accepted, but I think Parliament also has to recognize that there is substantial disagreement within the country about that change. I think it is within the jurisdiction of Parliament to say, well, we're going to change the definition, but just because we change it doesn't mean that people are going to have to bear the burden of law, and therefore we can't use the power of law to coerce people to think a different way.

That's where the suggested amendment I made, that the federal government incorporate a section about burden and benefit because of the way you think on religion, actually would have some traction under federal jurisdiction.

Those would be my views, if they're of any assistance on that.

**Hon. Don Boudria:** Do any others have views, Mr. Chairman? I'm not saying they must respond, but if others do, I'd like to hear them.

**Mr. Ted Seres:** Well, Mr. Boudria, I'm not a lawyer, so I'm not skilled in that, but you guys have wordsmiths who can probably put the language down.

I must say again, on behalf of our over 3,000 credential holders, that there's a lot of angst out there. Even though there are guarantees from the government side, they're not taken too seriously.

Last week I was here at the Laurentian Leadership Centre, part of Trinity Western University, and I was recalling a few years ago the battle they had in British Columbia, which they eventually won, but at the cost of hours and hours and hundreds of thousands of dollars to defend it. I'm fearful for clergy, and I know there's a lot of angst there. They're afraid that even though there are certain rights and there may be some guarantees in the charter, they're always subject to litigation; they're always subject to someone trying to challenge that. Our pastors just don't have the resources or the time to be able to defend against that.

If there's anything the federal government could do to help protect them and keep that process so they can honestly carry out their functions as clergymen without that fear or angst, anything you could do, it would certainly help.

I'm also concerned for some of those who are employed by the federal government, our chaplains within the armed forces and our chaplains who are contracted by the Correctional Service of Canada. In order to be employed by the federal government, they certainly have to be recognized by their denomination. Yet if they were asked to do something that was contrary to the denomination's beliefs, the denomination would have to dismiss them and withhold their credentials. Anything you could do to give them a guarantee would certainly be helpful.

● (1910)

**Hon. Don Boudria:** Presumably there are people in the organization who have had an opportunity.... Have they or any experts working for them had a chance to see if they could come up with wording that would assist us? That would be recognizing, of course, that the Supreme Court said in item six, responding to question three: "...we conclude that the guarantee of freedom of religion in the Charter affords religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs."

**Mr. Khurrum Awan:** In our research, we've referred primarily to the same-sex marriage reference. It seems that the court held unequivocally that the federal Parliament does not have the jurisdiction to provide substantial guarantees to religious officials, other than under federal law, as Professor Brown suggested. We wanted that explicit guarantee to be there, so that the spirit of that statement is there, so that it could be used by the courts as an interpretive guide. However, the primary option we're suggesting is the idea of cooperative federalism, which the government has pursued in other areas such as health care, where you negotiate with the provinces to ensure that those things are in place when this legislation comes about. This way imams, rabbis, and priests do not have to be hauled off to the courts. That was my response to that question.

I wanted to clarify another point you made. When we were talking about section 33, we were not suggesting that you should say "notwithstanding" and pass the whole thing. We were saying we objected to that being there within the preamble. It suggests that there hasn't been a wider consideration of the social considerations. We think that the court has answered a legal question. The broader societal questions are within the mandate of Parliament, and those must be addressed. Parliament must keep an open mind so that all tools, including the notwithstanding clause, are already there.

I gave you the example of the dialogue theory to suggest that the notwithstanding clause is not something outrageous. It's meant to be used on rare occasions, but we don't think it's something that should be taken off the table without a discussion of the merits.

**Hon. Don Boudria:** Thank you.

**The Chair:** Thank you.

We now go to the second round. From the Conservative Party, Mr. Warawa.

**Mr. Mark Warawa (Langley, CPC):** Thank you, Mr. Chair.

I'd like to thank each of the witnesses for being here today. I've been at most of these meetings. I've found them very informative, and I appreciate your spending the time with us today.

I'm from a community in British Columbia, Langley. I contacted each household there, by householder and by advertising, asking each one to let me know, in writing or by phone, how they'd like to vote.

I'm married, been married 33 years, have five children, four boys and a girl. Having both sexes in the family has given me a very interesting perspective. My IQ didn't go up, but my experiences in life have been enriched by being involved in raising boys and girls. They're quite different. So it's been a wonderful experience. They're grown now.

In 96% of the correspondence we've received, my constituents said they want to protect the traditional definition of marriage, but they also want to provide protection, the same benefits and rights, for all Canadians. In a same-sex union, they'd like to see them get the same rights and benefits under our Charter of Rights and Freedoms, while maintaining the definition of marriage.

My question is, what is the difference? What is superior? We've had documentation from some of the witnesses saying that they believe marriage, as an institution, is superior to a civil union, so I'd like to have comments on that.

Mr. Brown, I appreciated your comments. I'd like you to elaborate on the contradictory definition of equality. You started into that. Where does this take us? You said this was bad law. How is this going to affect faith-based schools, their freedom to teach as they would like to teach? There's a conflict of freedom of expression. Is that going to have an effect on faith-based schools? Perhaps the witnesses could comment on Mr. Brown's recommended amendment.

Thank you.

● (1915)

**Mr. David Brown:** Well, let me gaze into my crystal ball just a bit, I think with some justification, and tell you how the argument is going to go over the next five years, because it's happened in the States in a different context.

This bill will be passed. The definition of marriage will be changed. The argument then will be that the Canadian public policy or the Canadian public interest is such that it would be against the public interest to suggest that marriage should be only the union of a man and woman. The argument will be that Parliament has spoken to the contrary, and that's the expression of the public interest. If the public interest requires that marriage be the union of two persons, those who are advocating a contrary view will be advocating a position contrary to the public interest.

