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Chair

Mr. Marcel Proulx

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● (1535)

[*Translation*]

The Chair (Mr. Marcel Proulx (Hull—Aylmer, Lib.)): Good afternoon, ladies and gentlemen. Welcome to this meeting of the Legislative Committee on Bill C-38.

[*English*]

Good afternoon, ladies and gentlemen.

Welcome to the Legislative Committee on Bill C-38.

We have four witnesses today. We have three people as individuals and one representative of the Chinese Canadian National Council. The order today will be the order we have on the orders of the day: Mr. Cere, Mr. Kempling, Mr. Brudner, and then Mr. Ma.

The witnesses have 10 minutes each for an opening statement. Once all of the witnesses have given their opening statements, we will then proceed to questions and answers. The first round of questions and answers is seven minutes each, including answers, and the additional rounds are five minutes each, including questions and answers.

We'll start with Mr. Daniel Cere.

Mr. Daniel Cere (Professor, McGill University, Institute for the Study of Marriage Law and Culture, As an Individual): *The Rights Revolution*, Michael Ignatieff's study and Massey lectures, points out that a new brand of liberalism has brought rights talks right into the bedrooms of the nation. This new liberalism aims at transforming society's most basic social institution, marriage. According to Ignatieff, its ledger of achievements includes more divorce, more sexual freedom, more family diversity, fewer children, and more conjugal instability.

For most of its history, liberalism insisted that the state should keep a measured distance from the basic institutions of civil society, marriage, religion, and the economy. John Rawls refers to this long-standing tradition as political liberalism. Liberal values of justice and equality rule the political domain. However, liberalism rejects the imposition of any comprehensive view, including that of liberal ideology, on civil society. It expects the Constitution and the courts to serve as shields, protecting the soft-shelled institutions of civil society from state intrusion.

The struggle to protect the institution of marriage from political manipulation is evident in the foundational text of the liberal tradition. Locke's famous *Two Treatises of Government* argues that marriage is a pre-political institution vital to human well-being. "Conjugal society", he writes, "is made by a voluntary compact between man and woman, and...it consist[s] chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation". The society between parents and children and the distinctive rights and powers belonging respectively to them are far different from those of a political society.

More recently, John Rawls offers a restatement of this view, and he defines the family as a basic institution geared to the orderly production and reproduction of society from one generation to the next. Family life must be protected from the intrusions of government. According to Rawls, the political principles of liberalism do not apply to the internal life of the family.

So liberalism began with the battle for the independence of marriage as the basic institution of civil society. However, the new liberalism breaks the boundaries between the political and social. Social liberalism wants to penetrate deep into the social domains of life in order to coerce family and marriage to conform to liberal values. The courts are lured away from their crucial role as a shield protecting civil society in order to become a sword of the state, enforcing liberal norms in this non-political realm.

The flagship of the new liberalism is the reconstitution of society's most basic institution. The new doctrine asserts that marriage must be liberalized into a close relationship between consenting adults. Marriage must be blind to sex difference, procreativity, and the natural bond between parents and children. The historic understanding of marriage so fundamental to the classical liberal tradition is denounced as discriminatory and is driven from the public square. These developments not only derail in some sense the liberal tradition, they also arguably have implications for the institution of marriage, the rights of children, and civic freedom.

Impact on marriage. The best interdisciplinary studies on institutions conclude that social institutions are shaped by their shared public meanings. According to one Nobel Prize winner, Douglass North, institutions establish public norms or rules that guide and shape social conduct. Institutions are webs of public meaning. This helps account for the highly charged nature of conflicts over the core public meanings of institutions like marriage. Changing the public meaning of an institution works to reconstitute the social reality of that institution.

The implications for marriage. The courts and the governments are proposing to strip down the public meaning of marriage and reduce it to a couple-centred bond geared to the intimacy needs of adults. Three core elements disappear: bridging sex difference, procreation, and the role of marriage in connecting children to their natural parents.

Research indicates that sectors of society embracing this close-relationship model tend to be marked by declining marriage rates, declining birth rates, more marital instability, and more fragmentation of bonds between children and parents, and I draw on the work of Canadian sociologist David Hall for that comment. So impose this view as the authoritative norm for Canadian society as a whole and one might expect more of the same.

The question is, are these outcomes what Canadians want? A recent national study indicates that the aspirations of Canadians are still traditional. Reg Bibby's study points out that the vast majority of Canadians still aspire to marry, to have children, to be good parents, and to have lasting relationships. That accounts for over 90% of teenagers, who plan to marry, have children, and stay with the same partner for the rest of their lives.

However, the companion volume to this study indicates that current social trends—including declining marriage rates, high levels of marital instability, and declining birth rates—systematically defeat these aspirations. In short, by bringing the full force of the law behind these trends, we are setting future generations up for failure. The state needs to be working for the renewal of conjugal marriage, not denouncing it as discriminatory.

As to the impact on children, Bill C-38 requires a fundamental redefinition of parenthood, eliminating the concept of natural parent from public law and substituting for it the concept of legal parent. Why? To give legal weight to natural parenthood would compromise the parental claims of same-sex couples. One legal scholar writes that the traditional “privileging of biological parenting” represents a “heterosexual” constraint on “the wide range of family forms and practices”. By dismissing the biological bond of conjugal marriage and making family diversity the fundamental norm that must be promoted, the state sets itself up against the ideal of the intact family. It sides with social trends that further its erosion. Supporting intact conjugal marriages fosters the birthrights of children to be connected with mothers and fathers. Repudiating this public norm repudiates the complex set of rights imbedded in the institution.

Regarding the impact on freedom, let me say that the modern liberal state is now faced with deeply held, but conflicting conceptions of marriage. Some sectors of society identify with a close-relationship conception, while others adhere to the historic conception of marriage as an opposite-sex bond. Taking sides and imposing a close-relationship doctrine fails on liberal grounds of impartiality. Bill C-38 effectively condemns as discriminatory the historic understanding of marriage so fundamental to the faith communities and cultural communities of Canada. Social liberals argue that this vision of marriage must be driven from the public square and flee behind a thinning veil of religious freedom. Does the veil have any power to protect? The advance of social liberalism necessarily stirs anxieties about cultural and religious freedom. Bill C-38 promises that it won't break into the religious sanctuaries to coerce religious officials to solemnize marriages against their consciences. The fact that this legislation raises the spectre of such draconian action is telling.

What about those many other areas of federal jurisdiction? The government could have offered a few tangible safeguards: charitable status, communications, academic freedom, freedom to profess and promote the historic conception of marriage in the public sphere. So far, there has been not a whisper.

In my opinion, the amendments probably can't correct the flaws in the operative clauses of the legislation; however, there could be a number of amendments to soften the blow.

First, I would eliminate the consequential amendments referring to parenthood. This is a whole other question; the redefinition of parenthood demands serious public debate.

Second, eliminate the long, argumentative preamble, which has the effect of trying to wed a particular ideology of marriage to the charter.

Third, include strong provisions affirming religious, academic, and public freedom to hold, profess, and promote the historic meaning of marriage in Canadian society.

Fourth, promote protection for the charitable status of religious, cultural, and academic institutions aligned with that conception.

Fifth, make provision to religious and cultural communities for adequate federal funding to fight off the inevitable court challenges that will exploit their exposed position.

Sixth, recognize the existence of legally valid but truly competing conceptions of marriage within Canadian society. Perhaps you can include a clause recognizing and affirming the vital place and importance of the historic, conjugal conception of marriage in Canada—a bit of biconjugality, one might say, in the legislation.

Thank you.

● (1540)

The Chair: Mr. Kempling, you have 10 minutes.

Mr. Chris Kempling (As an Individual): Thank you, Mr. Chairman.

My name is Chris Kempling. I'm a school counsellor from Quesnel, British Columbia. I'm also a marriage and family therapist in private practice. I've been doing that part-time for 15 years.

I happen to be a professional in the public school system who also happens to be a sincere and devout Christian, and I've grown increasingly concerned since 1996, when it all got started, about the intention, it seems, to normalize homosexual behaviour in the public school system. The marriage bill is, I guess, the latest step in that process.

I wrote letters to the editor expressing my views as a professional, as a Christian individual, and as a citizen, and I have been punished quite severely for doing that. I have been suspended for one month by the British Columbia College of Teachers. I have yet to serve that suspension because I've been appealing it in the court system. I was suspended for writing scholarly essays where I explained my views and gave extensive scholarly citations to support those views. I was suspended for writing private memos to my own supervisor, who did not complain about me. I was suspended for writing private letters to my elected representatives in city council in my home town.

Just recently I joined the Christian Heritage Party of Canada. It is a registered federal political party. It closely represents my views. I'm the spokesperson for that party in the Cariboo—Prince George riding, and in that role as spokesperson, I wrote a letter to the editor explaining the position of the party on same-sex marriage, explaining why we respectfully disagree with it and think it is not in the public interest to change the definition of marriage. For that letter I was suspended for three months without pay. The reason I'm here today is that I don't have to take a leave of absence to come to talk to you. I have been off, without work, for the last two months.

