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Mr. Marcel Proulx

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● (1530)

[*English*]

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

We have four witnesses this afternoon. We have Mrs. Dichmont, Mr. Farrow, Mr. Patey, and I understand that Mr. Morton is on his way in from the airport. So we will start.

As you well know, witnesses have ten minutes for opening statements, and then we have a first round of seven minutes for questions and answers or comments. Then the rounds are of five minutes, questions and comments included.

We're ready to start.

Mrs. Dichmont, may we start with you for ten minutes? It's all yours.

Mrs. Diz Dichmont (As an Individual): Thank you.

I had understood that I was allowed to have no notes. I got the notice only a few hours before I was leaving for some meetings in Prince Edward Island, so I have no briefs or notes with me. I have some letters from which I might quote, but I have no copies, and I do apologize for this.

I'm not quite sure why I was invited. I suppose it was because I was one of the commissioners who resigned when I was told that I either had to take same-sex marriages or resign, which is what I did, not with any prejudice at all. I have many homosexual friends, but I did not feel comfortable conducting something that would not have my heart in it, without any prejudice at all.

I can say categorically that, to me, colour, creed, conduct, or any other variation in a human being does not leave me with prejudice at all. I grew up in a country full of racial prejudice, and from early childhood I rebelled against it. I can say categorically that I bear no prejudice to any human beings. Human beings are human beings.

Why I became a commissioner was because a friend's son was getting married, and he and his fiancée came to me seven years ago and said, “Would you please conduct our marriage ceremony?” They thought that as a justice of the peace I would be permitted to do that. Although that used to be the case in Newfoundland, it is not now, so I said I was sorry but I couldn't do it.

The bride-to-be said, “You may think I'm a bit of a gink not wanting a church wedding, but all my life my mother has tried to force religion down my throat. I've always resisted it, and I would feel like a hypocrite if I now asked for a religious ceremony.” I said, “I don't think you're a gink at all. I respect you, but I still can't marry you.” So she said, “Would you find out what you have to do to become a commissioner so you can conduct the ceremony?”

I felt a little bit uncomfortable. I didn't know whether I wanted to become involved or not, but the more I thought about it, the more I thought there was a place for the civic marriage, because if there's no commitment to the church, the mosque, the temple, or the synagogue, why should they be asked to act as a rubber stamp just because of tradition?

I really enjoyed being able to be of service to about 50 couples, some from Newfoundland, some from across Canada, from Europe, and from the States. The ceremony I conducted was put together by the first bride. She gave me a sheaf of paper she had taken off the Internet, from many, many different ceremonies, and had put together. So I've had a very wide scope for the ceremony.

I appreciated being able to give that service. I was disappointed when I was told categorically that if I was not prepared to take the ceremony for the same-sex couples, I must resign. It seemed to me that was infringing on my freedom of conviction.

It seemed to me they're rather like bilingual services. I know ideally somebody would serve the public in both French and English equally well, but I think I'm correct in saying, am I not, that as long as the service is available in both languages, it does not have to be from the same person? I feel this could have been done as far as the commissioners were concerned.

I'm not fluent in French, but I can get along if need be.

I don't understand why the call to have marriage for same-sex couples, to have a formal marriage ceremony, is of such importance. A friend and I, also a female, have teamed around together for 46 years. It is not a sexual relationship at all. The arguments I've heard, such as needing to have freedom to help the partner as next of kin, are not valid. This friend has been hospitalized five times in the last 14 months, once in Ontario and the rest in Newfoundland, and although I have papers of power of attorney—we each have for the other—on no occasion was I asked for them. I was just asked who was next of kin. I said I was, and there was no problem.

● (1535)

I've heard another reason same-sex marriage was wanted was to cope with wills and so on. We have joint wills and interacting wills, and there is no problem with that. Legal forms can take over like that.

I understand that one of the problems is survivor benefits, but I understand also that some of the private insurance firms cover that, and even some of the unions cover it.

So I'm not quite sure why there is such a demand to have a technical marriage, and I'd be happy to have that explained. I can see it as an equality right, and I think there should be something in the way of an opportunity of a ceremony. But as the norm has been for millennia in all cultures that marriage is a two-gender bond, I don't see that it's a human right. I see it as an equality right, and that can certainly be offered.

I noticed last night on the CTV that in the discussions with some of the Liberal members of Parliament, the Prime Minister has said that justices of the peace will not be forced to marry same-sex couples if they wish not to, but I think we'd run into problems with Newfoundland, because the Newfoundland government says they have complete and full control over all marriage matters. I don't know whether the Prime Minister is going to run head-on with Danny Williams again or not. But I do feel very strongly that my freedom of conscience has been encroached upon by being told I had to resign.

Something else that worried me very much about this going through in Newfoundland in December was that the law was that there was to be a two-day lapse from the application for a marriage licence to the issuance of a licence, and the licence had to be in the hands of the commissioner for a minimum of four days before the ceremony could be conducted. On December 21, the Tuesday, the court gave the ruling that same-sex marriage was law at about 3:30 in the afternoon, and a little over 48 hours later the marriage ceremony was conducted. That leaves one wondering whether in fact that particular ceremony was in accordance with the law. There have been so many actions that have pushed the laws to the limit that I wonder whether in actual fact some of these things are technically legal.

I'm also very concerned about the change in pattern. In our democracy I've always understood that laws were made by Parliament and enforced by our courts. We seem to have reached the point now where you're having laws made by courts and endorsed by Parliament. That worries me. It doesn't seem to be our tradition or our norm at all.

● (1540)

The Chair: Excuse me. You have one minute left.

Mrs. Diz Dichmont: I have just one other comment, then, about the fact that....

I'll leave it at that. I know it leaves it just in the air, but I'll leave it at that rather than go overtime.

The Chair: Thank you.

Mr. Farrow, you have ten minutes, sir.

Mr. Doug Farrow (As an Individual): Thank you.

My official submission is still with your translators, but you have before you—at least, I gave to the clerk—the Enshrine Marriage Canada declaration, which my written brief sets over against the preamble to Bill C-38. There are seven articles in the declaration, against no fewer than ten "whereas" paragraphs that cluster defensively around the lone substantive clause of Bill C-38.

These ten whereas clauses, I submit, betray the bad conscience of Bill C-38. I refer to them as the ten lepers, since only one of them cannot be faulted. My brief runs through them one by one. We don't have time to do all of that here, of course.

If the whereas clauses fail—and they do fail—clause 2 of Bill C-38 is left naked and ashamed, and all that follows from it constitutes a travesty of justice. It is the duty of this committee, in my opinion, to point that out to the House.

The first whereas clause already does great mischief. It implies that Bill C-38 will put an end to an equality rights violation, but marriage, as we have always understood it, violates no one's equality rights. If marriage is a union for life between a man and a woman, only those who are neither men nor women are, in principle, excluded from choosing to marry if they wish. There are several restrictions on one's choice of a partner, of course, and there is positive discrimination that is intended to encourage people to marry, as per articles 4 and 5 of the declaration in front of you.

Bill C-38 does not deny all restrictions, and it acknowledges the need for positive discrimination in its penultimate "whereas". What it really objects to is the age-old idea—and I believe Monsieur Ménard admitted in these hearings that this idea goes back at least as far as the Flintstones—that marriage is the life union of a man and a woman.

Well, why not object to it? Why not complain that the ancient Roman jurist Modestinus, for example, was wrong when he said, "Marriage is the union of a man and a woman, a consortium for the whole of life involving the communication of divine and human rights."

It may be a bit quixotic to do so, but this is meant to be a free country. Just don't say that the age-old idea of marriage constitutes a violation of clause 15, which can only make clause 15 look even more ridiculous than Don Quixote. A clause 15 violation, helper notwithstanding, could only arise after Bill C-38 passes. That is, once we decide to redefine marriage as a union of any two persons, then and only then does it become discriminatory to say a marriage is void by reason that the spouses are of the same sex. In other words, we may need a bill to protect equality rights if we change the definition of marriage, but we do not have to change the definition of marriage to protect equality rights.

The first "whereas" , though it can claim the support of a handful of provincial courts, undermines the credibility of rights discourse. It does not uphold our Constitution. In the long run, it will do it grave harm.

We skip to the fifth "whereas", which contains an even deeper flaw. That flaw is bound up with the language of marriage for civil purposes. There is nothing wrong with this language, unless by using it we mean to imply that civil marriage and religious marriage are not two different ways of effecting the same thing, but are in fact two different things altogether, two different things that may safely be isolated from one another—but that is exactly what this bill implies, and it is also the operating assumption of the Supreme Court.

I must refer you here to Professor DeCoste's devastating analysis of the reference opinion in the new issue of the *Alberta Law Review*.

The court produces this separation between civil and religious marriage out of thin air, in defiance of our history, our Constitution, our 1960 bill of rights, and even our charter, the preamble of which rightly links belief in the rule of law, including law of marriage, to belief in the supremacy of God. Neither court nor Parliament is free to make marriage a creature of the state and so to exercise unlimited power over marriage.