Once you advocate a position contrary to the public interest, you are engaging a number of legislative schemes. At the federal level, you're engaging the Income Tax Act, because the whole issue of charitable status in common law is that a charity can't exist if it's contrary to public policy. One of the arguments that will be advanced over the next few years is that those charitable organizations that take a position contrary to same-sex marriage will be taking a position contrary to the public interest and contrary to Canadian public policy, and therefore the argument will be that their charitable status should be revoked.

The precedent for that is the Bob Jones University case in the States. There was a different context—it was racial discrimination within a university—but that Bob Jones case, where the charitable status of a university was stripped, has been advanced in every case that I have been involved with on same-sex issues here in Canada, and so that will be the next logical step. That's not an *in terrorem* argument, that's just the way it's going to be.

In terms of faith-based schools, I think a lot of the provincial legislative schemes have two components. One, you have to register with the province in order to operate a faith-based school. Again, the whole issue will be whether it will be in the public interest or contrary to the public interest to register faith-based schools that oppose same-sex marriage.

Then in some provinces, in particular the province of British Columbia, there is a statute dealing with independent schools. There are five criteria that an independent school has to meet in order to be eligible for government funding. One of them is that you have to operate in the public interest and uphold the values of Canadian citizens. That is the wedge through which the argument will be made: that independent schools that object to same-sex marriage should be deprived of funding. B.C., I think, has been particularly aggressive in that area, with the College of Teachers. The Trinity Western case that was referred to is a prime example of that, and the Kempling one is the more recent example. So I think those will be the two wedges through which these arguments will be advanced.

I truly hope that what I say will be proved wrong. I hope it never happens. But I've been involved in this litigation for 15 years, and I don't see any indication that it won't happen. There will be good business for me for the next 10 years, but as Mr. Seres has pointed out quite rightly, why should individual citizens who take a contrary view be hauled up before human rights tribunals? Why should there be test cases and all that sort of stuff, and why should people have to spend the money to defend their constitutional rights? It lies within the ability of this committee to recommend a for-real amendment to the bill that will provide some real protection for religious liberty. I would encourage you to take advantage of that opportunity, and to do so.

**Mr. Mark Warawa:** Would your amendment give peace to the other two witnesses on the freedom of religion issues?

**Mr. David Brown:** They would have to speak to that.

**The Chair:** We're now way over our time. We're at seven minutes instead of five, so we'll come back to that.

We go to the Liberal Party, to Mr. Savage.

**Mr. Michael Savage (Dartmouth—Cole Harbour, Lib.):** Thank you, Mr. Chair.

As the others did, I would like to thank you for coming tonight. It's a beautiful night in Ottawa. There are lots of other things we could be doing, but we're here discussing an important piece of legislation, so I thank you for coming.

Realizing that this is a legislative committee—and I think we're supposed to be focused on technical aspects, but we've gone way beyond our mandate—I want to talk about an issue that I've thought a lot about in the last four or five months and that is specific to this topic, which is the issue of representing one's constituents or representing one's own feelings, one's own beliefs based on one's faith, life experience, and all that sort of stuff.

Mr. Seres, you mentioned that your second recommendation after having the bill withdrawn was to hold a national plebiscite. Now, we're not going to have a national plebiscite, but let me just hypothetically ask you, if a national plebiscite were held and it came back that 50% plus one or more supported the idea of same-sex unions, would that change your view on it?

● (1920)

**Mr. Ted Seres:** It wouldn't change my view. We recognize that we live in a pluralistic society. I think we would have to accept the voice of Canadians. It wouldn't change my view, necessarily, but we'd live within that.

**Mr. Michael Savage:** I've met with a number of people in my riding, as we all have, and I recall one particular discussion in my constituency office with a person of faith who was adamant that I needed to represent the views of my constituents; he assumed they were opposed to the legislation.

I had made my position clear as soon as this bill came out. To me, it's a matter of equality. It's a matter of the rights of the minority. I said that, as much as I respected and tried to reflect the feelings of my constituents, on an issue like this I would act in the best interests of what's in my head and my heart. And I asked him, if he was the member of Parliament and the majority of his constituents supported same-sex marriage, would he support it; and he said no, because it's immoral.

I think we often believe everybody shares our point of view. Since then I have had the opportunity, though, in April, to tag onto an omnibus survey of 400 samples in my riding. It showed that, 52% to 43%, people do support this legislation, which I'm pleased about.

But on the concept of asking the majority about the rights of the minority, I'd like to ask Mr. Awan how he feels about that.

**Mr. Khurrum Awan:** Well, I acknowledge that it is a bit of a slippery slope. However, at the same time, I do feel that there are competing interests that need to be balanced, and I think it is Parliament that accounts for that, more than the courts. A plebiscite or a referendum is definitely something that needs to be taken into account on those issues. Again, there are competing interests that need to be balanced.

I think the process of conducting a plebiscite or having people voting on a certain issue just lends greater credence to it in terms of formal democratic processes, and it also enables Parliament...I mean, if we have a split of 53% to 47%, or maybe 60% to 40%, I can see that there's a case for supporting the minority right. However, if we have something such as, maybe, a 95% to 5% split, I think the balance of power shifts a little there. Even if the courts have upheld a decision, I think there needs to be a consideration of both those views.