It doesn't appear to me that there is much freedom of speech in this country, at least not for Christians in professional positions, and I'm quite concerned, not only for myself, obviously, but for other Christian professionals who may choose to express a professional opinion that happens to concur with their moral beliefs or religious beliefs. I think we're going down a dangerous road, so yes, I would like to see some additional protection for professionals who happen to hold views that are contrary to the current zeitgeist.

My other areas of concern are professional in nature. I am a clinical member of the National Association for Research and Therapy of Homosexuality, and in that role I have been doing some studies.

One of the things that caught my eye was a study done in Holland. They've had legalized marriage since 2001. The Amsterdam Municipal Health Service, under Dr. Maria Xiridou, published a study in May 2003 in *AIDS* journal. Dr. Xiridou and her colleagues were surprised to find that the highest rate of HIV transmission was not among casual same-sex partners but among those in stable relationships. That was quite a surprise to them. They found that 86% of all new HIV transmissions were among stable couples. The average length of those relationships was one and a half years, and the reason was that they had six to ten external partners per year.

Can you imagine if any of us announced to our spouses that we were going to have six to ten external partners in a year?

● (1545)

It seems to me the concept of marriage is being so radically altered that it doesn't appear to mean the same thing as I suppose heterosexuals for generations have come to see it as—an exclusive, monogamous, long-lasting relationship.

I suppose that was illustrated quite well in 1999, when then Premier Ujjal Dosanjh offered the B.C. government as an intervenor in a marriage case that was going to go before the B.C. Supreme Court. The couple in this case was a lesbian couple. An intrepid reporter interviewed the two women and found out that they did not live together and did not intend to live together, even after they became married, if they were successful in their case. In other words, it appeared in my reading to be a publicity stunt. Now, why the Government of British Columbia would choose to sign on as intervenor in a case such as this I don't know, but it seemed to demean one of the essential attributes of marriage.

I'm not sure what's going to happen to me in my situation. Right now I'm working as a truck driver. That's all I can find. There isn't much work for unemployed counsellors in a town the size of mine.

I just want to close with a quotation from a man by the name of William Barclay. This was written in 1971:

> Unless there is chastity and purity and fidelity, there must follow the destruction of the home, and the destruction of the home would mean the end of society as we know it.

There are any number of people prepared to live lives that flout all moral standards, yet at the same time depend on hundreds of decent, ordinary people who live according to the standards of Christian morality. There are thousands of people who themselves abandon all Christian standards and quite consciously depend on those who do accept Christian standards to hold society and civilization together. That is why the responsibility of the church to be the leaven of society was never greater than it is today. The church is the custodian of those standards, and not even those who break them would wish to see them destroyed.

A gay man by the name of John McKellar said this:

> Most Canadians believe we should be able to pursue any brand of consensual sex and form whatever relationships make us happy; and by equal measure most secular gays and lesbians have no problem conceding that heterosexuality is, and always will be, the human norm. This is a perfectly civilized social contract. I strongly reject the activist view that we must go further, that our dignity and our relationships are somehow devalued unless the state codifies same-sex marriage.

I don't think there is strong evidence that the majority of homosexual people actually want the institution of marriage for themselves. Apparently in Holland, where it's been in place for the last four years, only 2.5% of homosexual people have actually gotten married, despite it being available to anyone who wishes it.

So I would ask the committee to carefully consider the views of not only conservative Canadians—and I hold myself in that category—but also of a large number of homosexuals themselves who don't appear to support this initiative either, according to editorials I have read in such publications as *XTRA! West* newspaper in Vancouver.

I thank you for inviting me to speak. I'll be happy to entertain any questions.

● (1550)

The Chair: Thank you.

Mr. Brudner is next for 10 minutes.

Mr. Alan Brudner (As an Individual): Thank you, Mr. Chairman.

I'm going to confine my remarks to the question of whether legislating the common law definition of civil marriage as the exclusive union of one man and one woman would require use of the notwithstanding clause. I assume that is the question I was invited here to address. I won't comment except in passing on the merits of Bill C-38, although I personally favour the change it will make.

I should also preface my remarks by saying that my personal view is that legislating the common law definition of marriage would be unconstitutional as an unjustifiable violation of the equality rights section of the charter. However, since no court outside Quebec has yet ruled on the constitutionality of a legislated restriction of marriage to heterosexual couples, that question is still legally open as far as the federal government is concerned, or so I'll argue in what follows. If the question is legally open, then not only would it be unnecessary for Parliament to invoke the notwithstanding clause if it wishes to legislate the common law definition of marriage; it would also, in my view, be improper to do so, for government would then be shielding legislation suspected of being unconstitutional from judicial scrutiny, and that would be inconsistent with a constitutional democracy.

My burden is to show that even though the appellate courts of a majority of the provinces and the Yukon have ruled that the common law restriction of marriage to heterosexual couples is unconstitutional, the constitutionality of a statutory adoption of the same definition is nevertheless an open question, even for those courts. How can this be?

The place to begin the argument is with two cases with which the members of this committee are no doubt familiar. One is R. v. Swain, which dealt, among other things, with the constitutionality of a common law rule allowing the prosecution and a criminal trial to lead evidence of insanity against the wishes of the accused. In that case, the Supreme Court said that where the constitutionality of a common law rule is challenged, the court will not show the same deference to the policy of the rule as it will when legislation is an issue, since no question of respect for the democratic will arises. Specifically, it will not need to ask whether a rights violation is justifiable as necessary to promote a goal important to a free and democratic society. Moreover, even if it makes this inquiry, it will not need to resolve reasonable disagreements in favour of the challenged rule. The corollary would be that where the constitutionality of a statue is in question, the court will show more deference to the policy of the rule than it would if the same rule were judge-made, in the sense that reasonable disagreements about whether a policy is pressing and substantial or whether a limit on a right is the least invasive possible would be resolved in favour of those who are electorally accountable for their political judgments.

The other case is R. v. Daviault, in which the Supreme Court declared unconstitutional the common law rule excluding evidence of intoxication in crimes of basic intent. Parliament responded to Daviault by legislatively reinstating the common law rule in the case of violent crimes, and it did so without invoking the notwithstanding clause. Noteworthy is the fact that Parliament prefaced its legislation with a lengthy preamble, clearly stating its social objectives and why they were considered important. In doing so, it gave the Supreme Court judges something to consider that they did not have when they struck down the common law rule.

So it's quite clear that, at least as a matter of general principle, there is logical room for a different judicial result when an invalidated common law rule is reinstated by legislation. Now, the next question is whether there is logical room for a different judicial result in the specific case of a legislative reinstatement of the common law definition of marriage. That is, given the reasoning of the provincial appellate courts in striking down the common law definition of marriage, is there logical space for a different result were they to consider a statutory enactment of the same definition? I believe there is.

Let's take as representative the reasoning of the Ontario Court of Appeal in the Halpern case. Having found the common law exclusion of same-sex couples from marriage to be in violation of section 15 of the charter, the court turned to the question of whether the violation could be justified as a reasonable limit under section 1. Answering this question requires an inquiry into, among other things, whether the aims of the rule are sufficiently important to justify overriding a right.

● (1555)

In its section 1 argument, the Attorney General of Canada had to come up with reasons for a common law definition of marriage that simply described an ancient and customary social practice, and so he had to speculate on the reasons for that historical practice. The Attorney General could not state the conscious reason for a new piece of legislation. He could only offer suggestions as to unconscious or tacit purposes of a long-standing social custom. The Attorney General came up with three. The purpose of marriage, he said, is to unite opposite sexes, to encourage the procreation and nurturing of children, and to encourage companionship.

The thing about a tacit purpose for an ancient social practice that admits and excludes on the basis of sexual orientation is that the purpose is bound to be contestable and discriminatory. That is, it is based on a stereotype or implies a devaluation of the excluded group.

Because the purpose is contestable, the court rightly paid no deference to the Attorney General's articulation of it. Who says procreation is the main point of marriage? Don't people marry for a variety of laudable reasons, reasons that are as valid for homosexual couples as for heterosexual ones? Even if procreation was once considered the central point of marriage, surely the common law must adapt to changing social attitudes about marriage.

Moreover, because the tacit purpose of a social custom that excludes homosexuals from a status available to heterosexuals is likely discriminatory, it is an easy target for the court. Why be concerned with uniting only opposite sexes? Doesn't that convey the message that same-sex unions are less worthy of concern?

As for encouraging procreation and child-rearing, don't same-sex couples now raise children they've conceived artificially and adopted? And why will recognizing the unions of same-sex couples lead to less procreation and nurturing by opposite-sex couples? Why isn't the companionship of same-sex couples just as valuable as that of opposite-sex couples?

So in sum, because a common law rule was at issue, the court showed no deference to the Attorney General's opinion concerning the policy of the rule, and it had an easy time finding the policy to be itself discriminatory and so incapable of justifying discrimination.