Bill C-38 is in fact ultra vires court and Parliament. If passed, it will mark the end of liberal democracy in Canada. It will also mark the end of civil marriage, for Bill C-38 is doing precisely what it claims not to be doing—establishing an institution other than marriage.

● (1545)

The sixth “whereas” is the leper for whose healing one may at least pray. Unfortunately, it is the least understood. Bill C-38 does not uphold but attacks religious freedom. It places the vast majority of religious communities in this country—and this means the majority of Canadians—squarely on the side of the bigot. It makes them out to be purveyors of discrimination and hatred. Moreover, it leaves them no option, if they wish to avoid this slur, to keep their religious opinions to themselves and to conform their visible practices to those of the state.

The seventh “whereas” illustrates my point. Why should we need a guarantee that clergy will not be forced to perform same-sex marriages? History has cast up few tyrannical regimes that required clergy to perform rights contrary to their faith. Stalinist Russia and its ilk forbade clergy to perform certain rights in which they did believe, but did not ordinarily try to compel them to perform rights in which they did not believe. That kind of crime is the preserve of perverts like Nero or Idi Amin.

What has happened in Canada that suddenly we are forced to contemplate such a thing? Freedom of religion indeed. All of this is handed to us as a reassurance of the state's respect, when the Supreme Court has clearly said that this at least is ultra vires Parliament.

On the ninth “whereas”, marriage is indeed a fundamental institution in society that the state has a responsibility to support. The Universal Declaration of Human Rights, article 16, declares “the right to marry and to found a family”, linking marriage to procreation. It states:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

But Bill C-38, while it is busy redefining marriage, in effect, also redefines family in non-procreational terms.

It can't be denied that the new definition accommodates homosexual unions only by refusing to accommodate procreation as a defining feature of marriage. This removes children from the immediate purview of the institution. It thus deprives children and parents of the one institution that entrenches their natural rights to each other. On the other hand, it leaves the door open to gravely unethical uses of reproductive technology, as Professor Somerville has pointed out.

But it does something more than that. It also restructures the law in such as way as to make not only marriage but the whole nexus of family relations into a pure legal construct. It brings them under the control of the state and makes them subject to whatever definitions the state wishes to impose upon them. When Bill C-38 strikes down the language of natural parent, blood relationship, and the like, it is striking down the very language that acknowledges the priority of the natural family unit, the unit with which article 16 of the universal declaration is concerned.

On the aim of these amendments, Professor DeCoste says:

> Their aim, that is, is to de-naturalize the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort —bled as they are of the stuff of social tradition and experience—are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state.

He says:

> It occurs to me that the initiatives being carried forward in this bill are an assault on the traditions of family life and that they risk the disintegration of that way of life, at least to the extent that they lure fathers and mothers, and husbands and wives, into detachment from and forgetfulness about the moral point of family life.

That is what Bill C-38 does, in the main, because it ignores children. As a sign of our sterile times, it mentions them only in the fine print. But Bill C-38 does not ignore children in a benign way, like a husband and wife trying to converse over the din raised by the kids. Bill C-38 undermines the very foundations of our children's lives, while doggedly pursuing its adults only conversation. Under the new same-sex marriage regime, children will be taught, implicitly and explicitly, that father doesn't matter or mother doesn't matter, or rather the father and mother that matter will be the state.

To quote DeCoste again:

> ...through the state's coercive power, social relationships will be not just re-defined at law but changed root and branch by law.

The ninth “whereas” is the most insidious. It is the reason why I stood on this Hill two months ago and insisted to a crowd of many thousands of Canadians that a vote for Bill C-38 is in fact a vote for tyranny.

The tenth “whereas” merely repeats the charge that Bill C-38 lays against all who resist it, namely, that they are deficient in the official state values, the values of the new Canada, or the Canada of the charter revolution, as the justice minister likes to say.

● (1550)

For my part, I deny both the deficiency and the dogma, the dogma of this new Canada, and I reject the ungodly haste with which this dogma is being forced upon us in the form of a piece of legislation that hasn't a leg to stand on, though it has ten horns on its head. Before you wrap up these hearings on 14 June, I recommend both to you and to Mr. Cotler that you pause and reflect on the message of Shavuot. This bill does not need amending. It *is* an amendment, a preposterous amendment that ought to be killed.

Thank you.

The Chair: Thank you, sir.

Mr. Patey.

Mr. Cecil Patey (As an Individual): Good afternoon, ladies and gentlemen. It's good to be here.

My name is Cecil Patey. I learned recently that it means "son of Pat", so I'm glad to give you the pronunciation correctly.

However, just to introduce myself, I have done weddings in five provinces as a minister of the church, and I've also done weddings as a civil commissioner. That's what I will be talking about today.

I was employed by the City of Barrie to do all its civil weddings. This continued for over two years. Then I was fired after Ontario and its cities began to sell marriage licences to people of the same sex. The Province of Ontario and its cities have acted beyond their authority in going ahead and issuing marriage licences to same-sex couples, against national or federal law.

I want the City of Barrie and the Attorney General of Ontario to make an admission of this and pay up on my two years of lost income. I might as well tell you the title on my brief here now, since you don't have a copy before you. It says, "I am suing the Attorney General of Ontario and the City of Barrie". I have registered my case with the Ontario Human Rights Commission and they have cooperated. They have served my complaint on the office of the Attorney General of Ontario and on the City of Barrie, but more assistance is needed from federal members of Parliament.

At the interview that brought about my firing, I told the city clerk of Barrie that we could not do it—that is, sell marriage licences to same-sex folks—because the law had not been changed at the federal level. Even though the provinces perform the administration of issuing marriage licences and registering marriages, provinces do this in accordance with national law. Changing the law regarding marriage is a federal matter. For a provincial judge to say that, effective immediately, marriage licences must be sold to any two people...that statement needs to await federal approval.

The provincial judge in such matters may say, "I recommend", but he cannot say, "I decree, effective immediately". The British Columbia judge was onto this distinction when he said that they would proceed within a year, as that would give the federal government, hopefully, time to approve or not approve. Until now, the federal government has not approved the marriage of same-sex people, and I'm 24 months short on monthly income.

The objective I seek is that marriage licences shall only be sold to couples of the opposite sex and that banns shall only be announced for opposite-sex people. That's not radical or revolutionary; that's been around for longer than Canada and longer than the British Empire or the French Empire. The reasons for this are all as old as the hills, or since mankind first learned to write.

Legal experts please note: heterosexual marriage is the best outcome and highest point of our creation. Proposed legal changes are not an improvement. They are retrogression, going backwards, and no model for the future. The definition of the word "marriage" is intellectual property. It is an inherited patrimony in which we all share. Legal attempts are being made to change that meaning. Perhaps that process is now at its final stage in the debate in this House and in the next election, God willing. I have conducted weddings in five provinces, including in the Canadian Forces as a chaplain on Vancouver Island, in Alberta, Quebec, Newfoundland, and Ontario. Some services were religious, while others were secular or civil in wording.

I'm alarmed that the Minister of Justice, Mr. Cotler, wants to taint it with a description. He calls it "marriage for civil purposes". Hey, I've always conducted weddings for civil purposes. Those have been civil or secular weddings, which have omitted religious or theological language at the request of the bride or groom. Sometimes this is done because the bride or groom or both are still on the way when it comes to having found a fitting religious culture for themselves. So if they're not ready for God talk, this is laid aside and we secure a bottom line, "To be faithful to you alone, as long as we live".

● (1555)

It is too clever by half for Mr. Cotler to think he can expropriate the common language for civil weddings and compel us to accept what he wants us to call homosexual marriage. Rather, I would say, let the law reflect the tradition, our tradition, that marriage licences or wedding banns be offered only to opposite-sex couples. Hey, when the sun rises in the west and sets in the east, call me back here to reconsider the matter.

What if, after considerable pleading, a judge decrees that effective immediately, when you wake up tomorrow you shall call it sunset and at the end of the day you shall call it sunrise? This is not such a simple matter as setting a law for shopping days in Halifax or setting a law for the speed limit in downtown Toronto.

Some judges and politicians have got into tinkering with language, as if we can make every word mean whatever we want it to mean. A perfect example of this came with the expropriation of the words "happy" and "gay" in the century recently passed. By social engineering and a few parades, "gay" is no longer what the English poet Wordsworth and others meant by the word.

For a generation, in the name of an undiscriminating tolerance, we the citizenry put up with this disorientation. All this legal tinkering with such a key word devalues the currency of marriage for us all, so we have forgotten, my friends, that marriage is really the name of the honour we ascribe to heterosexual union. Let's get back to, "Honour thy father and mother", for instance. This is not as good as mom and pop.

In its fundamental institutions, any state or civilization must draw the line, or we may find ourselves slipping into the untravelled territory of failing states. For example, in the early education and socialization of our children, if we raise them to make no distinction in boy-girl relationships in our new nurseries all across the land, would it not be the same as saying, when they come to cross the street, "It doesn't matter, go ahead, make no distinction". That is what we're about here today.