Again, it ties back to one of the propositions that I put forth to the committee about the relationship between the court structure and the legislatures. The idea is that the legislature represents the people of Canada. The courts represent a certain higher natural law that we subscribe to in terms of the Charter of Rights and Freedoms. There needs to be a better balance found between those than that represented by Bill C-38.

If you really look at the preamble of Bill C-38 and the way it has gone through the House, the government really seems to be saying that it's doing this because the Supreme Court or the courts told it to do so, really without proper or broad-based social consideration of the issues. I think that's something we object to.

**Mr. Michael Savage:** Parliament has a way, every now and then, of making enlightened decisions. I think this is one of those times. When a plebiscite in the 1980s would have shown that most Canadians wanted capital punishment, Parliament voted against bringing back capital punishment, including a majority of Conservatives because it was a majority Conservative government at that point in time. When people have a chance to look at issues and study issues, to me, that's when Parliament is at its very best.

We don't have a 95% to 5% split. I suspect in Canada it's probably pretty even overall. It seems to me that the protection of minority rights is one of the most important things we can do in a Parliament. That's why, from this particular point of view, I think this is the right thing to do.

I'll leave that as a hanging comment. I know we have different points of view on it, but I think I'm out of time.

Thank you, sir.

● (1925)

[*Translation*]

**The Chair:** Thank you.

We will now hear from the Bloc Québécois.

Mr. Ménard.

**Mr. Réal Ménard:** Thank you, Mr. Chair. I have a question for Mr. Brown, whose brief I will read very attentively, it goes without saying.

I agree with you when you say that clause 3 of the bill is perhaps too weak. However, if we look at a dozen or so rulings handed down by the Supreme Court for the last ten years with respect to freedom of religion, it is plain to see that this is not a matter of jurisdiction. What the bill seeks to do, above all, in addition to protecting the celebration of marriage, is to protect freedom of religion. This is dealt with in all provincial codes, as well as in the Canadian Charter of Rights and Freedoms. The Charter was referenced in different contexts, with regard to the observance of the Sunday holiday, wearing the kirpan, or establishing a succah in the Town of Mount Royal. The Supreme Court went very far in defining freedom of religion. Do you agree with me that it has always chosen to adopt the most liberal definition possible?

What scares me in your reasoning is that you seem to be attaching it to jurisdictions. In my opinion, this is not a jurisdictional issue. Suppose that there is a legal challenge because a Church, any Church, has refused to celebrate a marriage, invoking as grounds subsection 2(a) or one of the sections on human rights in provincial legislation. I am wondering how the court could arrive at a different conclusion, because the situation is not a discriminatory one. Churches, religious groups, cannot be forced to marry people, either because their beliefs preclude it, or because freedom of religion protects their right to refuse.

This situation has nothing to do with jurisdictional matters: it has to do with a particular vision of freedom. For this reason, I believe that clause 3, even if it is only a declaratory clause, should be included in a bill such as this one. It can be strengthened. In addition, we can take your amendment into consideration. However, I believe that it is somewhat erroneous to imply that this protection is not strong enough, and that for jurisdictional reasons, it will not apply.

[*English*]

**Mr. David Brown:** Perhaps I could give you first a narrow answer and then a broader answer. I really am in agreement with you in terms of the goal you're trying to achieve.

To give you the narrow answer, you describe clause 3 as weak, *faible.* It's a bit more than that.

Perhaps I can read to you paragraph 36 of the same-sex marriage reference: “Section 2 of the *Proposed Act*”—which is basically the same as clause 3 of Bill C-38—“relates to those who may (or must) perform marriages. Legislative competence over the performance or solemnization of marriage is exclusively allocated to the provinces under s. 92(12) of the Constitution Act, 1867.”

So my simple view as a lawyer, reading paragraphs 35 through to 39 of the same-sex marriage reference, is that the Supreme Court has said, look, nice sentiment, and your hearts are in the right place in trying to afford some sort of protection to religious liberty in the bill, but Parliament just doesn't have the jurisdiction to do that. It isn't going to work. It has no legal force or effect.

So that's the narrow answer, but I think it then comes back to how this committee can recommend that Parliament achieve the larger goal, which I think is a goal you share, that religious liberty be protected.

There are two ways you can do that. One is by putting in some sort of amendment, as I have suggested, linked to matters of federal jurisdiction. As long as you link them to matters of federal jurisdiction, you'll be okay.

The second way is that I suppose you could do nothing. If you do nothing, you're quite correct, the courts in this land—for instance, very recently in the Amselem and Village de Lafontaine cases, in the minority—give very robust protection to freedom of religion. But you have to appreciate that from a litigator's point of view, those expressions by the Supreme Court of Canada arose in what context? In the context of litigation. Orthodox Jews were part of the Syndicat Northcrest in Montreal, having to sue their condominium corporation in order to exercise their liberty. You had the Jehovah's Witnesses entity down in Lafontaine having to sue the municipality to assert their religious liberty.

All I'm saying to you is that this costs money, which I think Mr. Seres has alluded to as well. So perhaps you could put something in the bill that would obviate the need for that kind of litigation.

● (1930)

[*Translation*]

**Mr. Réal Ménard:** I would like to ask a second question on what you have just said.

[*English*]

**Mr. David Brown:** Okay.

[*Translation*]

**Mr. Réal Ménard:** What I want to hear you say is that you cannot conclude from this wording that it will not offer any guarantee.