Now, suppose Parliament were to legislate the common law definition of marriage. It could now say the following: We do not care what the historical purpose for restricting marriage to heterosexual couples is, nor does it matter what reasons people have for getting married or what attitudes society now has about the purpose of marriage. All this is irrelevant, because we have our own reasons now for recognizing only heterosexual unions, and those reasons are not discriminatory or demeaning of homosexuals.

The government could say there is no duty on government to solemnize conjugal unions at all. Government could legally withdraw from marriage entirely.

Nevertheless, the state has an interest in channelling sexual activity that can produce children into stable relationships where the children will be properly cared for. Since the state has no duty to recognize conjugal unions at all, it has no duty to go beyond what its interest requires. Conjugal unions between same-sex couples, while just as valuable as those of heterosexual couples, don't engage the state's channelling interest, because unlike heterosexual couples, they can't beget children independently of state involvement and supervision.

Homosexual couples can, of course, produce children artificially and adopt such children, but here the state's interest in ensuring a suitable environment for the raising of children is satisfied by the legal regulation of adoption. Because the state is already involved in the way homosexuals obtain babies as a couple, channeling their sexual activity into marriage is not necessary for the fulfilment of the only purpose the state has in recognizing conjugal unions. It's true that heterosexual couples who cannot procreate also fail to engage the state's channelling interest, but government is justified in pursuing its interest with the least possible invasion of individual privacy.

Now, I want to emphasize that I personally do not subscribe to this argument. My view is that there is a duty on government to solemnize conjugal unions, because there is a duty on a state whose end is human dignity to foster committed and lasting relationships in which individual self-esteem is mutually validated. Same-sex conjugal relationships are no different from opposite-sex ones in this respect. Moreover, since laws can demean by effect as well as by intent, government cannot be indifferent to contemporary social understandings of the purpose of marriage, or to whether the distinction between homosexual and heterosexual is irrational from the standpoint of those purposes.

● (1600)

But my point is just that there is logical room—logical room—for a court to reach a different result on the constitutionality of heterosexual-only marriage, if that restriction were legislated for the kind of purpose that I mentioned. And if that's so, then there would be no need to invoke the notwithstanding clause as a rider to such legislation.

I want to conclude with the following remark.

Those in the political arena who favour same-sex marriage should rationally favour my position on the notwithstanding clause, since that position will allow the courts to review any legislative reinstatement of the common law rule. However, given the unfortunate choice—to my mind—of debating strategy by the governing party, my comments on the notwithstanding clause will, as it happens, benefit the party with whose substantive views on same-sex marriage I disagree. Nevertheless, I've come here to offer these comments because I think there's something at stake in the debate over the notwithstanding clause that is at least as important as the equality rights of gays and lesbians.

What is at stake is constitutionalism itself, without which there would be no enforcement of equality rights in the first place. To invoke the notwithstanding clause where there is room for a judicial finding of constitutionality is to use the clause pre-emptively to shield legislation from judicial review under the Charter of Rights. True, there's nothing in the wording of section 33 that bars using the clause pre-emptively, and the Supreme Court has ruled such a use to be permissible, but statesmen who acknowledge the rule of law would not, in my view, want to exploit this possibility.

Thank you.

● (1605)

The Chair: Thank you.

Now we will go to Mr. Ma, representing the Chinese Canadian National Council. You have 10 minutes, sir.

Mr. Jonas Ma (President, Ottawa Chapter, Chinese Canadian National Council): Thank you very much, Mr. President, and honourable members of the committee.

[*Translation*]

I will be making my presentation in English, but I will gladly answer any questions you may put to me in French.

[*English*]

Thank you very much for the opportunity to present our views on this bill.

My name is Jonas Ma. I'm a member of the national executive of the Chinese Canadian National Council and president of its Ottawa chapter. So I'm not the national president.

The Chinese Canadian National Council, or in short, CCNC, is a national non-profit organization, founded in 1980, with 27 chapters across the country. Our mandate is to promote the equality rights and full participation of Chinese Canadians in all aspects of Canadian society. The Chinese Canadian community, according to the 2001 census, has over a million people. It is a diverse community. Obviously, a healthy diversity of views can be found on various issues that concern our community and Canadian society.

The issue of equal marriage is no exception. However, outspoken groups and media coverage may have led the general public to believe that our community has taken a unanimous position. Our council believes this is a false impression. It is unfortunate that diverse views in our community are not adequately reflected. It gives rise to a certain degree of racialization on this issue as far as our community is concerned. I hope that our presentation will reduce this effect and provide some balance.

In respecting our mandate, the Chinese Canadian National Council has worked towards the protection of equality rights for all Canadians, including different minority groups such as the gay, lesbian, bisexual, and transgendered communities. There are also gay, lesbian, bisexual, and transgendered Chinese Canadians. Over the past decade, the council has worked with them, their families, and other supportive groups to promote understanding and to fight against homophobia within our community and in the general public.

As you may know, the Chinese Canadian community was subject to 62 years of legislative discrimination under the Chinese head tax and the Chinese Exclusion Act. It was not until 1947 that the discriminatory legislation was repealed. It took us a long time and a lot of courage and determination to win our equality rights. Our community understands how important equality rights are and how easily they can be attacked. We were reminded again of this as recently as two years ago, during the SARS outbreaks in Toronto, when our community was targeted.

For these reasons, we are committed to defending the protection under the Canadian Charter of Rights and Freedoms. The charter provides guarantees for all minority groups to safeguard their rights. If these rights are weakened or challenged for any group, other minority groups can be equally vulnerable to the erosion of their rights. The charter is also a cornerstone of what our nation stands for. Many members of our community came to Canada over the last two decades because they wanted to live in a country where their rights and their children's rights were protected. Some may be afraid that giving equality rights to sexual minorities on the matter of marriage will weaken the values they believe in. The bill and the advice from the Supreme Court has provided reassurance that this fear is not grounded in fact. In fact, we should be more afraid of the consequence of overriding the equality rights of individuals who are different from us.

Some of you may have read about the story of Ms. Velma Demerson in the newspaper. She's in her eighties, I believe. In the forties, interracial relations were forbidden, but love knows no boundaries. She fell in love with a Chinese Canadian man, but as a consequence, she was put in custody and her son was taken away from her. Obviously, our views on interracial marriage have changed, but Ms. Dennison has suffered harm that can no longer be undone. To this day, she's still suffering and she's seeking justice by suing the Canadian government.

● (1610)

Mr. Chairman and dear members of the committee, I share this story in the hope that our society can learn from these past wrongs and no Canadian will ever suffer or be less equal because they are different from others.

Thank you.

The Chair: Thank you, sir.

We will now move to the first round of questions for seven minutes.

We'll start with the Conservatives and Mr. Toews.

Mr. Vic Toews (Provencher, CPC): Thank you, Mr. Chair.

I want to thank the witnesses for their very articulate presentations. I certainly appreciate the effort that each of you has put into your presentation.

I'm going to leave some of the questioning of the other witnesses to others, but I want to address Professor Brudner.

I want to say, sir, that your articulation of the legal arguments has been one of the finest I've ever heard. I would have been proud to be a student in your class. I think it's very important that lawyers and judges understand how to articulate legal arguments simply, rather than simply pushing policy positions. Unfortunately, what we so often see in the area of constitutional law is simply lawyers opining on political matters rather than articulating in such a clear, concise, legal fashion as you have done today. On what you have said today, even though I disagree with your political position, I think it has done the Law Society and the Canadian Bar tremendous good to have a lawyer actually talk about law as opposed to their political views. I want to thank you very much.

The comment I want to make relates to your observations that the intent of the law that can be stated through preamble is a very important part of expressing the parliamentary will in terms of a particular policy choice. In this particular case, Bill C-38, Parliament has made a policy choice to advance the interests of same-sex marriage by recognizing that in law.

But what I find disturbing about this act is twofold. Number one, in the preamble of this act it states:

> WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

Again we see that what the Government of Canada has done in this particular bill is not articulate a legal position at all, but essentially articulate a political position in respect of same-sex marriage. It's their opinion that it would violate the Charter of Rights and Freedoms, when in fact, as you've articulated, there is certainly no conclusive finding by our highest court that not extending the definition of marriage to same-sex couples would somehow violate the Charter of Rights and Freedoms.

The second point is clause 3:

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

The Supreme Court of Canada we know specifically said that clause was unconstitutional, ultra vires the jurisdiction of the federal government—ultra vires in a division of the power sense, rather than a Charter of Rights and Freedoms sense. Whether it's a substantive provision or whether it's declaratory, it is ultra vires.

I'm wondering if you have any further comments on my comments on the preamble section I've quoted to you, and also on clause 3 of the bill.

● (1615)

Mr. Alan Brudner: I actually don't think I can comment on clause 3; I'm just not familiar enough with what the court said on clause 3.