Homosexuals are still free to live together. If some of the provinces want to work on granting social recognition to people living together who are not married, let such provinces proceed as they see fit. I'm sure the seven provinces that have talked about this can readjust what they're trying to talk about. Only don't let's call it marriage. We cannot elevate same-sex marriage in law so it is on the same footing with mom and pop.

The qualification for marriage is the free consent of a man and a woman. No others need apply. I shall work that, under God, our nation shall make no additional law about marriage other than that it's a union of one man and one woman.

Thank you, Mr. Chair.

● (1600)

The Chair: Thank you.

Welcome, Mr. Morton.

Mr. Ted Morton (As an Individual): Thank you. I apologize to the committee for being late.

The Chair: No problem. We were forewarned that you would be some minutes late.

Mr. Ted Morton: Okay. Thank you for inviting me here today to speak on Bill C-38 and the subject of marriage.

I come here today in my capacity as a professor of political science and not in my elected capacity as a member of the Legislative Assembly of Alberta. My observations today represent my own thoughts on the topic and not the views or policies of the Government of Alberta. I am speaking as one who for the past 30 years has studied, thought, taught, and written about the Canadian Constitution, the tradition of British constitutionalism, and the broader stream of modern liberal democracy of which both are integral parts.

The first and second parts of my presentation, which I have provided a written copy of, rehearse some of the information I gave in an earlier version to this committee two years ago, which emphasizes the importance of the family as providing the social glue that helps keep societies together—the moral capital, if you like, the social capital—and the reasons why changing the definition of marriage is likely to have the effect of eroding that social capital.

The section of my paper I would like to concentrate on in my oral remarks first tackles the subject of the claim that same-sex marriage is in some sense required by the charter or is a basic human right.

I suggest in my paper that of course there's no reference to same-sex marriage anywhere to be found in the charter. In fact, there is not any reference to sexual orientation. In fact, even further, the term "sexual orientation" in reference to homosexual rights was put to votes twice back in 1981, in a special parliamentary committee. Both times they were defeated. This has been added by the judges; it's not in any sense required by the charter itself.

On the question of basic human rights, again I'd ask the committee to ask itself, since when is homosexual marriage a human right? Is it listed in the U.S. Bill of Rights, the 1948 United Nations Declaration of Human Rights, the European Declaration of Human Rights, the 1960 Bill of Rights, the 1982 Charter of Rights and Freedoms, the Meech Lake accord, the Charlottetown accord? Is it recognized in any western democracies other than Belgium and Holland?

The answer to all of the above is, no, no, and no. In Canada, the idea that homosexual marriage is a right is an interest group, judge-made affair from start to finish, and even this is new. As recently as 1995, the Supreme Court, with a different configuration of judges, recognized the complete legitimacy of traditional marriage.

I would suggest that once you clear away the rhetorical confusion about charter requirements and human rights, you as parliamentarians can and should approach the same-sex marriage issue as a public policy issue. As parliamentarians, you have a responsibility to determine whether the benefits of same-sex marriage will outweigh the cost. I've already noted what other social scientists and political theorists have suggested will be the cost. I would simply add here, you're talking about benefits to somewhere between 4% and 6% of the population, but how do you balance the good for 4% and 6% of the population against the negative consequences for the other 95%?

I particularly want to draw your attention to the effect Bill C-38, if you pass it, will have on public education, and of course eventually private education. Bill C-38, if enacted into law, will establish same-sex marriage as a new state norm. The equality of homosexual marriage with heterosexual marriage will be taught and enforced in the public schools, primary as well as secondary, and of course we already see the beginnings of this in some provinces. Any teacher or administrator who dissents from this new orthodoxy, the new norm, will be disciplined or fired if necessary. Parents who disagree will be forced to accept this so-called education—but really social engineering—or abandon the public schools in favour of the private schools. But once this state leviathan of social engineering is set in motion, who here really believes it will stop at the front door of private schools, religious or secular?

We already have examples of zealous human rights commissions forcing faith-based schools to conform to same-sex norms—with, of course, the full support of the courts. So much for religious freedom. Freedom of speech on this topic has already been sacrificed on the altar of anti-hate speech legislation passed last year by this Parliament.

● (1605)

Aided and abetted by the courts, the human rights movement, of which the gay rights activists have become the most zealous column, are dismantling the very institutions that have made this country a free and democratic society.

For Parliament to proceed now to legislate a social experiment, with no real knowledge of how far-reaching its consequences may be, is reckless. Before a new drug is introduced in the Canadian market, the law requires years of testing on laboratory animals. Before a new dam is built, the law requires what's called an environmental impact statement to be filed and approved. Where is this Parliament's same-sex marriage impact statement on Canada's human environment? Why should Canadian children be treated as, in effect, laboratory animals for this new social experiment?

It is especially reckless for this Parliament to rush lemming-like over the same-sex precipice when such an obvious compromise exists. That compromise, already in place in several provinces, is to leave marriage as it is but allow the provinces to provide civil unions, as in Quebec, or a comparable set of rights, as in Alberta, my province, for homosexual couples who wish to confer formal public status with legally enforceable rights and duties on their relationship.

At the same time, this government should introduce in Parliament a resolution to amend the Charter of Rights to extend the status of marriage to include same-sex couples. If, as its proponents contend, same-sex marriage really is a constitutional right, then surely this is the democratic way to add new rights to the charter.

To rely on the whip of party discipline to force Bill C-38 through Parliament will only deepen Canada's democratic deficit. In case none of you has been home recently, I can report that out in the country Canadians are rapidly becoming disillusioned with what goes on in this city. Nor will a Bill C-38 settle the issue. Canadian provinces have ample power to derail federally imposed same-sex marriage.

Speaking as a constitutional scholar, I would urge the government to take the high road, the democratic road, and let the Canadian people, who are the people who have to live with this new law, decide for themselves via the constitutional amending process.

Finally, to end on a personal note, speaking as one of those 33 million Canadian people, one who knows that my views are shared by two out of every three Canadians—in a democracy I hope this would count for something—I want you to know that we, the defenders of traditional marriage, know what marriage is. Others are free to choose something else, and we respect that freedom, but they are not free to force us to call that something else “marriage”.

Thank you.

● (1610)

The Chair: Thank you.

From the Conservative Party, Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you to all the witnesses for appearing, and thank you to Ms. Dichmont and Mr. Patey. I appreciate your being here to put a human face to the effect this legislation could have. As Dr. Morton has said, you are the sharp edge of the knife, the first casualties of changing the definition of marriage. The future casualties could be more far-reaching, pushing people who do not agree with changing the definition of marriage completely out of the public sphere.

Part of the problem with this whole debate is that there has been a tremendous amount of misinformation. Bill C-38, in the preamble and even in the substantive sections of the bill, purports to protect religious freedoms. This is how it has been sold to Canadians. In the news today, we read that there have been some assurances given to MPs on amendments to this bill. Then we find out that maybe they haven't been given after all. I'd like for Dr. Morton and Mr. Farrow to comment on some of what I've heard from the Prime Minister about stronger charter guarantees to protect freedom of religion—so that justices of the peace would not have to marry same-sex couples, churches would not be required to rent out their facilities or halls for same sex-marriage, and schools and institutions would be able to preach on this issue without being subject to the Criminal Code.

My understanding of the Supreme Court reference is that, with respect to justices of the peace and the Knights of Columbus, who are already before a human rights commission, this is a provincial jurisdiction. My understanding is that the court was clear on this point.

I'd like both of you to comment on the possibility of extending protections, especially in the context of what we heard today.

Mr. Ted Morton: I think your understanding of the Supreme Court's decision is absolutely accurate and correct. The court was very clear that all the areas you just described are protecting the freedom of religion of justices of the peace, in terms of exercising their function, churches, school exemptions.... All those matters clearly fall under property and civil rights, provincial jurisdiction, and are beyond the reach of any sort of federal legislation.

I find this is very elemental constitutional law, and I find it somewhat astonishing that the Prime Minister continues to go on national media and state something that's not accurate.

I also find it somewhat astounding that members of the Liberal caucus, many of them, are being whipped to vote on this. Why should Canadians expect respect for freedom of religion if the very freedom of religion and freedom of conscience of Paul Martin's own caucus is not respected?

The one fallback position, I suppose, and I think the Prime Minister has alluded to this, is that the Supreme Court, of course, has ultimate jurisdiction over freedom of religion issues. But again, as you alluded to, Mr. Moore, there are half a dozen cases in the courts already, and every time the issue of freedom of religion and religious institutions or freedom of conscience has come into conflict with a gay rights equality claim, the latter has won in the courts.

● (1615)

Mr. Rob Moore: Thank you.

Mr. Doug Farrow: I suppose, to my former colleague, a right is a right is a right, isn't it? So if same-sex marriage is a right, then I don't know where these amendments come from, honestly. I know some of them come from my friends on this issue, but I don't understand how you can pass a bill that declares that this is a right and it's discriminatory to take a different position, and then add a whole bunch of discriminations in as amendments. How can you do that?