The recent history of Supreme Court rulings came down against that. In Amselem, the challenge for the Town of Mount Royal was based on Charter provisions dealing with provincial jurisdiction. The court makes a distinction between incidental and paramount objectives. That does not mean that the wording does not need to be strengthened. Yes, we may look at some amendments, but I feel that you are being unfair from a legal standpoint when you say that this offers no guarantee. It is not a jurisdictional issue. When the court had to rule on freedom of religion, it was not a matter of jurisdiction, but rather of dogma and official positions. Your interpretation of clause 3 is not found in any of the recent rulings on freedom of religion that you have cited: Amselem, Northcrest and all the cases that we are aware of. Yes, it needs to be made more "virile", if I may put it that way, but do not be too negative about clause 3.

[*English*]

**Mr. David Brown:** Then perhaps let me try to clarify my position.

If Parliament thinks clause 3 will provide legal protection for solemnization of marriages that will be upheld and recognized by the courts, the Supreme Court has already told you, nice try, it won't; you don't have the jurisdiction to do it.

Now, the Supreme Court may go on to say that notwithstanding that clause 3 is of no force or effect, the body of law that has developed under paragraph 2(a) will offer that protection. I think your point is that there are many indications in the current case law to point in that direction, and I agree with you, Monsieur Ménard.

But my point is, if it's the sentiment of the House to try to incorporate some protection for religious liberty in this bill, the Supreme Court has told you clause 3 won't work, so I would recommend you come up with another clause that will work that is linked to matters of federal competence.

I don't disagree with you about the jurisprudence—

**Mr. Réal Ménard:** Oh, thank you. Will you give me money for the Bloc Québécois as they give it to the Liberals?

**The Chair:** Mr. Brown, I have to say you ran after that.

**Mr. David Brown:** What's that?

**The Chair:** You have to expect Mr. Ménard to come back to you on that.

We're back to the Liberal Party.

Mr. Macklin.

**Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.):** Thank you very much.

As has been said, we extend our thanks to all of you. We know you have to go through a great deal of work and effort to be here, and we appreciate it. You do enlighten us, and we're looking for more enlightenment as we go forward.

Tonight, Mr. Brown, I remember with great interest your original presentation—in Toronto, as I recall—a couple of years ago. I was intrigued then by the arguments you brought forward, and I'm equally interested in what you're proposing tonight as a way of giving us a greater way to protect, at least from the federal perspective.

However, although I don't have it before me, as I listen to what you're saying I get the feeling that maybe what you're proposing is extraordinarily broad. That breadth gives me some concern about such areas as the potential for an argument being developed, using this as protection, under the guise of advancing polygamy or underage marriage—that sort of concept.

Can you give me some sense of assurance that my fears, in listening to what you propose, are not fears I should take with any sort of seriousness?

**Mr. David Brown:** That's a very good point, sir, because this was put together rather hurriedly last night when I looked at it on the plane coming up.

I think your concern is quite a legitimate one, coming out of the breadth of this language. I can suggest some changes to it, although let me step back and say I think the equality analysis the courts have adopted on this issue has opened the door to expanding marriage to whatever group wants to have it. But let's put that to one side and just deal with this.

I think perhaps my proposal could be changed so that instead of having language such as "by reason of their practices and belief relating to the definition of 'marriage'", perhaps you could substitute language such as "by reason of their beliefs with respect to same-sex marriage", which would actually make it more in the nature of a consequential amendment, because it would tie in specifically to the operative clause, clause 2.

The gist of what I was trying to get at there is simply that if you have a significant number of the Canadian community who disagree with same-sex marriage, by reason of that belief they should not be deprived of benefits or saddled with burdens under federal law. That's what I was trying to get at. I was not trying to open the door any wider. And you have great legislative clerks and lawyers around who can wordsmith this.

I agree with the concern you raised, and I think that to achieve my objective, a narrower tailoring of the language would be appropriate. But I still think this burdens/benefit concept or structure is one that would work, and I would suggest you refer to your House lawyers to see what they might be able to do with it.

● (1935)

**Hon. Paul Harold Macklin:** I very much appreciate that, because I think you've given us as much as we've received from any witness, at this point, in terms of a starting point to move forward on. That's really what we are seriously trying to find.

**Mr. David Brown:** I don't like playing Don Quixote—I've done that too much. I am trying to offer something of practical assistance.

**Hon. Paul Harold Macklin:** I would like to go back on a couple of other points, assuming I have time.

**The Chair:** Yes, you do.

**Hon. Paul Harold Macklin:** Good, thank you.

Mr. Seres, you indicated that you believe this use of marriage could undermine monogamous relationships. I'd like to get a better understanding of that, if I properly heard you.

The second point is that I don't hear people making a distinction tonight in their evidence between civil marriage and religious marriage. Under the concept of freedom of religion, I know that you're cherishing and protecting religious marriage. The use of the word without the adjectives somehow to me isn't maybe addressing it in the finite way that we'd like to have you address the issue, because I think specifically, and as you notice in this bill, it does refer to civil marriage. It does try to distinguish that.

As we went through this process earlier, most religious communities—I won't say every religious community—were all right with the concept of equality, but they were very uneasy about the use of the term “marriage” as a free-standing, single word.

So I'd like your comments on both of those items, if you would, please. I think we are trying, as legislators, to make that fine distinction, but it is a clear distinction, between civil and religious marriage. We are trying to protect that religious freedom, and yet, on a civil basis, provide equality.

**Mr. Ted Seres:** I think my comments concerning the undermining of the monogamous part of marriage were simply made on the readings that we have done on the lifestyle. It would appear that for most same-sex commitments there is not a commitment to a lifestyle of monogamy.

If you compare that with common-law relationships, even in those relationships there seems to be somewhat of a commitment to a monogamous relationship for as long as that lasts, whereas in the evidence that we have looked at—and I know it may be disputed—it would appear that this gay lifestyle would look at a monogamous relationship as repressive.