But regarding the preamble, it essentially seems that what the bill is doing is presenting an opinion about the constitutionality of Bill C-38 as a legal fact. That is somewhat problematic, in the sense that Parliament, it seems to me, should not arrogate to itself the authority to determine the constitutionality of laws, since that is judging its own cause and is a violation of the division of powers. Right? It's ultimately for the Supreme Court to decide on the constitutionality of laws.

I would say that there is even a valid use of the notwithstanding clause after the Supreme Court has ruled, but again, the significance of that should not be a case of your saying, well, the Supreme Court has said this law is unconstitutional, but we disagree. Your disagreement with the court should not be the significance of the use of the notwithstanding clause, because again, that would be Parliament arrogating to itself the authority to rule on the constitutionality of laws, and that's for the court.

The valid use of the notwithstanding clause would be to say that in deciding that a certain law is unconstitutional, the court has failed to defer to Parliament in the spaces left open for political judgment. For example, if the Supreme Court were to say they think this violation of a right is not justified under section 1 because the challenge law would not be a very good instrument in achieving its goal, that, it would seem to me, would be infringing upon Parliament's business. Political judgments are for Parliament.

So there is a valid use of the notwithstanding clause, but its significance is not to say, the court thinks this law is unconstitutional but we disagree.

Mr. Vic Toews: Yes.

Mr. Alan Brudner: To get back to your question, to the extent that the preamble states a legal opinion as a fact, that is problematic. On the other hand, one could say that we know this is just an opinion and....

Mr. Vic Toews: I guess my concern, Professor, is that it states it as a legal opinion. The way you phrased it, these are the policy reasons that Parliament has chosen to proceed down this path, which it has then set out. But this appears to me not only to be taking the court's responsibility to determine what is constitutional or not, but is in fact also colouring the policy decision that Parliament should be making and dressing it up in some kind of legal or constitutional framework to tell Canadians, I'm sorry, this policy choice is simply not your choice anymore, as the courts have made that determination. Not only are they taking over the court's responsibility, but they're also abdicating their own responsibility in terms of making a policy choice. That's what bothers me about the way the preamble is drafted.

I think your explanation of how a preamble can be used properly in defending a policy choice is the right one.

Have I misrepresented your position in any way, Professor?

The Chair: Very briefly, please.

Mr. Alan Brudner: I think it is unfortunate that the governing party has framed its debating strategy in this way, apparently because, politically, it wants electors to think its hands are constitutionally tied.

● (1620)

Mr. Vic Toews: Right.

Mr. Alan Brudner: My own view is that this is an open question legally; there's no reason to think its hands are constitutionally tied at this moment. It seems to be a political strategy, but it does not detract, it seems to me, in any way from the substance of Bill C-38.

[*Translation*]

The Chair: *Merci.*

We will now go to the Bloc Québécois.

Mr. Marceau.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you very much, Mr. Chairman.

I want to thank the witnesses for their highly informative presentations. It's a pleasure for me to see some of you again, in particular, Professor Cere. We met several years ago and discussed this very subject at the time.

My first comments are directed to Mr. Brudner.

I listened closely to your presentation and I was somewhat surprised to hear you dismiss quite summarily a rather important ruling relevant to this debate, namely a ruling by the Quebec Court of Appeal, not on the definition of common law marriage but rather on the definition of marriage adopted by the federal Parliament, which holds that marriage is the union between a man and a woman. The court clearly ruled that this definition adopted by the federal government was unconstitutional.

Therefore, help me to understand. We're not talking about a municipal court decision in a small backwater community. We're talking about a Quebec Court of Appeal decision. I'm surprised that you gave such short shrift to this important ruling in your analysis.

Can you explain your reasons to us?

[*English*]

Mr. Alan Brudner: As I recall, the Quebec Court of Appeal did not decide on the merits of the appeal, did not give standing to the putative appellant, because the Attorney General of Canada had asked the Supreme Court of Canada to answer the question. So if you're asking me whether the superior court decision, the lower court decision on the Civil Code definition of marriage is a definitive statement, at least in Quebec, whether a legislated restriction of marriage to heterosexual couples is unconstitutional, I would say there is an argument for that. On the other hand, if the superior court did not address the issue regarding the difference between a common law definition of marriage and a legislated definition of marriage—and I don't believe it did—then the question about the constitutionality of the legislated restriction would still be open, even in Quebec.

[*Translation*]

Mr. Richard Marceau: I'm not sure I understand.

First of all, paragraph [56] of the Quebec Court of Appeal decision ordered that same sex couples be allowed to get married. However, the Superior Court Justice, a woman, as I recall, also focussed on the legal definition of marriage. She was not asked to look at the definition of common law marriage. Pursuant to section 5 of the Federal Law — Civil Law Harmonization Act No. 1 adopted by this very Parliament, Madam Justice held that same sex couples should be allowed to marry. Therefore, I'm having a problem following your argument, because clearly, the Superior Court and the Quebec Court of Appeal rulings declared the legal definition of marriage unconstitutional under section 15 of the Charter. At least in Quebec, the legal definition of marriage as the union between a man and a woman to the exclusion of all others, was struck down. by the courts. If Parliament were to say at this time that marriage must be the union between a man and a woman to the exclusion of all others, why would the reasoning applied in Quebec not apply as well to the other provinces?

● (1625)

[*English*]

Mr. Alan Brudner: Well, once again, I agree that the situation is different in Quebec, given that a legislated restriction of marriage to heterosexual couples was ruled unconstitutional. So the situation is different in Quebec.

On the other hand, I just want to state this reservation, that to the extent that the judge's reasoning in the Quebec case, in the Hendricks case, did not address the difference between a common law rule and a legislative rule, it might still be open for a law to legislatively reinstate the common law definition, but with the kind of argument that I mentioned. It seems that the kind of argument I mentioned, that someone might make for a restriction of marriage to heterosexual couples by legislation, was not addressed. It was not made in the lower courts in the Hendricks case. That argument was not made. So to that extent, there may still be an opening. But I agree with you that the situation is different in Quebec, where the legislation was challenged.

[*Translation*]

Mr. Richard Marceau: Thank you.

[*English*]

The Chair: Okay, we'll go to the NDP. Mr. Siksay.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Mr. Chair, and thank you to all the witnesses for your testimony this afternoon.

I had a question as well for Mr. Brudner. It's around the preamble as well, Mr. Brudner, and I heard your comments to Mr. Toews earlier. You mentioned the Daviault case, and it's not one I am personally familiar with. But I do recall that you said that in that case there was a lengthy preamble that turned out to be helpful, and I'm wondering if you could tell me a little bit more about that preamble and if it's different from the one that's in Bill C-38, why it was helpful and why this one might not be, although you did say it could be helpful just as an opinion as well. Could you comment further on that?

Mr. Alan Brudner: Well, the preamble in the Daviault case simply related to the purposes specifically of legislation that wanted to reinstate the common law exclusion of intoxication from violent crime. So substantively or in content, that preamble doesn't help us here. I merely raised that example because it showed that in the Daviault case Parliament stated purposes—why it was considered important—that the court did not have when it struck down the common law rule. But substantively, the preamble related specifically to that intoxication issue. It's not relevant here.

Mr. Bill Siksay: Thank you.

Mr. Ma, I appreciate your raising the situation of Ms. Demerson and the situation that she faced because of an interracial relationship many years ago in Canada, back in the forties. I recall stories in my family. My grandfather was a small landlord in Oshawa, Ontario, back in the same period, and he was the only landlord at the time in Oshawa who would rent to an interracial couple of Chinese and Caucasian background. He was very moved by their story of how difficult it was for them to find accommodation in Oshawa at that time, and how very frustrated they were and about the anxiety it caused them, the insults they had borne in the process of trying to find a place where they could live together. That's always been part of the lore of my family in terms of the situation of folks in that period.

I'm wondering if you know anything of the history of the change in attitude in Canadian society with respect to interracial marriage and when that change came about, or if there is anything that's illustrative in that for our present discussion?

● (1630)

Mr. Jonas Ma: I'll put it in more of a historical context. When the Chinese Canadian community arrived here, they were not able to interact with the rest of society. They were ghettoized. They were given certain jobs that nobody wanted. So the level of interaction was quite limited. The other aspect of the legislative discrimination we suffered was that, because of the head tax and the Chinese Exclusion Act, there were few women in the community. I'm aware of people in Vancouver who had relationships with aboriginal women, but they were not recognized as couples. The men were supposed to have wives in China, whom they had not seen for 10 or 15 years, because they could not afford the voyage back home.

The involvement may have come with the repeal of the Chinese Exclusion Act. This allowed the second- or third-generation Chinese Canadian to enter university, to enter professions that they couldn't participate in previously. All of that led to further interaction and the reduction of fear of the so-called alien. There was some commonality. This might explain the breakdown of the barrier. With the greater understanding allowed by the repeal of the exclusionary legislation, interaction was possible and the anxiety and fear were reduced. That's the context.

Mr. Bill Siksay: You mentioned the connection between people in the Chinese community and the aboriginal community when Chinese women weren't often allowed to come to Canada. Do you know anything of the history of these relationships? We have often heard that gay and lesbian relationships are unstable, that they don't last long, yet our relationships form without the usual societal supports. When you remove all the supports and relationships fail, who's surprised? Did a similar thing happen in that period in the Chinese community?