The problem is that it isn't a right, and no court of last resort in the world has declared it to be a right. It's still before courts in this country. It has not gone to the Supreme Court. Here's a bill that wants to shut this down by saying it's a right. Then you start talking about completely inconsistent amendments and even put them in the newspaper before this committee has had a chance to think about it.

Mr. Rob Moore: Thank you.

On that international context that you've mentioned, I have two questions that maybe each of you could answer.

One, it's my understanding that there has been no declaration in the international context or at the highest level of any country, including our own, that this is somehow a right. The Canadian Bar Association appeared here and said somehow this was required by our charter, but even the lower court rulings didn't require that the federal government introduce Bill C-38. They did attempt to change the definition of marriage, but I did not see where they demanded that somehow we take this step of introducing legislation. I'd like you each to comment on the international context.

Also, what we do see in clause 3 is this recognition that has no legal effect, that religious groups are free to refuse to marry individuals when not in accordance with their religious beliefs. To me, that's the absolute worst-case scenario, as you alluded to, Professor Farrow. That would be the ultimate discrimination against religious groups. But what's so insulting about it is everyone who falls beneath that highest threshold. I wonder if you could each briefly comment on how you could see this affecting individuals, much like the marriage commissioners who are here today, but some others in the public sphere and their ability to participate fully in Canadian society.

Thank you.

Mr. Ted Morton: I'll comment on the international side. I'm not sure I quite understood the second part of your question. On the international side, you can search all the international human rights documents and there is no right to homosexual or gay marriage to be found in them. In fact, in a number of international UN rights documents there are references to the rights of children and the right to be raised by their parents.

In other jurisdictions, English-speaking jurisdictions, which I think are obviously relevant to Canada.... In New Zealand I believe it is, there's a high court/final court of appeal decision there that despite the existence—I don't know whether it's the constitution or a human rights act—of sexual orientation rights protection, either statutory or constitutional, the New Zealand court said that did not transfer into or create some sort of right to same-sex marriage.

Of course, in Australia, which is so similar to our parliamentary democracy in so many ways, the government has passed a defence of marriage act. That, as I understand it, had virtually all-party support.

So when you look around the world, with the exception again of Belgium and Holland, you don't see much support for that. Again, in those two western European democracies, at least it was done from start to finish as a parliamentary matter, rather than being driven by the courts.

● (1620)

Mr. Rob Moore: Thank you.

The Chair: We're out of time. Did you want Mr. Farrow to answer that?

Mr. Rob Moore: If he can, yes.

The Chair: Sure, let's take 30 or 40 seconds.

Mr. Doug Farrow: I'll just say very briefly then that the kind of debate I take is happening in this committee is the kind of debate that Canada should be having amongst its people, and I think is having. You can argue about what you think marriage has been, what you think it should be. I have no objection to that. It's actually good fun sometimes. But when the court comes in, the lower court, and now Parliament, and says it's going to put an end to that argument, it's going to say marriage no longer is that, it's now this, and it doesn't matter what the average Canadian thinks, well, I have a problem with that. I don't think the average Canadian started marriage, or has the final word on it for that matter, but I do think the average Canadian needs to be heard.

[*Translation*]

The Chair: We go now to the Bloc Québecois. Mr. Marceau, you have seven minutes.

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

Thank you to the witnesses. I guess they won't be surprised if I tell them that I don't think we will find much common ground in our discussions, however friendly these may be. I still have a few questions to ask. By the way, I am very pleased to see you again, Mr. Morton. We had a very nice discussion the last time you were here.

First, to Mr. Patey and Mrs. Ditchmont. A marriage commissioner who is not working for a religious organization, a church, a synagogue, a congregation or a mosque, is an employee of the government, is he not? And we know that the government does not favour any religion over another. As employees of the government, don't you think that your role is just to apply the laws of the state?

[*English*]

Mr. Cecil Patey: Can you repeat the last part of the question?

[*Translation*]

Mr. Richard Marceau: As employees of a secular state, isn't your role just to apply the laws of the state?

[*English*]

Mr. Cecil Patey: If the law is legal, apply it. But there's no legality to same-sex marriage because it has not been passed at the national level. So I say that the provinces have acted prematurely.

[*Translation*]

Mr. Richard Marceau: If you're a marriage commissioner, you have some basic knowledge of the law, especially if you live in an English-speaking province. As you know, common law is judge-made law, not necessarily law made by legislatures. You obviously know that all laws are not necessarily made by legislatures or parliaments. In our system of constitutional democracy, since the entrenchment of the Charter of rights and freedoms, the interpretation of this constitutional Charter has been part of the law. So, I am a bit surprised to hear you say that, if it comes from the courts, it is not law.

Could you tell me on what grounds you come to this conclusion?

[*English*]

Mr. Cecil Patey: You might have some knowledge of the law, but I have the sense of what's commonly done. We see the sun rise in the east and set in the west, and you see a man and a woman who are married. Now you're going to shift that; you're going to change that. And in Canada you have to go through the process. The provinces have gone through the process, and they've sent it on to you guys in Parliament and said, "What are you going to do about it?" So we're waiting to hear from you. I've been waiting for two years, because I uphold that marriage must require a man and a woman.

● (1625)

[*Translation*]

Mr. Richard Marceau: I can tell you that your analogy with the sun is a bit strange. I really fail to see your point, especially since nobody can claim, I believe, that the marriage institution has not evolved over the centuries.

I now have a question for Mr. Farrow, whose statement was extremely interesting. You stated that, and I quote "[...] *we do not have to change the definition of marriage to protect equality rights*."I find this surprising since you also stated that "[...] *a handful of provincial courts* [...]" have decided this matter.

When we refer to the Courts of Appeal of Québec, British Columbia or Ontario, we're not talking about some insignificant courts in some out-of-the-way hamlet. We're talking about very respectable and high-level courts which have very clearly stated that the so-called traditional definition of marriage contravenes the Canadian Charter of rights and freedoms, especially clause 15.

One may agree or disagree—and I'm sure you disagree—but the reality is that very high-level courts have concluded that the so-called traditional definition of marriage is unconstitutional.

Are we in agreement on that at least?

[*English*]

Mr. Doug Farrow: Yes, quite high levels of courts, and some day the Quebec Court of Appeal may be as high a level as the Supreme Court of Canada.

Mr. Richard Marceau: We're working on it.

Mr. Doug Farrow: Yes. Well, I wouldn't have any objection myself.

But I do want to point out that it's still the case that no court of a last resort in the world has made the claim that same-sex marriage is an equality right, and there are very few lower courts that have made such a claim. We happen to have a number here in Canada, and there's one in America.

In America, in Massachusetts, in the 4 to 3 decision, the three dissenters cross-signed each other's dissent, and they pointed out what I was pointing out in the passage you read, namely that the basic argument of Halpern is circular; the conclusion is already there in the premise. If marriage is simply the union of any two people, and John and Jack are two people, then they should be able to marry, and it would be discrimination if they weren't allowed to.

What prevents them from doing that? Well, simply the traditional definition of marriage. So we'll change that. But of course in the traditional definition of marriage, marriage is the union of a man and a woman; therefore, it is not discrimination against a woman or a man to say that they can't marry without meeting that qualification.

That's what I mean...back to the argument. We could decide that we want to change the definition of marriage, just like we could decide we want to separate Quebec. That's the kind of argument we should have. But we shouldn't decide that we have someone else telling us that we want this definition changed, that we must have this definition changed, right? It's for us to work out.

Now, I think when you try to work it out, it doesn't actually make very good sense because it has all these knock-on effects on society. But that's the kind of argument you have as a civil society. The court has made a mistake in its logic. This has been noticed by other justices at the same level.

[*Translation*]

Mr. Richard Marceau: You've made some rather dramatic statements. I would like to have some clarification about two of them since you obviously did not have enough time, in 10 minutes, to say everything you wanted to say. I suppose you have a lot to say about this matter.

What did you mean when you said that bill C-38 would mean the end of civil marriage? And what did you mean when you said that voting for this bill would be voting for tyranny?

Those are very strong statements and I would like to give you the opportunity to clarify them.

[*English*]

Mr. Doug Farrow: On the first point, there are good arguments for saying that the new institution, the union of a man with a man or a woman with a woman is something other than marriage. If that is right—of course, that's the argument I'm saying we should continue to have—Bill C-38 will only create a legal fiction; it will call something by name that doesn't belong to it. We can argue that, but it at least makes sense to that extent.

As to the other point about tyranny and the end of liberal democracy, I refer back to the point of Fred DeCoste, the professor of law from the University of Alberta. This takes the primary social unit—the relationship of parents with their own children—and turns it into a legal construct. As you are well aware, all the consequential amendments to Bill C-38 are about changing the language of natural relationships and blood relationships into legal constructs.