So our fears are that the inclusion of those people who embrace that type of lifestyle—that's not a derogatory remark—and to call that marriage would undermine one of the pillars that keeps marriages together.

Although we try to distinguish, I suppose, between a religious marriage and a civil marriage, I think in their minds most Canadians don't distinguish that. So what our children are taught in our schools will just be marriage. They won't distinguish between a church marriage or a civil marriage, or whether this is a civil marriage. So they will be simply taught that all of those couples, of whatever gender, are together. Whatever type of lifestyle they embrace, this is what marriage is.

I guess I just have to get practical. I represent over 3,000 credential holders. Every day they're dealing with real people, real Canadians, whether they subscribe to the faith or whether they don't. My concern is simply this, and I just say this as compassionately as I can. We have kids from broken homes. We have kids where marriages have broken down. There are hurting kids. There are hurting mothers. There are hurting fathers. Whenever we tamper with this unit that built our country and made it strong...and it didn't start with tampering with the definition of “marriage”. We lost the battle, I think, years ago when we started to liberalize the divorce laws and to make marriage something where you could just get in easily and get out easily. We're reaping the results of that now. We have hurting people. We have a sick country, in many respects. We have hurting kids.

I have credential holders right across this country who are dealing with this on a day-to-day basis. Like for a lawyer, this is probably good legislation to keep the church in business, because when nothing else helps, they somehow come to the religious community and try to find some solace there. It may keep us working harder. I'm just concerned that as we redefine something that has made this country so strong, it's in fact going to weaken the country. That's not a derogatory comment on gays or lesbians at all.

● (1940)

**The Chair:** I'm sorry, we're way over time.

We'll go back to Mr. Siksay. Do you have questions, Mr. Siksay?

**Mr. Bill Siksay:** I do, Mr. Chair. Thank you.

Mr. Chair, I just want to say that I'm a kid who grew up in this country and I grew up as a hurting kid, knowing there was no place for me in this society or in this world. If you want to talk about hurting kids, let's look at the gay and lesbian children in this society and how we grow up. It would be nice to hear some concern for those children in our society, who don't often get a lot of sympathy from their families, from their churches, from their schools, or from their society. And that continues to this day.

I'm afraid I'm losing my patience a bit, hearing people say let's think about the children in all of this. Well, let's think about the children in all of this. It would be nice for children to grow up knowing that the model of a married, committed gay and lesbian relationship was available to them as well. That's one of the reasons I'm working hard on this legislation.

You talk about the credential holders in the Pentecostal Assemblies. Are they ministers or are they the congregations?

**Mr. Ted Seres:** No, they would be ministers.

**Mr. Bill Siksay:** Have any of them ever been—somebody used this term—"hauled off" to court, to be forced to provide religious services to someone who they decided for some reason didn't meet the requirements of the Pentecostal Assemblies or their particular congregations?

**Mr. Ted Seres:** Not to my knowledge, no.

**Mr. Bill Siksay:** So they haven't been forced to.... I'm sorry, I don't know necessarily the doctrine in theology, but have they been forced to baptize someone or admit them to communion or do a burial for someone they deemed wasn't appropriate for their congregation?

**Mr. Ted Seres:** No, not at all.

**Mr. Bill Siksay:** So there's no history of that being used in those circumstances.

Have the Pentecostal Assemblies faced the situation where someone went to court to force them to ordain someone who the Pentecostal Assemblies said was unacceptable? I don't know if the Pentecostal Assemblies all ordain women, for instance. Has a woman ever gone...?

**Mr. Ted Seres:** We do.

**Mr. Bill Siksay:** All of them? Okay.

Do you know if the Catholic Church has ever faced that kind of lawsuit from a woman who wouldn't be able to be ordained in the Catholic Church? Has anyone ever taken them to court?

**Mr. Ted Seres:** I can't speak on behalf.... I don't—

**Mr. Bill Siksay:** Mr. Brown, you're an expert on this kind of stuff. Do you know of any situation like that?

**Mr. David Brown:** You're asking a hypothetical question.

**Mr. Bill Siksay:** You've been commenting, looking in your crystal ball a lot.

**Mr. David Brown:** Well, I will—

**Mr. Bill Siksay:** So I'm asking you.

**Mr. David Brown:** But you're asking hypothetically. You're posing a very valid question, but you're posing it by asking if this has happened to date. And the reality is that the law hasn't changed yet, so how could it have happened to date?

**Mr. Bill Siksay:** I'm asking specifically about the reasonable parallel.

**Mr. David Brown:** Let me give you the analogous situations that form my view that I see this as an area of contention in the years ahead: Trinity Western, which is admissions of students to private institutions; Chamberlain, which is the use of materials in public schools; Brockie and Brillinger, which is the provision of services; and the Hall case, which is the Roman Catholic prom case. Those are the four that come to mind with—

**Mr. Bill Siksay:** None of which are religious rites, like ordination might be or like admission to the eucharist might be, or a burial rite might be.

● (1945)

**Mr. David Brown:** No, they're all religious rites.

**Mr. Bill Siksay:** A high school prom is a religious rite?

**Mr. David Brown:** Absolutely, because the—

**Mr. Bill Siksay:** Not in my recollection.

**Mr. David Brown:** —school said it didn't have to allow these two boys to come as a couple because of the teaching of their church. And the court said no, it was going to force them by way of injunction to allow them to come.

So these are analogous situations that simply lead me to say that in terms of the major area of litigation—and I work in the trenches, I'm a litigator—I see this as the tension ground for the next decade.