Mr. Jonas Ma: I know two friends of aboriginal and Chinese origin. They wouldn't talk too much about their background. You were probably right in saying that they suffered quite a bit because of non-recognition. I think many of them stayed together even though society didn't recognize the relationships. But I think they suffered a great deal in order to stay together.

One of the films made by the National Film Board, *A Tribe of One*, talks about a mother who had to separate from her Chinese husband because there were social and other pressures on the relationship. So it did affect the relationship. But when they were together, it seems to have been a happy relationship.

The Chair: Thank you.

We now move to the Liberals. Mr. Macklin, parliamentary secretary.

● (1635)

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you, Mr. Chair. And thanks to you, witnesses, for being with us.

So far we've neglected you, Professor Cere. In the over 500 witnesses we've heard either directly or indirectly, by incorporating their evidence into this hearing, you're likely the most widely quoted person in terms of presentations that you've made in the past. Therefore, when you come here today to give us guidance on this bill, prepared to talk about specific amendments we should make to it, I'm very interested in your opinion.

When I look at your first suggestion for an amendment, you indicate that we should eliminate the consequential amendments referring to parenthood, that the redefinition of parenthood has grave and complex implications and demands serious public debate. Could you refer to the bill and give us the specifics of what you would have us do, telling us your reasons as you proceed?

Mr. Daniel Cere: When I first read the bill, I was struck by the fact that the redefinition of parenthood appears in the consequential amendments and not in the operative clauses. Looking at the significance of that, I thought it should have been in the operative clauses, just to highlight that this will be a significant change. If you work through the consequential amendments, there are a whole series of deletions of concepts of natural parent from existing laws and the substitution of the concept of legal parent. And if you look on the justice website, the argument is that in order to deal fairly with same-sex couples, we have to eliminate this notion of natural parenthood. You can see the logic in that argument.

However, I think the whole question of parenthood, in a profound way, connects with the question of the interests of children and the fundamental question of whether there is some basic birthright of children to be connected to their natural parent—a soft birthright, in the sense that there are exceptions to the rule. We have historically in place adoption as a mechanism for dealing with those exceptions, but the question of parenthood, in marriage, particularly within the last 30 years, has been separated in family law. In a certain sense, this draws it back together by linking these two things.

I think they are somewhat separate issues, given the direction of the law. I think that deserves a separate discussion—the law's affiliation and the implications of that for Canadian society. I think it deserves separate treatment. So to tuck it into the legislation, I think it just increases the problematic nature of the legislation. The fact that it's tucked into the consequential amendments, I think, doesn't help the situation. In a certain sense, because it appears in the consequential amendments, it seems like a small amendment simply to eliminate it. It leaves the large question open that would have to be dealt with in further legislation.

Hon. Paul Harold Macklin: Remember, now, that each amendment in the bill, or the bill itself, is taken in its totality. I don't think that just because something is consequential, it loses the value of being a very integral part of the bill.

Mr. Daniel Cere: Well, if it were integral, then one would assume it would appear in the operative clauses—I hope.

Hon. Paul Harold Macklin: Not necessarily, because in fact you have to find a collective way in order to amend all of the other statutes that are involved. So this is the effective way of doing it, rather than simply putting it in the initial substantive portion of the bill.

Mr. Daniel Cere: Well, given that, it would have been nice to see it in the operative clause, and then you'd see it reappear in the consequential amendments. The bottom line here is, I think, the question that parental rights and responsibilities need a large discussion within Canadian public debate. I don't know if that has occurred within the context of the current debate on this particular question of the redefinition of marriage. This plays into reproductive technologies; it plays into a number of other important issues. I would argue that you carve this off, have a separate discussion.

● (1640)

Hon. Paul Harold Macklin: Well, I'm not necessarily accepting your position, but let us move on so we have a chance to look at your other ideas here.

You say to eliminate the long argumentative preamble that attempts to wed a particular ideology of marriage to the charter. Could you give us a little more definitive response? Are you suggesting we remove all of the references in the beginning of the charter, including references to guarantees of individual rights?

Mr. Daniel Cere: I think the problem—-and it is a basic problem in the bill as a whole—is that even the preamble, as Professor Brudner was suggesting, sets up a sense of “our hands are tied”. There's a certain constraint, given the charter, that sort of pushes us in this direction, moving towards a fundamental redefinition of marriage.

I think in terms of the content of the bill as whole, there's a problem here with what I would call the politics of recognition. The bill represents one conception of marriage, an important conception of marriage that's held by significant sectors in the Canadian community now, this close relationship understanding of marriage.

Some Canadians can see themselves in that view, that understanding of marriage. Many other Canadians cannot, and therefore when they look at the legislation, they cannot see themselves nor can they see something that's central to their understanding of an institution core to their lives. Perhaps the preamble has to be reworked to embody, in a sense, the existence of legally valid but truly competing conceptions of marriage within Canadian society. Somehow that has to be in the legislation, so that the cultural and religious communities and academics like me, who look at marriage as a social institution and who do so maybe from the point of the liberal tradition, see it as constituted in a certain way, and we don't find ourselves in the situation, which this legislation suggests, of operating with a discriminatory conception of marriage that fundamentally is at odds with the charter. I think that's a very unfortunate conclusion that this legislation lands us in.

In a certain sense, it doesn't allow for—and it fails on liberal grounds—real diversity being expressed within this highly contentious legislation. We have one view emerging as the dominant, victorious view, and emerging at the expense of a significant defeat. The shared conception of marriage is now seen as discriminatory, and I think that creates all kinds of difficulties.

If the legislation could be modified to have what I would call a more bi-conjugal conception of marriage within the legislation, it would put on the table the notion that there are competing conceptions of marriage within Canadian society, and yes, we see them as equally valid, but we recognize that the historic conjugal conception of marriage is a major player, and an important player. It is and will remain the large elephant in the room in Canadian society.

The Chair: Thank you.

We will now move to the second round. As I had said before, each of you has five minutes. I'll start with the Conservatives.

Mr. Jean, go ahead, please.

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

My question first is for Mr. Brudner.

Sir, I would suggest first of all that your presentation was excellent. The objectivity in what you've put forward has been, for me, insightful. I would agree with your premise. I think you mentioned that it's the duty of government to solemnize relationships. I would agree with that, as well as with your indication on section 33, that it's not necessary to invoke the notwithstanding clause.

I'm curious. You mentioned a law to reinstate the common law definition. You mentioned that it would be within our mandate and the jurisdiction of the federal government, I think, to invoke a law to reinstate the common law definition. I'm wondering if it's possible, sir, for you to expand on that somewhat.

Also, keep in mind, when you're expanding on that, the necessity to balance the competing interests of the two groups, which I think it is fair to call the pro and the con in this case, as well as to comply with individual rights under the charter. Keeping in mind the competing interests of both sides, can we satisfy them under your premise of reinstating the common law definition?

● (1645)

Mr. Alan Brudner: Let me emphasize that I think reinstating the common law definition would be in violation of the charter. That's my personal view. So I think that would be unconstitutional. My argument is just that there is logical room—logical room—for a judicial finding that a legislated reinstatement of the common law definition is constitutional.

Mr. Brian Jean: That's what I'm saying, sir. Taking that position, what would you suggest?

Mr. Alan Brudner: The only thing that follows from that position is that legislative restatement doesn't require the notwithstanding clause. I don't really want to take any position on how to draft a legislative restatement of the common law definition.

Mr. Brian Jean: But you're suggesting it's certainly possible.

Mr. Alan Brudner: Right. It would be open to the federal government to do that without invoking the notwithstanding clause. That's all I'm saying.

Mr. Brian Jean: And to be able to satisfy the competing interests without violating individual rights?

Mr. Alan Brudner: My personal view is—

Mr. Brian Jean: I'm looking for your professional view, though, sir.

Mr. Alan Brudner: Well, my personal view regarding the constitutionality of that is that a legislated restatement of the common law definition would be in violation of the charter. Therefore, there really is no way it could be constitutional, in my view, even with some kind of balancing of the competing interests by, let's say, recognizing so-called civil unions and giving same-sex couples the various incidental benefits of unions.

My view of the legal situation is that a legislative restatement would be unconstitutional and there's no way of reconciling the two views that would make it constitutional. I'm just arguing that there's logical room for a finding of constitutionality and that the notwithstanding clause is therefore not necessary.

I can't help with a drafting of a legislative restatement that would actually be constitutional, because I don't think it would be.

Mr. Brian Jean: Mr. Cere, following on that line, I read your paper with interest and I've seen some of the costs you suggest society is going to have as a result of this legislative proposal by the government. Can you carry on where Mr. Brudner left off as far as your view goes on what the long-term costs are going to be? I see some of them, but more specifically, what are the social and economic costs to society?