That is the beginning of a tyrannical course of action by the state. The state is a tertiary form of sociality. The natural family unit and tribe is the primary, civil society is the secondary, and the state is tertiary. When the state presumes to take authority over marriage and redefine our most fundamental human relationships—not just marriage, but, as the consequential amendments show, parent-child relationships, what a parent is, what a child is—then the state has interfered where it has no authority to interfere.

I was quite serious about the ultra vires. I would not recognize Bill C-38 as a legitimate law were it to be passed by this House.

● (1630)

The Chair: Thank you, Mr. Marceau.

We now move to the New Democratic Party and Mr. Siksay for seven minutes.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Mr. Chair, and thank you to all the witnesses for their testimony this afternoon. I know some of you have come long distances, and we appreciate that you've made the effort to do that.

Mr. Patey, I have a question for you. At one point in your presentation you said you've always done civil or secular marriages, and you assumed these couples were not ready for God talk. Is it your assumption that people are always on the road to at some time accepting God talk, or that kind of personal belief?

Mr. Cecil Patey: When a couple comes to see me, they come with a marriage licence from city hall with their names, the province they were born in, their parents' names, and so on. There's a part there that says “religion”, and often the couple, or one of them, writes “incomplete”. That's all. So they haven't come out with a denomination label. That's what I deal with.

If they don't want to talk about the differences between a Catholic and a Protestant, I never get into it. Often I'll have a Jewish person marrying a gentile, or a Muslim marrying an informal or lapsed Christian, or whatever.

Mr. Bill Siksay: You must have married people who had no religious affiliation and no intention of going through with that.

Mr. Cecil Patey: Yes. They are often both without a religion.

Mr. Bill Siksay: Is that not an appropriate function of civil marriage in our society?

Mr. Cecil Patey: That's what I provide for them—a civil marriage. We leave out the religious part of it because they don't want to get into that right now. So it is a civil marriage. We don't need Mr. Cotler to change that.

Mr. Bill Siksay: In those instances, a more religious interest in marriage, like procreation or the place of children, may not be considerations for you. Did you make those kinds of demands of the folks you were marrying?

Mr. Cecil Patey: Well, the clerk of the City of Barrie said I wasn't there to counsel people, so I couldn't go into those questions, could I? So he prohibited me.

Mr. Bill Siksay: If that is a condition of your employment, do you accept it?

Mr. Cecil Patey: No. He wanted to tighten up those conditions. Until that point I felt I was free with him and her, and if they wanted to talk about anything, I would talk about anything. I did that as a pastor, and I felt I could do that as a citizen.

Mr. Bill Siksay: When you were performing a civil marriage for folks, you didn't require them to have the ability to procreate, or the interest in having—

Mr. Cecil Patey: No, it's none of my business if they want to get into that. They will do lots of that, I'm sure, down the road.

Mr. Bill Siksay: Or they could choose not to as well.

● (1635)

Mr. Cecil Patey: Or if they choose not to, yes.

Mr. Bill Siksay: You mentioned that the basic vow that people made when you were marrying them was, “faithful to you as long as we live”.

Mr. Cecil Patey: “As long as you live”. Yes, I drew that out of the United Church traditional wedding ceremony, which I found comfortable to use even in a civil context.

Mr. Bill Siksay: Do you think that's something that gay and lesbian couples aren't able to proclaim to each other or to promise to each other?

Mr. Cecil Patey: Yes, but I have not had a wedding for same-sex folks.

Mr. Bill Siksay: That wasn't my question, though. Do you think gay and lesbian couples are incapable of making that kind of commitment to each other?

Mr. Cecil Patey: Yes, they can, but I don't think they're making a marriage. They're making a commitment. The marriage is not there because the potential is not there to have children.

Mr. Bill Siksay: But you just told me a minute ago that you didn't make that a criterion for people you married civilly.

Mr. Cecil Patey: I was forbidden to talk to same-sex people about marriage—

Mr. Bill Siksay: Okay, but I'm misunderstanding you then I think.

Mr. Cecil Patey: —because I was told I was counselling when I shouldn't be.

Somehow or other, that comes around to the area of religion and the state. I think this law has the potential to trespass really badly. It has done so for me for 24 months.

Mr. Bill Siksay: Okay. I'm a little confused then if you think that even in your role as a civil marriage commissioner there needs to be a requirement for procreation or the interest in having children.

Mr. Cecil Patey: A requirement, I don't know, but always he and she show up. They want to get married. I can do it. That's all. Finito.

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

Mr. Farrow, I just want to ask what Enshrined Marriage Canada was...or is. Sorry. I didn't mean to put it in the past tense for you.

Mr. Doug Farrow: Its mission is to see what is already implicit in the Constitution made explicit, namely that marriage is a union of one man and one woman.

Mr. Bill Siksay: Okay, and who are the members? Who sponsors the organization, and in what cities?

Mr. Doug Farrow: The organization sponsors itself, and you can find all about it at www.enshrinemarriage.ca.

Mr. Bill Siksay: Right.

Can you tell me something about who the members are? Are there organizations that are members?

Mr. Doug Farrow: No, there are no organizational members, although there are doubtless organizational supporters. I wouldn't know that.

The chair of the steering committee is William Gairdner, who, as you know, is one of Canada's outstanding political and literary thinkers and a former representative of this country in the Olympics.

Mr. Bill Siksay: Are there other officers you can name for us?

Mr. Doug Farrow: Oh, dear, officers.... Could you look on the website? It is all there.

Mr. Bill Siksay: Okay.

I think those are all the questions I have at this time, Mr. Chair. Thank you.

The Chair: That's it? Thank you.

We'll now move to the Liberals, Maître Françoise Boivin.

[*Translation*]

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

I would like to thank you all for having come to Ottawa to share you views on this bill. My first questions would be for processor Morton.

Let's put aside, for the time being, the fact that you have political responsibilities. You are also a teacher of political science and it is in this context that I would like to ask you if you have read the decision of the Supreme Court of Canada of December 9 about the same-sex reference.

[*English*]

Mr. Ted Morton: Yes.

[*Translation*]

Ms. Françoise Boivin: If I understand, you took the time to study it in detail. I would not want to attribute any given expertise to you in error but isn't it true that you have studied the Constitution during all your life?

[*English*]

Mr. Ted Morton: Yes, I'm quite familiar with that decision.

[*Translation*]

Ms. Françoise Boivin: I would like to see if you agree with some of the Supreme Court's statements about this reference. For example, we read in the decision that:

> A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted.

Then, the Court gives the example of the telephone which had not yet been invented when the Constitution was being drafted. It states that its analysis of sections and 91 and 92 made it possible to conclude that telephony is a federal matter.

Do you agree with this large and liberal interpretation of the Constitution?

● (1640)

[*English*]

Mr. Ted Morton: You've referred to two different lines of argument in that reference decision. One is the Constitution is the living tree approach, the constitutional interpretation that comes out of the law of federalism but has been adapted by the Supreme Court to the charter of rights. That adaptation completely undermines and reverses the original purpose of the living tree doctrine.

The original living tree doctrine was to take a 19th century document, the British North America Act, and allow it to be adapted via judicial interpretation to social and economic changes that were taking place in Canadian society over the course of the 20th century. I'd make two points about each case in which it was invoked.

First of all, it was invoked to facilitate legislative problem-solving to give elected governments flexibility to deal with new issues. I'm going to forget the second point on that. As it's been adapted to apply to the charter, though, it's been used to replace or override the legislative decision-making.

Ms. Françoise Boivin: Am I to understand you're against that? You don't think the charter of rights is supposed to have *une interprétation large et libérale*?

Mr. Ted Morton: *Une interprétation large et libérale* verges on I think almost a meaningless phrase, and it's meaningless precisely because the court is very selective in its use of it. When it's talking about the rights to freedom of speech and freedom of expression in hate law cases, does it take a *large et libérale* approach to freedom of speech and press in those cases? No. It chops it right down as a reasonable limitation in favour of equality rights.

Ms. Françoise Boivin: But then you're hitting two rights. Sometimes you have two fundamental rights that can collide and there will be a different interpretation. But as such, as a document, do you believe the Charter of Rights and Freedoms has to be

[*Translation*]

interpreted in a large and liberal manner, so that as many people as possible would benefit from the rights that are included?

[*English*]

Mr. Ted Morton: You just said that if you always press further and further to a large and liberal interpretation of rights, every—to use an expression—metre or foot that you expand the scope of a charter of rights, you restrict freedom of action of elected governments. So if you follow the logic of that argument to its conclusion, the larger and more liberal the rights are interpreted, the less freedom of scope that governments have to approach.

So discussed in the abstract like that, I don't think.... You can see that it's problematic and doesn't really serve any purpose.

Ms. Françoise Boivin: So your answer is no, you don't believe in.... That's all I want to know. I want to know if you believe that it should be or it shouldn't be. So am I to understand that your answer is

[*Translation*]

no, the Charter of rights and freedoms should not be interpreted in a large and liberal manner?

[*English*]

Mr. Ted Morton: In the context of the specific case here, the addition of sexual orientation, and now homosexual marriage, making them into part of the Charter of Rights and Freedoms, you're taking clauses or alleged claimed rights or policies that were expressly kept out of the charter when it was being written and you're adding them.