**Mr. Bill Siksay:** Would you take a case from a woman who approached you saying the Roman Catholic Church has denied her ordination and she wants to sue them to be ordained in the Catholic Church?

**A voice:** If she paid cash.

**Mr. Bill Siksay:** No, but quite seriously, is that a reasonable case to pursue? Would you advise someone that they had a reasonable case to pursue that in the court?

**Mr. David Brown:** You're asking for an off-the-head opinion? I don't think that case really stands much of a chance.

**Mr. Bill Siksay:** Why not?

**Mr. David Brown:** The reason is that there you are dealing with the internal workings of an association. But regarding the internal workings of an association—do we ordain or do we not ordain—there's no nexus there with public law. It's all about the law of a private organization.

**Mr. Bill Siksay:** You're denying someone access to employment. Is that not similar? You're denying someone access to a public, an institutional, service like marriage. Is there not a parallel there?

**Mr. David Brown:** No, but in terms, sir, of the access to employment, a lot of the provincial human rights codes do require access without discrimination, but they carve out by statute exceptions for religious institutions.

I think the concern about the clergy is that most clergy in this country wear two hats. They are representatives of their religious organizations, but they're also licensed agents of the state—and they have to be licensed agents in order to solemnize a marriage. I think it's because they wear that public hat that a concern has arisen that if a definition changes, they may be compelled, because they have this public aspect, to solemnize marriages.

I'm trying to be direct and candid with you.

**Mr. Bill Siksay:** Thank you.

**The Chair:** Thank you.

We're back to the Liberals.

Mr. Macklin.

**Hon. Paul Harold Macklin:** Thank you.

I wanted to pursue another matter with Mr. Awan. Parliament passed the Charter of Rights and Freedoms, so Parliament set up certain standards. They had to look to someone to be the guarantor of rights, particularly minority rights, and it fell upon the courts to be that guarantor.

If we look back to historical experience, if you go back to Germany, for example, the Second World War, no one stood up for minority rights. There were no guarantors, the courts didn't act, there was no protection.

You say you want a guarantee. You want protection. I presume that we're talking about the clergy here. I go back to the marriage reference, and I believe Mr. Boudria read it into the record: "With respect to Question 3, we conclude that the guarantee of freedom of religion in the *Charter* affords religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs."

I believe that guarantee is there. With the declaration in question three, referring back to this guarantee, you should feel a reasonable comfort. The highest court in the land, the guarantor of minority rights, is making that statement clearly and distinctly.

How do you address that? Are you still fearful?

**Mr. Khurrum Awan:** Yes, we are. I have studied constitutional law in law school. Professor Brown can correct me if I'm wrong, but one of the fundamental principles that the highest courts of our land have come up with since they started adjudicating on constitutional issues is that the Constitution of Canada is a living tree, capable of expansion to accommodate changes that come about in our society.

Now, the Supreme Court may think this is a principle today, but it may not think that tomorrow or ten or fifteen years from now. This pattern has also been reflected within the rulings on the same-sex cases. There have been times when the court has ruled that same-sex rights are not violated in this context. Then, five years later, they consider the issue again and rule in favour of it.

Our point is that we do not want to see any ambiguities, because the courts have over time changed their rulings over the same issues.

There was a case—I can't remember it off the top of my head—where the court upheld the traditional definition of marriage, before the current M v. H case was considered by the Ontario Court of Appeal. My point is that the court makes different rulings at different times. Rulings on charter adjudication, the meaning of equality rights, the meaning of religious freedoms—all have changed over time. So we would like the legislation to give us an explicit guarantee that this is the interpretation, and that this interpretation will stand.

This is our concern.

● (1950)

**Hon. Paul Harold Macklin:** If you read section 1 of the charter, it says: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out...", and paragraph 2(a) guarantees "freedom of conscience and religion".

There is a fundamental point here that doesn't seem to be accepted. I think these are absolute guarantees, subject to change by Parliament in the Charter of Rights and Freedoms. I submit that the Supreme Court believes this is a guarantee being put out to protect religious officials. We can never say that someone won't bring an action against someone, but I'd like to defend someone where there is a guarantee in our Constitution.

**Mr. Khurrum Awan:** I fully agree with you. I'm not denying the fact that those guarantees are there. The question is how the court interprets those guarantees. There are different guarantees within the Constitution that the court balances within the scope of the charter. Where it will draw the line and how far it will take one guarantee at the expense of the other, however, has changed over time, and it has changed consistently over the last 20 or so years of charter jurisprudence. It has also changed in terms of how the courts have viewed the equality provision and how they've interpreted the equality provision.

So our point is that there is ambiguity within the courts' jurisprudence. If we look into the equality cases, there have been strong judgments against, and there have often been strong dissents. So again, I think the case law is not as black and white as we would like to think it is. We would like to think it is, but it's not, which is why we are suggesting to you that Parliament and the legislatures provide explicit guarantees. And in particular, where there are ambiguities in language the courts have been very liberal in going off with whatever interpretation they think is best.

The courts have already said they're not bound to the original intentions of the people who drafted the Constitution Act of 1867 or the Constitution Act of 1982, which includes the charter. So they could give another interpretation to equality rights ten or fifteen years from now, and that is why we would like to see an explicit guarantee. Religious rights might at this time, in their view, protect religious institutions and religious officials, but they may not do that ten years from now, and that is what our concern is. That's why we would like to see an explicit guarantee provided by Parliament, so that there's no ambiguity on this issue.

**The Chair:** Thank you.

I'm sorry, we're running out of time. We're coming back to the Conservatives.