Mr. Daniel Cere: I think it would be wrong to say “this legislation”. What we're seeing in the legislation is a piece of an evolving puzzle. I think there has been a drift in culture towards a kind of reconceptualization of marriage, and you see it's been associated with large social trends over the last thirty years.

The challenge to public policy is, do we just run with those social trends or do we try to renew the culture of marriage in Canadian society? I think Bill C-38 is another case of running with the trends rather than trying to think through how we can enhance and renew conjugal culture within society.

We know from a lot of the data that the best outcomes for kids, the optimal outcomes for kids, are intact homes with their moms and dads. There's a fairly substantive body of data that points in that direction. Are we committed as a society to promoting those kinds of relationships, those kinds of situations, for society? I think the legislation, particularly on the parenthood issue, suggests not; it suggests it's off the table.

One of the big issues for me, of course, is the freedom issue, and I think that's spelled out in the brief. The way the legislation is framed has large and significant implications for freedom as well; for communities to continue to promote the conception of marriage is seen as discriminatory.

● (1650)

The Chair: Thank you.

We'll go back to the Liberals and Monsieur Boudria.

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Thank you, Mr. Chairman.

I want to welcome our witnesses today as well. Perhaps I could ask questions of Professor Cere, at least in this round.

Initially I want to indicate about the way the bill is drafted, just so there's no confusion. Of course the preamble in any bill has less weight than an actual clause. That's recognized, and I'm sure others would agree with that. But in terms of how the clauses otherwise are in the bill, they're worded this way because clause 1 to clause 4 create new law.

Mr. Daniel Cere: Exactly.

Hon. Don Boudria: From that point on you're amending existing acts, so they cannot be in the same body because they amend different legislation. When it does that, the second is in consequence to the first, and that's why they're referred to as consequential amendments. They're not of less value or anything like that.

Mr. Daniel Cere: I understand that.

Hon. Don Boudria: Just for everyone to be clear, it's because they amend existing law in some cases—and others will argue that later—perhaps for even a variety of reasons.

But I want to get into some of the four different things that you proposed to us here. I'm just trying to get a sense of your point (d): "Re-affirm the historic liberal recognition of unique and irreplaceable importance of intact, conjugal marriage for Canadian society".

I'm just trying to assess here how you would like to see this manifested. Would you like to see, for instance, a greater clarity clause: "For greater clarity, the historical recognition of conjugal marriage is affirmed"? Is this the kind of thing you're espousing?

Mr. Daniel Cere: In a certain sense, the legislation right now points to one dominant conception of marriage. I think what it needs to do minimally is point to the fact that there are competing and deeply held conceptions of marriage in Canadian society. One of them is in clause 2—the union of two persons, the close relationship view.

But as we've seen from the hearings, there are other deeply held conceptions of marriage, and the tone of the legislation suggests those alternative conceptions are discriminatory. Something serious has to be done with this legislation to say that they aren't.

Hon. Don Boudria: Okay. I'm just trying to assess this. What you're saying is something like this—and I'm not trying to put words in your mouth, so please correct me. The bill talks about what it considers to be the definition, but for greater clarity this other definition is equally valid. Is that the kind of thing you'd like to see?

Mr. Daniel Cere: I think the bill has to make an affirmation of, at a minimum, two competing conceptions of marriage within Canadian society that are equally valid.

Hon. Don Boudria: When you say an affirmation, are you seeking something that would be declaratory, a little bit like clause 3 of the bill, which is declaratory in the way it expresses things?

Our committee is here to provide technical advice on the bill. It's a legislative committee as opposed to a standing committee. That's why I'm being a little picky in trying to find out from witnesses what modifications they are seeking. Then of course in the end we'll decide what we can do. Sometimes we've asked witnesses how to improve the bill and they have said, well, don't vote for it. That's not helpful, because that's not why I'm here. We're trying to find amendments, and to the extent of what you have said in (d), it would be helpful if I could get a little further advice.

● (1655)

Mr. Daniel Cere: I think the core of it is to have in these opening operative sections recognition of the historical conjugal conception of marriage as a major piece of Canadian reality, and that it's not a discriminatory view. In some of the discussion, I think the way this debate has evolved is to say this one wins and this one loses. Not only does the historic conjugal view lose, but it loses big time because it's seen as an intention in violation of the charter and fundamentally a discriminatory conception of marriage.

Now, this inevitably must cause all kinds of problems down the road, because communities that hold and promote that view in the public sphere are operating under a legal cloud. So how can we get them out of that cloud in this legislation? I think there has to be a forceful affirmation in the legislation that the historic conjugal view is like one major player in Canadian culture, and it needs to be given space to move, breathe, and promote itself.

There is a competing conception of marriage. Is this a more stripped-down understanding of marriage as a close loving relationship between committed adults? I think the legislation is saying that view is in as well; that conception is in. But it shouldn't be saying that conception is in at the expense of—

Hon. Don Boudria: Thank you very much.

[*Translation*]

The Chair: Thank you.

Next up is the Bloc Québécois. Mr. Marceau.

Mr. Richard Marceau: Thank you once again, Mr. Chairman.

I'm sure you knew that I couldn't pass up the chance to question you about the matter now before the committee.

I've read a lot of the material that you submitted either to the previous Justice Committee or to this legislative committee. I've also read some of your material that has been published in various forums.

On re-reading your paper entitled “On Liberalism, Marriage and Bill C-38”, I was again surprised by your tendency to view marriage as a static institution, as if it had never evolved over time, as if polygamy had never existed a few centuries ago — in fact polygamy is still practised in some societies —, as if a woman still lost her status as a person of full age when she married, something which was true up until the mid 20th century. My parents lived in that era and perhaps you're familiar with it as well.

Marriage is not a static institution and the corresponding definition has changed over the years. Is it that hard, or that much of a stretch, to see Bill C-38 as the reflection of an institution that continues to change with the times? The concept of marriage per se is not changing. Rather, we're seeing some sociological changes: more widespread acceptance of homosexuality, couples who marry and do not want children. Today, men and women pursue careers and have no desire to compromise. While they may be committed to their partner, they choose to make that person, not parenthood, their focus.

Therefore, I don't exactly understand your view of marriage as a static institution.

● (1700)

[*English*]

Mr. Daniel Cere: It's not static. I fully recognize that marriage has been in constant evolution. The modern period has been an incredibly creative time in the evolution of marriage—sometimes some positive elements, sometimes some negative elements.

I think the particular difficulty we're facing in this legislation is not that we're just opening things up a little bit more, but that the state is actually proposing to impose a kind of one-shoe-fits-all, a paradigm, a conception that some sectors of the Canadian community can see themselves in very well. Certain heterosexuals identify with this understanding of marriage as essentially a loving, consensual commitment between consenting adults, and this legislation is tailor-made for them in terms of affirming their conception of marriage, connecting with it, and saying, we're with you.

But the legislation is in fact saying, we're not with you; we have really serious reservations. We have serious concerns about this other conception of marriage that seems to be quite central to many of our cultural and faith communities. You've probably heard many of them at the hearings. That is a different paradigm of marriage. It's a public meaning of marriage that really informs their lives, informs their communities, and makes them tick in a big way.

My view is not necessarily to hold to the static conception of marriage, but where's the kind of openness here in the legislation? It seems to, in a sense, create a situation where one sector of the Canadian community can see themselves very well in this legislation, and other sectors can't.

[*Translation*]

Mr. Richard Marceau: What we are seeing here is a mirror effect, particularly when a reference is made to civil marriage. You spoke about people from different religious backgrounds. It's not a matter of not identifying with the current, so-called traditional definition of marriage. The issue here is that some people are being denied access to marriage. By adopting Bill C-38 and in the process changing the definition of marriage, we'd be saying that marriage is the union of two persons. However, this definition would not prevent those who believe that marriage is a lifelong commitment and who reject divorce from holding to these beliefs, particularly if they are based on religious values, or from getting married. By preserving the traditional definition of marriage, we would be excluding a significant proportion of the population that neither identifies with this definition nor has access to marriage.

[*English*]

Mr. Daniel Cere: My amendments don't simply propose a reassertion of the traditional definition of marriage; that's not what the amendments are proposing. What my amendments propose is the creation of a very large space in the legislation, so that the communities that adhere to the traditional conception of marriage can see themselves in the legislation and not feel, as they do now, that the legislation is saying, this view is victorious and your historic conception of marriage, the traditionalist conception of marriage, is essentially discriminatory and violates the intention of the charter.

I think at minimum the legislation has to be cracked open a bit to say there are competing conceptions of marriage within Canadian society and that we see these competing conceptions as equally valid, and that we're not taking sides and not saying this conception.... Sometimes simplicity is a problem in legislation, right? Sometimes a little bit of complexity and diversity within the legislation, not having one shoe, but instead creating a little bit of diversity or a little bit of what I would say is bi-conjugality or duality in the legislation, may actually serve the purposes of inclusion better or in a bigger way.