Over time, for the same reasons that with the passage of time some flexibility and opportunity for growth makes sense in the law of federalism, it makes sense to do something similar in the context of rights, as you indicated in your one example, the progression of telegraph to telephone to e-mail, and so forth. In secrecy, privacy rights means different things in those different contexts.

But in the case of sexual orientation and homosexual marriage, this started to be worked on before the ink on the charter was practically dry. The large and liberal or living tree approach to adapting constitutional language, constitutional rights and powers, to the passage of time presupposes some significant change in the passage of time. What's changed between 1982 and 2002? Public opinion has changed. There's much more acceptance of sexual orientation and homosexuals, as witnessed by the very fact it's been added to many human rights codes. But that in itself militates for the courts to stay out. Let legislatures reflect public opinion.

That's the other way the Constitution grows and adapts.

● (1645)

Ms. Françoise Boivin: Another statement—and I want you to respond, and maybe others will want to join in—from the Supreme Court of Canada says:

[*Translation*]

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. It is in this context that I have the most difficulty understanding your statements. How can recognizing the rights of a new group be a violation of your rights? Why would the fact that a same-sex couple wants to marry undermine the marriage of my parents? Why would that have any impact on heterosexual marriages? I really can't understand your argument.

[*English*]

Mr. Doug Farrow: I would like to speak to that.

It's because marriage as a fundamental institution, which Bill C-38 acknowledges and the courts acknowledge, works with vast complexes of meanings that are all linked to the basic understanding of what marriage is. If you assume, again, that the right understanding of marriage is the union of any two adult persons... and it isn't at all clear why we should assume that. For instance, maybe we should be willing to talk about three or four; I don't know why not. But at any rate, if you assume that, then of course it would make no difference to your parents if two men or two women were to marry.

But if marriage is not that—and I was a bit surprised to find Mr. Siksay suggesting that procreation was somehow a religious enterprise, but at any rate, if you assume that marriage has something to do with procreation, that procreation is one of the inalienable goods of marriage, then of course it changes things. Now, your parents may be dead before it changes anything for them, but that doesn't mean it isn't going to change anything for the rest of us.

Ms. Françoise Boivin: Yes, but how?

Mr. Doug Farrow: It takes children out of the purview of marriage, for example. Marriage is the only institution we have in law that establishes the rights of parents to their children and children to their own parents. It's the only one we have. Change the definition, remove procreation, remove children from that position in marriage, and that institution no longer serves that purpose. What will serve that purpose in law? The state? Do we trust the state to take up the task of the parent?

Well, maybe Ken Dryden thinks so. I've always admired Ken Dryden—I'm a fellow goalie—but I don't admire him on this point.

Ms. Françoise Boivin: We'll pass the message.

Thanks.

The Chair: Thank you. Merci.

We're now on to rounds of five minutes. We go back to the Conservatives.

Mr. Toews.

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

I was interested very much in the exchange between Ms. Boivin and Dr. Morton in respect of the broad and liberal approach to the interpretation of the Constitution. Of course, Dr. Morton is right; it is an old division-of-powers phrase that is now adapted for the purposes of the charter. What we have seen is a total disconnect from the old meaning of that phrase. The term "liberal" is now being used in the sense of liberal values as opposed to any other values. We see that specifically in the reference case, where they add the word "progressive". It's now broad, liberal, and progressive, so we can see a monumental shift in what the meaning of that phrase actually was.

Again, it's a very self-serving kind of expansion of power by the Supreme Court of Canada. When the Supreme Court of Canada first started adjudicating Charter of Rights cases, they talked about that liberal and broad approach in the context of existing Canadian values. They said these values don't spring out of thin air—I'm paraphrasing here. I think to suggest the kind of answers Ms. Boivin gave to Dr. Morton to try to trap him.... I know he doesn't need my protection, but I thought it was very unfair to suggest that kind of approach to Dr. Morton.

What concerns me more, though, is Mr. Marceau's comments to the witness Mr. Patey, basically saying, aren't you obligated to enforce the laws as a public servant? Again, what Mr. Marceau didn't explain is that the human rights codes provide for what we call "reasonable accommodation". Reasonable accommodation isn't limited to private sector employees; those rights are also extended to public sector employees. There is an onus on a government, a duty, that if a person can be reasonably accommodated in their job, they can, for reasons of conscience or religion, be excused from performing certain aspects of that job. I know Mr. Marceau simply forgot to mention that, but he should have, because I think it would have given Mr. Patey a better way of responding to the question, a fairer way.

What I'm concerned about, listening to the two marriage commissioners here.... For example, in Manitoba we have about 600 marriage commissioners, and the authorities sent out this letter basically firing those who wouldn't perform same-sex marriage, never once asking, could this have been reasonably accommodated by the state?

I'm wondering, Mr. Patey or the other witness, was there an opportunity you saw as marriage commissioners to be reasonably accommodated? That is, for those who did not want to perform those types of ceremonies, could that have reasonably been done?

Perhaps we could start with Ms. Dichmont.

● (1650)

Mrs. Diz Dichmont: I would suggest that in the same way bilingualism can be dealt with reasonably by having both services available, the same thing could happen indeed with marriage commissioners. You can have some who will be willing and some who won't; there's always someone available when the request comes.

I'll go back, if I may, to the other question about whether, as a marriage commissioner, I would respect the law. Indeed I would, not just as a marriage commissioner but also as a citizen. I feel I'm responsible for maintaining the law myself—not that I could maintain it for others; I didn't mean that. Certainly, there are ways accommodation can be made, there's no question about that, but they've been ignored—in our neck of the woods anyway.

May I mention two other things? The question of adoption bothers me hugely because that means if you have same-sex parents, there's a role model being missed by the child of whichever sex, and that is disastrous for the children later on as they grow up. I'm also concerned that if the courts can, by signature—and I'm not flattering courts—change the marriage act, can they not also, at a later date if they wish, because of some pressure group, change the law about polygamy and also incest? That rather worries me.

Mr. Vic Toews: I know that's another huge topic, but I want to hear from Mr. Patey on the issue of reasonable accommodation.

Mr. Cecil Patey: A reasonable accommodation has tried to be operative in some provinces by doing that thing. There are some cities that provide a list of 30 marriage commissioners and say to the couple, "Phone whoever you like, and if you strike up somebody who will do same-sex weddings, proceed; if some don't, then phone the next person".

To a degree, from a municipal point of view, that's reasonable accommodation. However, I believe it is not fundamentally reasonable accommodation. We have apples and oranges here.

● (1655)

Mr. Vic Toews: But what I'm trying to do is save your job.

Mr. Cecil Patey: Save my job?

Mr. Vic Toews: Yes.

Mr. Cecil Patey: Well, in effect—

Mr. Vic Toews: I'm asking you, could the government have reasonably accommodated your request?

Mr. Cecil Patey: In fact, they did. They provided a list of 30 people, and I was one of them. I ended up with a 90% cut in income —

Mr. Vic Toews: I see.

Mr. Cecil Patey: —because I'm not the exclusive person to do the weddings. The city has said, here's a list of 30, not a list of one. The effect for me has been that I have a 90% loss in my income.

Mr. Vic Toews: And that's something you'll prove then to the human rights commission?

Mr. Cecil Patey: Yes. I have made an appeal to the Ontario Human Rights Commission. I'm happy to say that they have served it upon the Attorney General of Ontario and the City of Barrie.

Mr. Vic Toews: Thank you.

Mr. Cecil Patey: So I'm pursuing that.

The Chair: We go now to the Liberals.

Mr. Macklin.

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

I'd just like to pursue this a little bit with you, Mr. Patey.

In the recent past, the Government of Ontario has introduced legislation that has attempted, I understand, to meet some of these concerns. Have you had a chance to examine that legislation to see whether it would have accommodated your concerns in any way?

Mr. Cecil Patey: What the Province of Ontario has done is make their Marriage Act gender-neutral. There's no longer a bride and groom; there's no longer a man and a woman; there's no longer a he or a she, or a husband and wife. There's just a respondent and a co-respondent. They've nullified gender differences.

Hon. Paul Harold Macklin: So it would it not have been helpful to you then—

Mr. Cecil Patey: That's not helpful to anybody. That's disastrous to everybody.

Hon. Paul Harold Macklin: Ms. Dichmont, with respect to when you entered into this occupation as a marriage commissioner, did they set out for you what your expectations were by some type of job description?

Mrs. Diz Dichmont: I don't know about the term "job description". They gave me instruction as to what had to be included and what was not necessary. That was really all there was—and a copy of the marriage act. They sent me examples of the forms that would be required, based on the licence, which I, of course, would not issue, and the forms that had to be filled in to certify the marriage. But that was all.

Hon. Paul Harold Macklin: So there wasn't any distinction made, or nothing that would limit the potential for you at some point to have to face this option of having to consider marrying—

Mrs. Diz Dichmont: None at all.