For those of you who are interested, the meeting was to be from 6 to 8 o'clock; however, the honourable members of the committee did not supply us with a quorum until 6:08, so we will continue, if there are questions, until 8:08. Thank you.

Mr. Jean, go ahead, please.

**Mr. Brian Jean (Fort McMurray—Athabasca, CPC):** Thank you, Mr. Chair.

Firstly, Dr. Cohen, I'm concerned somewhat because we've heard opposing opinions on the information you've given us today. It concerns me because obviously I think, as all of us do, that children are our future and we should make sure they're protected. I am curious. Certainly you are a learned person. There are studies on both sides of this issue, are there not?

**Ms. Karen Cohen:** There are two studies necessarily set out to ask the same questions or examine the same facets of all issues. I think, though, with all respect due to Mr. Seres, if you want someone to interpret psychosocial literature, then you need to look to the scientists who do that and who conduct that research. If you have questions about theology or other belief systems, then there are other places you should go for that.

The point I made earlier is that our goal is not to start out with a position. Our goal is to see what the evidence shows us, not to find evidence that supports a position. Are there studies that have multitudinous findings on any topic? Yes, but you need to look at the preponderance of evidence in terms of the questions that have been asked. We've done that. We've reviewed the studies that exist and we feel confident in making this assertion. Will there be other studies that may have different points of view? That will always be the case.

● (1955)

**Mr. Brian Jean:** But there are studies on both sides that say it's a good situation and it's a bad situation regarding children.

**Ms. Karen Cohen:** The interpretation of every single study is that unequivocally there is no difference in these dimensions on the children of both unions. Well, it depends on who's reading the studies, for one, and I've already addressed that point, I think.

**Mr. Brian Jean:** And indeed, Ms. Cohen, doesn't it depend on who is doing the studies?

**Ms. Karen Cohen:** Yes, it does.

**Mr. Brian Jean:** I taught quantitative methods for several years at university level, and I can tell you, just as in the joke I told earlier about lawyers, statisticians can make anything happen.

And I am concerned especially.... My next question is to Professor Brown.

Were you involved at all in the 2003 case in which the Attorney General of Canada filed an affidavit regarding these studies that said there was no difference between the two? In fact, I think the Attorney General stated that he had an affidavit by a University of Virginia professor in relation to these studies and not in relation to the children themselves or the effect of that. It simply said that these studies that were done for proponents were flawed, that the methodology was flawed.

**Mr. David Brown:** Yes, that was in the Halpern case, and that evidence went to both divisional court and the court of appeal. And indeed, the group I acted for I think also put in evidence. I'm not going to stray into an area of expertise that is beyond me, but my recollection of the affidavit evidence that went in is that both sides put in evidence.

I think the same-sex couple applicants put in studies that said there was no difference in the effectiveness of parenting. And my recollection of the affidavit that went in on the other side from the AG of Canada was really saying, well, looking at those studies, they are not methodologically sound; therefore, at this point in time it's not possible to draw a conclusion one way or the other. I don't think the affidavit went any further than that, and it went in the better part of three years ago. I have no idea what the literature says today.

**Mr. Brian Jean:** Wasn't it indeed the case that they said the evidence wasn't scientifically sound, that the studies themselves had to do with advocates of particular positions, that there were small numbers of participants used in the studies, that they used control groups? For instance, as a statistician, I can tell you that random selection and the number of participants make a huge difference on any study.

**Mr. David Brown:** All I remember, as a lawyer, is that, yes, there were allegations that the people who authored the study may have come to it with bias, and there were allegations that the stats were wrong. What the details were are lost to memory now.

**Mr. Brian Jean:** My next question, Mr. Brown—

**The Chair:** Very short, please.

**Mr. Brian Jean:** —is very short.

In your opinion, is the word “marriage” a right, or can more than one word that describes a group in our society have the same rights and obligations that flow from that?

**Mr. David Brown:** I'm not quite sure what the question is.

**Mr. Brian Jean:** What I'm asking you is, can you have two words that have the same rights?

**Mr. David Brown:** I don't think I would phrase it that way. In terms of civil status, I think the way I would phrase it is that you can have two groups that have the same legal rights, although the groups may be called by different names. The argument was made that the Modernization of Benefits and Obligations Act, which Parliament passed in the early nineties or something like that, effectively provided the same legal benefits to non-married people as they otherwise enjoyed under federal law. So I guess that's the way I would answer the question.

**The Chair:** Thank you.

We're back to the Liberal Party. Mr. Macklin.

**Hon. Paul Harold Macklin:** I understand that Mr. Ménard is waiting to have an opportunity to ask a question. I'll defer to him.

[*Translation*]

**The Chair:** We will go now to Mr. Ménard from the Bloc Québécois.

**Mr. Réal Ménard:** It is such a warm and welcoming world, Mr. Chairman, because you are so attentive in your duties.

Mr. Seres, I would like to ask you a question that I will put in the form of a comment. Of course, I understand perfectly well that the difference between law and religion is that religion is a matter of conviction and not demonstration. We will not be able to prove here tonight that God exists or does not exist, but we need to respect people's convictions. It is not something that can be scientifically proven.

Around this table, Bill and I probably have the best understanding of what it is like to be homosexual, which is necessarily a plural reality, in passing. If you think that life as a heterosexual is sometimes complicated, don't think for a minute that life as a homosexual is much easier.

What surprises me when I listen to you is that you firmly believe that commitment, faithfulness and mutual support are not values of the gay community. I feel that you have a bit of nerve to say that because I hardly see how that is something that can be investigated. Is it not also possible that people in the gay community want to have a choice? I'm not saying that everyone wants to get married: some do and some do not, but they all want to have a choice.