I think the folk who are feeling excluded from the legislation—our cultural communities, our religious communities, our faith communities, and a lot of folk who maybe don't identify with faith communities but certainly identify with this historic conjugal conception of marriage.... The competing conceptions, in a sense, cannot come to agreement. The close relationship view has little or no use for any talk about procreation, whereas the historic conjugal view sees that as a big piece of the puzzle. These are very different conceptions.

I think what you would want Canadian society to do is not to say one side wins and the other conception is effectively discriminatory, but you want to create a larger frame within the legislation, so that the diverse community can really see themselves affirmed in different ways.

● (1705)

[*Translation*]

The Chair: Thank you.

The Liberals are up again.

Ms. Neville.

[*English*]

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you very much.

Mr. Cere, my question has been somewhat pre-empted by Mr. Marceau, but I am going to follow up with you, because I'm having a hard time following and understanding your argument, though I'm listening carefully.

You are presenting two competing visions of marriage. I read the bill as presenting a more inclusive vision of marriage, one not necessarily competing with the other, but being simply an extension of it. I don't know whether you can, but I need some help to have a better understanding of what you're saying.

My other comment is that you were talking about the consequential amendments as they relate to a natural parent and a legal parent. My understanding is that those changes were made in Bill C-23, the bill on the modernization of benefits, which recognizes adoptive parents, and that this legislation is really just filling in the gaps brought about by that legislation.

I guess my question to you is, help me understand your view of two competing visions of marriage as opposed to a more inclusive extension of marriage.

What I have difficulty with in the whole argument is how extending the definition of marriage diminishes the more traditional form of marriage.

Mr. Daniel Cere: I think if there weren't two competing conceptions of marriage, we wouldn't be having these hearings.

There are very different social conceptions of marriage at work in Canadian society. They cluster in two kinds of comprehensive views. One I characterize as the close relationship understanding of marriage as a committed, loving, consensual relationship between any two adults. From the perspective of communities that are deeply embedded in the historic conjugal conception of marriage, the problem with that other view is that it strips off some core dimensions, the sex...[*Inaudible*]...dimension of marriage and its connection with the ecology of procreativity in connecting children to their natural parents. These are large elements.

The legislation clearly, in clause 2, identifies with the close relationship model, and also suggests, in the implication of the bill in terms of the human rights argument, that the historic conception is inadequate, it's exclusive, it's discriminatory, and therefore it has to be pushed off the table in terms of the legislation.

Can those communities see themselves in the legislation? I think not. Their worries about freedom issues are serious ones, because if the understanding of the public meaning of marriage they adhere to is discriminatory, it's inevitably going to cause problems for them. Promoting that view, promoting that conception of marriage, is inevitably going to cause difficulties. It's thrown under a legal cloud in the legislation, and I think we have to get it out from under the legal cloud and have it in the sunshine, in a sense, of Canadian law, along with and holding onto this competing conception of marriage as another equally valid conception. The law is not taking sides, in a sense.

What you want to avoid in the legislation, what a lot of the cultural and faith communities see coming, is that something that's essential to their lives and identity is being thrown under a legal cloud in this legislation, and the challenge is to get this right.

● (1710)

Ms. Anita Neville: Okay, thank you.

The Chair: We'll go back to the NDP.

Mr. Siksay, for five minutes.

Mr. Bill Siksay: Thank you, Mr. Chair.

Mr. Cere, since we're discussing this, are you actually suggesting that we should include in this bill some reference to the procreative nature of marriage or the complementarity of sexes kind of thing? Those are the other two points you raised.

Mr. Daniel Cere: Yes, in some way you can do it. You can say that there are competing conceptions of marriage offered within Canadian society, and the law is recognizing the existence of that.

Mr. Bill Siksay: How do we do that, given that there isn't widespread agreement on those kinds of things?

Mr. Daniel Cere: There isn't widespread agreement on either conception.

Mr. Bill Siksay: I think there is widespread agreement on the fact that marriage involves two individuals coming together in a relationship. Beyond that, I don't know where we go in terms of seeking agreement.

Mr. Daniel Cere: It doesn't work that way. You can't make an argument. What would be the analogy? Marriage is a highly contentious arena right now in modern liberal societies. We have competing conceptions of marriage. Back in the 17th century you had competing conceptions of religion. One resolution that was attempted and failed was in the 17th and 18th century in England when they said, let's impose the most liberal view of religion; strip it down and get it down to the most liberal view, the common or basic element we all agree with, that there is a God. What they ended up with was a kind of Unitarian view of religion, the latitudinarian approach. That failed because it represented a view, a conception, that was shared by some communities that deeply identified with that view, and others didn't identify at all with that view.

Similarly, in a highly charged area like marriage, you have communities that hold competing conceptions. Can Canadian society say we'll create a space for at least two competing conceptions of marriage? Another conception of marriage would be a polygamous conception of marriage. But the current law says no, this view wins; the competing view, the historic conjugal view, loses and then has to be screened out of law.

Mr. Bill Siksay: Can you give me an example of why you think the language of this bill is win-lose language? Where does it say this view wins, that view loses?

Mr. Daniel Cere: It doesn't say that, but it achieves it. It achieves it by entrenching one definition of marriage.

Mr. Bill Siksay: But the bill itself doesn't say “triumphs this”, “trumps this”, or “supplants” or anything like that.

Mr. Daniel Cere: No, obviously it wouldn't use that inflammatory language when you can get that at the same end by appealing to the charter in a particular way to suggest that one view of one conception of marriage is consistent with the charter and others aren't; one conception of marriage is consistent with fundamental human rights and other views aren't. Instead of bringing in the heavy armament of charter and human rights, just open up a bigger playing field in the legislation to hold competing, but equally valid, conceptions of marriage. That way it would seem to me that you avoid a lot of the problems in terms of potential threats to religious and cultural freedom.

● (1715)

Mr. Bill Siksay: Thank you.

[*Translation*]

The Chair: *Merci.*

We're back to the Liberals.

Ms. Boivin.

Ms. Françoise Boivin (Gatineau, Lib.): Thank you, Mr. Chairman.

Mr. Cere, quite frankly, I'm having trouble following your argument. I'll put the same question to you and phrase it somewhat differently than my colleagues. I'm not sure I'll understand or be satisfied with the answer.

I'm trying to understand how, by granting a right to a minority, you're depriving the majority of their rights. That's where I have the biggest problem. When I meet people, either in my riding or elsewhere, who argue that their marriage will never be the same, I have to wonder what exactly they mean by that statement. I see nothing at all in the proposed legislation that deprives the majority of any rights whatsoever.

My other question deals with the core marriage elements of which you spoke. In the paper that you tabled to the committee, you state the following on page 3:

> Three core marriage elements disappear. First, marriage struggles to bridge sex difference and to form a stable bond between men and women. Second, marriage provides a social home for the procreative ecology of this bond. Finally, marriage attempts form stable community of life that enshrines the birthright of children [...]

In your opinion, are these three core elements intrinsic to the definition of marriage? Must a marriage include these elements in order to conform to your vision? Perhaps you could explain to me what you mean by this statement.

[*English*]

Mr. Daniel Cere: Those elements disappear from law. They disappear from this law. The law shapes the public meaning of institutions; it attempts to do so. The public meanings of institutions are central to the life of social institutions.

When your constituent says they feel a threat—

Ms. Françoise Boivin: There was one, just to be clear.

Mr. Daniel Cere: The sense of threat is due to the way this debate and legislation has evolved. This shared conception of marriage that would be central to her, central to many Canadians, is thrown under this legal cloud, because it's seen as exclusive, as discriminatory, and needing to be pushed off the table of public law and replaced.

I've looked at this from a couple of sides. How do we resolve the issue of large sectors of our communities feeling excluded from this legislation? One of the proposals at the beginning was the disestablishment argument—get the state out of marriage. I actually wrote a piece for a gay and lesbian magazine called *Capital Xtra* on the disestablishment argument. Some of the most passionate proponents of disestablishment, people like Gareth Kirkby, are found in the gay and lesbian community. But there are problems with that approach as well. How do we handle the whole question of children? That is an issue that I would argue should be dealt with in a separate discussion.

More recently, I thought that another way of getting at this might be to open up the legislation to include competing conceptions of marriage within the legislation itself. The cultural and faith communities that adhere to the conjugal conception are broad-based. It's a shared conception for many cultural communities, very diverse communities. They converge on these shared principles. It bridges difference. How can we find a place in the legislation to say that this is a fundamental part of Canadian reality? How can we say to them, if you have that conception of marriage, that shared public conception of marriage, go for it; we're carving a space out for you?

Ms. Françoise Boivin: Aren't these views, though, based a lot on religious belief?

● (1720)

Mr. Daniel Cere: No, you have different cultural communities, not necessarily religious, that adhere to this view. It's a conception. Marriage is important to these people, even if they're not religious. Religion might be insignificant to them, but conjugality is very significant, sort of a touchstone for their lives.

Ms. Françoise Boivin: Just to make sure I understand your point about the three elements. As soon as there's one of these elements absent, you feel it's threatening the definition of marriage? Like procreation, if it's not there...?