I did in fact about three years ago when I was conducting a wedding in an area where a same-sex couple was running the B and B where the ceremony was being conducted. One of the two—who are actually good friends of mine—said, "That's a lovely ceremony. One of these days we'll have to ask you to marry us." I made no comment at that time, but the next working day I phoned the department. I waited for over a year to get a reply to my inquiry. I said I wanted it in writing that my commission did not include same-sex marriage. More than a year later I had a letter, after many reminders, saying, according to the law currently, this is not part of your commission. That was the only time there was any reference to that.

Hon. Paul Harold Macklin: Where you practised your job as a marriage commissioner, how many commissioners were there on staff or available?

Mrs. Diz Dichmont: Oh, I have no idea. They'd just go to the web. There was nobody in my area at all other than me.

Hon. Paul Harold Macklin: So this concept of a reasonable accommodation, I'm just wondering how acceptable or possible that would have been within your jurisdiction. Do you think it would have—

Mrs. Diz Dichmont: Quite possible, because as soon as this came up at the end of December, the beginning of January, other people applied, including a woman who said that maybe one day I could marry her and her partner. She applied and several homosexuals have applied and have said they think their fellow homosexuals would prefer to have a homosexual marry them. Then surely if it's good for the goose, it's good for the gander. Straight people would prefer to have a straight person marry them. At least, that would seem logical.

● (1700)

Hon. Paul Harold Macklin: I liked your example suggesting that the analogy to language law was a way in which you thought this should be approached. I think that was a very good and appropriate analogy.

You sounded to me, in your opening statement, a rather broad-minded person, actually; not particularly prejudiced. Taking that into consideration, was there any discussion that in fact those of you who felt the way you did could have simply been grandfathered, or grandmothered in your case, possibly?

Mrs. Diz Dichmont: Grandparented, maybe.

There was none at all. Actually, in my letter of resignation I suggested it to them. I also wrote a letter to the Minister of Justice and pointed out a number of things and suggested that. I have, at various people's requests, put in a presentation to the Human Rights Commission and suggested, under the topic “Do you have any suggestions for how this can be resolved?”, that it could be grandfathered. But that has not gone to any hearing as yet.

Hon. Paul Harold Macklin: So as you look at the topic then, do you have an opinion on whether you see this as a question of evolution? In other words, people are going to have to work at trying to find accommodation and deal with these issues from province to province.

Mrs. Diz Dichmont: Yes, I think it should be looked at and developed, but at the same time, as I indicated, I'm really not convinced that it's not a storm in a teacup, to be quite honest. I'm not minimizing the rights of the homosexuals to have some ceremony, but I agree with the other speakers that using the term “marriage” is not necessary unless it's some sort of psychological thing the homosexuals really want, no matter what. But I don't see that there's any need for it, because other ways can be met.

And may I rather naively give you an acrostic that I put together the other day just to remember these things on marriage? It is a bonding between a man and a woman, allowing procreation, rearing of children by responsible parents, in traditional ways, always generating wholesome environments and examples.

I think when all is said and done, we have to come back to the fact that marriage is marriage, and it has been for centuries, through all kinds of cultures, to all religions, and it's not a case of just an isolated person here and there not being happy with it.

Hon. Paul Harold Macklin: Thank you.

[*Translation*]

The Chair: We go back to the Bloc Québecois. Mr. Marceau, you have five minutes.

Mr. Richard Marceau: Thank you very much, Mr. Chairman.

Professor Morton, I was a bit surprised by one of your statements and I want to make sure I understood correctly. You were asking why we should change the definition of marriage when it would only affect 4% to 6% of Canadians.

Is this really what you said? If not, can you tell me exactly what you meant to say?

[*English*]

Mr. Ted Morton: I said that once you take the misleading and confused claims of charter requirements and human rights off the table, you're looking at a public policy as a parliamentarian, as a law-maker, the way you should look at any public policy. And that is, do the benefits outweigh the costs?

There may be some benefits to same-sex marriage to homosexual couples, but I'm suggesting that there are also significant costs to the rest of the population in terms of the effect it will have, not on my marriage or marriages of this generation, but going forward into the future. So there are benefits and costs, but the costs are going to be incurred by 95% of the population that is not homosexual and to which the benefits of homosexual marriage do not accrue.

I actually have noted that a number of homosexuals themselves have noted that they thought it was quite important, even for them, to have both a mother and a father, so I'm not even sure that homosexual marriage would be a benefit to all homosexuals.

● (1705)

[*Translation*]

Mr. Richard Marceau: In the preamble of your answer to my questions, you state that, if we put aside all the claims made on the basis of the Canadian Charter of rights and freedoms...

I would like to know how we could put all that aside when, as you know, 8 jurisdictions in Canada have already stated that, on the basis of the Charter, the traditional definition of marriage is unconstitutional.

How could we leave aside this aspect of the debate?

[*English*]

Mr. Ted Morton: You have to go back to what I said earlier. It cannot be disputed that neither the term “sexual orientation” nor the terms “homosexual marriage” or “gay marriage” appear in the Charter of Rights. In fact, the term “sexual orientation”, which became the legal foundation for going to the next step, to gay marriage, was explicitly rejected in two different contexts back in the fall of 1981 when the charter was being framed.

We can talk all we want about large and liberal interpretations and updating constitutional meaning, but when you change the meaning of the charter to mean something that is the opposite of what was originally intended, you've amended the charter. And it's hardly surprising that eight courts have done this. You're a lawyer, I believe, and you know as well as I do that once precedents are established, the rest fall like dominoes. This has been very carefully orchestrated in terms of the sequencing of these cases, so it's hardly surprising at all.

What I'm simply saying is that as the members of this committee, as members of a parliamentary democracy, as members of a legislature, and particularly as members of a democracy in which the final word for constitutional meaning is left with you...thanks to the notwithstanding clause, we're not a nation of constitutional supremacy. We're a nation, in the end, of parliamentary supremacy because Parliament gets the last word, still, under the notwithstanding clause.

As a lawyer, I know you understand the genesis of those legal decisions and the logic in them, but I would expect you, as a parliamentarian, to acknowledge at least the plausibility of the line of argument I just laid out.

[*Translation*]

Mr. Richard Marceau: In conclusion, Mr. Professor, do you believe that Parliament should use the notwithstanding clause to protect the so-called traditional definition of marriage against the decisions that we have both referred to?

[*English*]

Mr. Ted Morton: As the advocates of gay marriage claim that this is a constitutional right, a human rights issue, but it was explicitly kept out of the charter to begin with, the proper way to change the meaning of the Charter of Rights is through the constitutional amending process, and that is not that demanding in this context. It's not the unanimity requirement that was the source of the defeat of things like the Meech Lake and Charlottetown accords. Seven provinces plus the federal Parliament, provinces with 50% of the population, are certainly sufficient to add this to the Charter of Rights in a democratic country, if Canada still wants to call itself a democracy. I suggest this is the way it should be done.

[*Translation*]

Mr. Richard Marceau: Thank you.

[*English*]

The Chair: We're going back to the Liberal side.

Mr. Savage, for five minutes.

Mr. Michael Savage (Dartmouth—Cole Harbour, Lib.): Thank you, Mr. Chair. I don't think I'll take all of my five minutes.

I apologize. I was late. I was speaking in the House on another issue from another committee I'm on. We have a busy schedule these days. I try to get to all these sessions, and I apologize for being late.

I just have one question of clarification, and then I have a question that may have been asked before, and if that's the case, I'll cede some time.

My fellow Irishman, Mr. Patey, you indicated that your income had dropped by 90%. Are you still doing marriages?

Mr. Cecil Patey: Whenever the phone rings, which is very seldom.

Mr. Michael Savage: So you're still going to continue to do them?

Mr. Cecil Patey: Yes. My licence wasn't removed, but I removed myself from doing same-sex marriages.

● (1710)

Mr. Michael Savage: So you're prepared to still do marriages but not same-sex marriages?

Mr. Cecil Patey: Of course. I didn't resign; I was fired.

Mr. Michael Savage: My other question—and it may have been asked—is as a legislative committee we're primarily focused on the technical aspects of the bill. Are there changes that can be made to this bill, other than scrapping it, that would satisfy anybody here?

Mr. Doug Farrow: If you're going to pass this bill you certainly ought to remove the incoherences and inconsistencies in the preamble. But once you finish doing that you won't have any basis for passing the bill.

Even terms like "the right of couples"—what's the right of couples? Does that have an established legal tradition behind it? Where does this language come from?

Mr. Michael Savage: So nothing short of really gutting the bill would satisfy you on this.

Mr. Doug Farrow: Its operative clause is either there or not there. So it's not really a matter gutting it; it's a matter of either passing it or putting it in the garbage.

Mr. Michael Savage: Dr. Morton.

Mr. Ted Morton: There was discussion earlier, before you got back, about the difficulty—impossibility, in my opinion—of federal legislation trying to provide special protection for areas that fall under provincial jurisdiction.

Mr. Michael Savage: Yes, we've talked about that a fair amount. Do you think that could be covered off in this bill to make it acceptable to you?