How does the fact that people want to belong to an institution called marriage possibly threaten its continuation or integrity?

You would have to agree that the institution of marriage has been damaged the most by heterosexuals who divorce. Homosexuals have not had access to marriage and have therefore not done any damage to it.

Could the religious orthodoxy that you represent not take an open and charitable approach by assuming that people who want to get married are motivated by faithfulness, commitment and mutual support? Homosexuals also hold those values. I am not saying that some of them are not a bit flighty or eager for adventure, but those types can be found among heterosexuals as well, and I would even go so far as to say among parliamentarians here; but I will not mention any names, don't worry.

● (2000)

[*English*]

**Mr. Ted Seres:** I'm sorry?

[*Translation*]

**Mr. Réal Ménard:** Here is my question: do you not think that, where values are concerned, a minimum of good faith should lead you to recognize that among homosexuals there are people who believe in fidelity, in commitment, and in mutual support? I do not understand how you can presume to say that there are no such values among homosexuals. It seems to me that this is a purely gratuitous value judgment.

[*English*]

**Mr. Ted Seres:** I don't think I said that they don't exist. It would seem to be very much the minority, at least in our studies. And this isn't just based on empirical evidence; it's also based on our ministers who are out there on the streets working within the gay community, trying to work with their hurts, trying to bring hope to their lives. This is the experience they're coming back to us with.

So again, if there's such a very small number of gay people who want this institution of marriage, why are we changing and why are we restructuring the whole institution of marriage? I know you're saying that this is obviously something that I'm saying from a majority standpoint and it's not protecting minority rights, but again—and I know we've probably gone beyond the mandate of this committee—historically and around the world, marriage has always been something to which both sexes contributed. So it would be as if I had been a woman who wanted to have the same rights as males back at the turn of the century; I wouldn't redefine what being male was so that I would be included under the definition.

We're not saying that gays don't have rights; we're not saying that at all. But we're defining this institution of marriage as it has been defined, and we don't even understand why someone else would want to redefine it to include them.

[*Translation*]

**Mr. Réal Ménard:** Do you realize that up to the 1960s, interracial marriage was spoken of in the same anthropological and essentialist terms that you are using today?

Mr. Chairman, 20 years ago, people could have sat here and told us that this was all in the normal order of things. In the name of anthropology and of all that is human, they would have told us that Blacks cannot marry Whites. Do you realize that this kind of argument can be very dangerous? No doubt, you are not making it in bad faith, but it is an anthropological argument, it is circular and uninformative and does not lead us anywhere.

Religions may propose such arguments, but the legislator cannot, because he must be concerned with equal rights for people.

Twenty years ago, we were told that for the sake of humanity, and of basic human nature, there should be no marriages between races. You can see that if the legislator had followed this logic, he would have made a historical mistake. We have heard others speak in the same way as you speak about homosexuals.

[*English*]

**Mr. Ted Seres:** I think that's a completely different argument, honestly, because interracial marriage didn't really change any of the fundamentals of marriage. There was nothing at all, especially in our conviction, that meant races couldn't intermarry, but in our conviction there is something distinctly different between a man and a woman marrying—and building a family, and building a nation on the family unit—and a man and a man or a woman and a woman marrying and trying to develop a family.

The differences there are vast, and it goes far beyond.... It was certainly an injustice, and the church was guilty in the past of probably being proponents against racial marriage, but allowing for racial marriages doesn't significantly change the institution. It doesn't significantly change those characteristics that go into it. You still have the complementary contribution of genders, whereas gay marriages don't afford that.

● (2005)

[*Translation*]

**Mr. Réal Ménard:** It was not...

**The Chair:** Mr. Ménard, the time is up.

**Mr. Réal Ménard:** Thank you.

[*English*]

**The Chair:** Thank you very much.

Mr. Siksay.

**Mr. Bill Siksay:** Mr. Jean has raised a complaint, I think, in two meetings now about how somehow our practice in this committee is different from that of other committees in terms of the provision of briefing documents and notification about witnesses. I just want to say that this hasn't been my perception, from the standing committee. I want to clarify whether there is something different about what we're doing here and if it can be corrected, if that is the case.

**The Chair:** You'll recall that the committee members voted on some rules and regulations at the first meeting we had. One of these rules is that if a brief or documents are tabled by any of the witnesses, they must be in both official languages. When they are not handed to us in both official languages, we hold back on the distribution until we've obtained the other version, if I can call it that, in the other official language. As soon as we have that, they're supplied to you.

**Mr. Bill Siksay:** I understand that.

**The Chair:** In regard to delays, you have to realize it wasn't until this week had already started that decisions were made in regard to that.

Mr. Jean, very briefly, please.

**Mr. Brian Jean:** I just want to say I understand that and I'm fine with that in my other committees, but this is a situation where 24 hours' notice is usually given to witnesses. I wouldn't be surprised if they couldn't provide reports to get translated within that timeframe.

I understand, Mr. Chair, we're dealing with what we have here in front of us, but I don't think there's any rush. What's going to happen is going to happen.

**The Chair:** We're dealing with what happened in this committee, and until we made a decision, until there was a compromise—

**Mr. Brian Jean:** I understand, certainly, but the rule of law suggests that we would have adequate time, and I don't think there is.

**The Chair:** We couldn't invite witnesses without knowing what the list was.

Thank you for your comments.

Thank you very much to the witnesses. We appreciate your help. It was very interesting. There were some good suggestions. I could see that members were taking notes. Thank you for helping us do our work.

This committee is adjourned.

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