Mr. Daniel Cere: It's threatening the historic conjugal conception of marriage. That's a package. In a certain sense, the competing conception of marriage as a close, committed, loving relationship between two adults is a package. Can we have those two packages in the legislation rather than just one?

The Chair: Merci.

We're going back to the Conservative Party. Mr. Brown.

Mr. Gord Brown (Leeds—Grenville, CPC): Thank you, Mr. Chair.

We've had two witnesses. One has received most of the questions. So I'm going to mix it up a little bit. I'd like to ask Mr. Kempling to expand on some of the problems he's been having.

One of my biggest concerns about this bill has to do with religious freedoms and freedom of speech. You're an example of someone who has already experienced some discrimination. Could you expand on that for us, please?

Mr. Chris Kempling: Well, I've been listening to Daniel talk about how a competing view is being pushed off the public stage or pushed into an area where the expression of that view would be considered discriminatory. That is exactly what has happened to me.

I searched about for a political party I felt shared my sincere religious views about marriage and other issues as well, and it closely matched that. And when I chose to become active—which I thought was my right as a Canadian citizen, to exercise free speech, to become active in a political party, and to engage in public expression of those views or in promoting that particular point of view in a riding that had had no representation before—I was severely censured by my employer.

I have been directed by my employer not to express any opinion about homosexuality publicly. Now, I've been trying to fight that, obviously. I purposely did not tell my employer I was coming here because I could be fired for talking to you people today. I say that in all seriousness, because what comes after a three-month suspension is termination.

Mr. Gord Brown: I don't know what you were actually expressing. Were you expressing views on this specific legislation?

Mr. Chris Kempling: Yes. In January of this year I wrote a letter to the editor on behalf of my political party. I made no reference whatsoever to my other roles in the community but said our party disagreed with it. I gave some reasons and suggested there ought to be a national referendum. That was the letter that got me into the hot water I'm in today.

A voice: Unbelievable.

Mr. Gord Brown: Is there anything more you want to tell us about this?

Mr. Chris Kempling: Well, it's been a long-standing struggle, basically since 1996.

Mr. Gord Brown: Have you taken any actions to fight the employer?

Mr. Chris Kempling: I've filed a Human Rights Tribunal complaint against my employer, and that will go to a hearing on October 25. I am basing it on religious discrimination in that I cannot express a view consistent with my religious beliefs publicly without being deprived of my profession, my means of earning a living.

The employer has not provided any evidence that what I said caused difficulty on the job. Basically, I expressed my views off the job. There was no evidence provided that it caused a problem on the job, yet I am still being disciplined and muzzled.

That I find unacceptable in an open society. I don't mind the other side having their point of view and being able to express their point of view. I simply want the same right, that's all.

● (1725)

Mr. Gord Brown: Thank you very much.

I'll turn to Mr. Ma now. I'd like you to get in on the questioning and answering as well.

Can you tell us a little bit more about your organization? You say you and your organization are in support of the legislation. I have witnessed a couple of rallies here on Parliament Hill where there were a significant number, in fact in the thousands, of Chinese Canadians rallying in support of traditional marriage. Maybe you can give us a little sense of the feeling in the Chinese Canadian community, but tell us a little more about your organization and maybe how many people are actually considered to be members.

Mr. Jonas Ma: Thank you for the questions.

I think it relates to what I said when I started, that there are diverse views in our community. What we see on TV is often a certain segment of the community that is against the bill. We don't see other segments of the community that may be supporting it, that may be neutral, or that may be indifferent. That's the point of view I was trying to share, that there are community members who are not in agreement with the bill. We're talking about a community of a million, so I'm just trying to reinforce the point that there are diverse views.

But from our own organizational perspective, we are focusing on the equality rights that are protected under the charter. I think these are the key elements that are of relevance to us as a group that is committed to defending human rights.

The Chair: Mr. Brown, very briefly.

Mr. Gord Brown: How does one become a member of your organization?

Mr. Jonas Ma: We have a website. We have different activities. We invite people to join us if they agree with our objective, which is on our website, www.ccnc.ca.

The Chair: Thank you.

We're back to the Liberals.

Mr. Macklin.

Hon. Paul Harold Macklin: I'm deferring to Mr. Breitkreuz.

The Chair: Mr. Breitkreuz, five minutes.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Thank you very much, Mr. Macklin, for deferring to me.

I have been listening very carefully to all of the witnesses, and I think, Mr. Kempling, you have made many who support this legislation uncomfortable with your testimony.

I want to refer to Professor Cere's third and fifth recommendations. Your third recommendation states that the legislation should include strong provisions affirming religious, academic, and public freedom to hold, to profess, and to promote the historic meaning of the social institution of marriage in Canadian society.

I am going to represent a view here, for Mr. Cere and Mr. Kempling to respond to, that many Canadians have given to me, and that is that they fear they will suffer the same problems as Mr. Kempling just described to us. They fear that they may not be able to teach their children the historic meaning of marriage, or teach them the ethics of their religious beliefs, or direct the education of their children.

Some believe they won't be able to express their opinion on the issue of same-sex marriage. Many religious individuals in Canada belong to religious groups that teach that they are equal to the official ministers in their faith. Those denominations teach it as an obligation to speak out on the issues in the public square...as well as the recognized leaders of their religions. I know that this legislation has been defended with clause 3 on page 2, where it says, " It is recognized that officials of religious groups are free to refuse to perform marriages", but they don't feel that's adequate and protecting their rights.

So my question to you is this. These religious individuals and cultural groups feel that if this legislation is passed, this will impact on them in these areas. I also have to say that many Canadians who don't have strong feelings in the areas of culture or religion don't understand the concerns they have. Could you describe to me what impact you think this may have on individuals within these particular faiths when it comes to expressing their beliefs, even in the privacy of their home, or in educational institutions, or in the public square?

● (1730)

Mr. Daniel Cere: I see it in educational institutions.

Because of the way the debate is structured, it's created in an unfortunate kind of atmosphere that one view is thrown under the legal cloud of being a violation of human rights. Therefore, it makes people very tentative about coming forward on this.

I know academics who are profoundly concerned about the legislation. My old mentor, Charles Taylor, has serious reservations, but he has not come out. His reservations would be somewhat similar to mine. I think they are similar, if I can dare to speak for him. We need inclusion. We need to design this legislation so that different communities can really see themselves in it and not feel that they're excluded from it—and not only excluded from it but thrown under a legal cloud.

I think that's going to be a bit of a challenge in terms of amending this legislation, to be able to open it to create a lot more generosity in this legislation than there is now. These kinds of problems of just silencing a view that needs public space....

Communities can't survive in closets, as the gay and lesbian community knows. Similarly, I think the historic conjugal conception of marriage needs public space to be able to express itself. It too cannot survive in a legal closet. I think the tone of the legislation creates a legal closet.

Mr. Garry Breitkreuz: Thank you very much.

Mr. Kempling, would you also like to give your opinion? I'd like to know if you received any funding to defend yourself at these various hearings. You told me there have been hearings held in regard to your case. Have you had any funding to assist you in defending yourself at these hearings?

Mr. Chris Kempling: I have a trust fund, and individuals have been making donations to my trust fund. I also have the financial support of my union for some of my expenses.

Mr. Garry Breitkreuz: But there's not been any government money or public funds provided to you?

Mr. Chris Kempling: No.

Mr. Garry Breitkreuz: Okay. Anyway, can you respond to my question?

Mr. Chris Kempling: If I can speak more generally, I guess part of the concerns of the evangelical or traditional Catholic community is the impact on the public education system of normalizing same-sex marriage.

The reason I became an activist on the other side, so to speak, was my own experience in 1996, attending a conference where it was recommended that we supply *Xtra West* newspaper in our counselling office waiting rooms. We were advised not to read the classified ads, and I wondered why not. I had never seen this newspaper before. Of course when I read the classified ads, they were extremely pornographic. I didn't understand why it would be recommended to make pornographic material available in public schools. When I wrote people in authority to express my concern, I was shut down or told there wasn't a serious problem. Anyway, I was brushed off. That's when I decided to get active and start letting parents know what was being proposed or suggested for their children.

I guess a good example happened just last month in Massachusetts, where a very explicit pamphlet, called "The Little Black Book", was provided to school children as young as sixth graders. It's extremely graphic, pornographic as well. It seems that part of the push is to normalize this type of behaviour. The concerns or fears of traditional-minded parents, it seems, will be ignored or overridden.

We have a case where a parent of a kindergarten student was arrested and hauled out of a school in Massachusetts for objecting to what was being proposed to be taught in his son's school.

It's happening down south of the border, and I think the fears are valid here as well.

● (1735)

The Chair: Thank you.

This meeting is now coming to an end. Let me, in the name of everybody around this table, all parties, thank the witnesses for appearing in front of the committee today. Thank you ever so much.

For those of you who are interested to know when our next meeting of this committee will take place, it's in exactly 25 minutes.

This committee is adjourned. Thank you.

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