Mr. Ted Morton: No. I think for the same reason the Supreme Court said that under the federal division of powers, provinces do not have the jurisdiction to define the capacity to marry, the federal government does not have the jurisdiction to deal with issues of property and civil rights, which include labour law, the anti-discrimination clauses, and the types of reasonable accommodation that were discussed earlier, before you got back.

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

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

Mr. Patey, I'm confused about your exact status as a marriage commissioner. When you first started, you said that you'd been fired by the City of Barrie.

Mr. Cecil Patey: I didn't lose my licence to do weddings.

Mr. Bill Siksay: So you're still a marriage—

Mr. Cecil Patey: I'm still licensed by the Province of Ontario to do weddings. And all those weddings are understood as X and Y.

Mr. Bill Siksay: And the City of Barrie still puts forward your name to—

Mr. Cecil Patey: Well, I'm on a list of 30, but that list is expanding all the time.

Mr. Bill Siksay: So you weren't fired by the City of Barrie then.

Mr. Cecil Patey: Yes, I was removed from my duties as the one who did all the weddings the City of Barrie had. I was interviewed for the job and hired four years ago.

Mr. Bill Siksay: Was this part of the City of Barrie trying to accommodate the—

Mr. Cecil Patey: At the time, there was no sight of homosexual marriage coming down the pipe. For me, it came on the agenda 25 years ago, when I was a United Church minister in Alberta. That church went through that crisis at that time, and still is in crisis, along with the Anglicans.

However, you have a declining interest here in the whole problem. There's a walking away from credibility here on the part of many people when it comes to this whole effort to institutionalize same-sex marriage. The fact is that most United Churches, congregations and official boards, have voted whether they will do weddings of such people in their church, and most of them are saying no, we won't. There's only one or two or more so-called former moderators and others who are speaking to the press, and those are the people the press are interviewing. By and large, the presbyteries down the road, out in the country, have said they're not going to do these kinds of weddings if their minister doesn't want to. So if the minister doesn't want to, they don't do the weddings.

Again, there are one or two in every presbytery; there are 90 presbyteries across the country. So you can have one in every presbytery who wants to go ahead. The examination has not followed the line of argument that folks in Toronto have told them they're permitted to do.

● (1715)

Mr. Bill Siksay: That's certainly not my experience, Mr. Patey. Certainly the majority of congregations in my presbytery of the United Church are performing same-sex marriages, and my own congregation is doing it quite happily.

Mr. Cecil Patey: Well, I would ask you to—

Mr. Bill Siksay: This year in the annual report of my congregation, the majority of marriages done in that congregation were with same-sex couples. It's something my congregation supports.

Mr. Cecil Patey: Well, add up the number of congregations in your presbytery and see how many are pro and—

Mr. Bill Siksay: As I say, it's the majority.

Mr. Cecil Patey: Well, I'd like to talk to you later about that. I will be able to check out the yearbook through my own sources.

Mr. Bill Siksay: I just take issue with your description of the situation in the United Church and your lack of confidence.

You mentioned you used a service book of the United Church to plan your services. Have you seen the new United Church service book, in terms of marriage resources?

Mr. Cecil Patey: No particular United Church minister is required to conform to a particular service.

Mr. Bill Siksay: I understand that. I just asked if you'd seen the new one.

Mr. Cecil Patey: I've seen many kinds of services over the years, including homosexual ones, but that's provided as a resource by the top. The United Church is not like a papacy, where the guy at the top calls the shots.

Mr. Bill Siksay: That's very true.

Mr. Cecil Patey: We have congregational decisions that are saying, “Hey, we don't want to go this way, thank you very much. Pass it up and send the folks down the road somewhere else.”

Mr. Bill Siksay: That's one of the things we celebrate in the United Church.

Ms. Dichmont, you told us of a definition of marriage that you found particularly helpful recently, as the union of a man and a woman, and you mentioned procreation and the rearing of children as part of that. I'll ask you a question I asked Mr. Patey a while back, whether when a couple came to you for a civil marriage, you made that a requirement of marrying them.

Mrs. Diz Dichmont: Of course not.

Mr. Bill Siksay: So you would marry folks even if they had no intention of procreating or—

Mrs. Diz Dichmont: The question never came up.

Mr. Bill Siksay: Okay. Thank you.

The Chair: We now have 15-minute bells on a vote. The vote will be a little after 5:30, so we still have some time.

Are there any more questions?

Mr. Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you very much, sir.

First, I'd like to say to Mr. Farrow, I don't have any questions for you, but I thoroughly enjoyed your analysis.

Dr. Morton, I have studied constitutional law, both at Bond University in Australia and at the University of Calgary, and I can't agree with you more. I can't see this as a rights issue, and I don't know why we're addressing it as this, or the government is. It's obviously a public policy issue, and I would suggest that we deal with it on that basis, which makes much more sense, no matter what the outcome.

My question to you, Dr. Morton, today is that obviously you know the Supreme Court has ruled that the federal government doesn't have the authority to regulate same-sex relationships or same-sex unions under any other title than marriage.

The courts obviously, through common law, have done power grabs for years, and I would suggest that the federal government continues to do that. Do you see this in any way as a power grab by the federal government in relation to the regulation of same-sex marriages under the title of marriage? Have you addressed your mind to that at all, since the Supreme Court has specifically said that the federal government doesn't have the power to regulate under anything else except marriage?

Mr. Ted Morton: Because marriage and divorce are explicit federal jurisdictions under section 91, whereas things like Quebec's civil union act or Alberta's Adult Interdependent Relationships Act fall under property and civil rights and are under provincial jurisdiction...?

Mr. Brian Jean: Yes. Do you look at this as somewhat of a power grab by the federal government, or at least taking the ability to regulate same-sex marriages out of the jurisdiction of the provinces?

Mr. Ted Morton: That interpretation certainly is plausible. I'm more concerned with the question of democratic accountability. I think this policy change is more fundamental and more important than any domestic policy change, certainly more important than any other Charter of Rights decision that has been made since 1982.

When there are decisions of this import whose policy consequences are as far-reaching and long-lasting as this, I think it's appropriate that it be made through a process that is democratically accountable. It has been driven by the courts to the point it is now, and the government of the day continues to use the “human rights and the charter require it” approach, even though the Supreme Court, of course, refused to answer that specific question in the December reference.

● (1720)

Mr. Brian Jean: Dr. Morton, you suggested Australia, and you talked about that legislation, and others in Europe, I believe, specifically excluding same-sex relationships from being defined as marriage. What international complications do you see as a result?

Obviously we're in a global economy, and in regard to immigration, 20% or 25% of Canadians are from other countries. Do you see this as being a major issue in the future, going to other countries and having people come to this country, same-sex couples obviously being married in Canada and going to the United States, and also overseas? Do you see this creating problems? Do you see this being an immigration problem in the future?

Mr. Ted Morton: We certainly know, for the time being, with the possible exception of Massachusetts—and that may be pending—that if you had same-sex couples married from Canada, that's not going to be recognized in the United States.

Are you asking me, if we make this policy leap, whether that will deter immigration from other countries?

Mr. Brian Jean: I'm thinking more of difficulties for our citizens emigrating to other countries.

Mr. Ted Morton: I don't know that it would make it difficult for traditional married couples to travel or emigrate. But as I said, I don't see the international community leaping up to recognize what's happened in Belgium and Holland, although there is some litigation in fact ongoing in Europe right now on that.

Mr. Brian Jean: My final question is, do you see any option for compromise in this case? It seems the same-sex proponents want the term “marriage”. Is there any way for compromise that you could suggest as far as the technical aspects of this bill are concerned? I know Mr. Savage has asked that same question. Do you see any other areas where there might be some compromise that would actually bring this country back together? There are divisions. Most of them are regional differences.

I see Mr. Farrow has his hand up in relation to that.

Mr. Doug Farrow: It's not in relation to that.

Mr. Ted Morton: No, I do not. I think the alleged attempts to protect freedom of association or freedom of religion are themselves constitutionally impermissible and would be found to be such. It would depend upon the provinces. We know from the experience with marriage commissioners that a lot of provinces, and particularly provincial human rights commissions, have very little interest in protecting freedom of association and freedom of religion when confronted with a gay rights equality claim.

The final backstop is the courts. Again, because the courts are interested in giving large and liberal interpretations to equality claims but aren't very interested in giving large and liberal interpretations to freedom of speech or freedom of association or freedom of religion claims when the two butt up against one another, I don't see the courts being a particularly reliable backstop for these problems either.

Mr. Brian Jean: Thank you.

I see Mr. Farrow has a point he would like to make.

Mr. Doug Farrow: It's in another connection, but I would like, if I could, to clarify my answer to Mr. Savage's question about gutting this bill.

These kinds of hearings that you're having now will be had ad nauseam—if it isn't already that for you—if this bill passes, because of the very issues Professor Morton was just speaking of. I'm not asking that this bill be gutted, but I am saying it is not too late to go back to look at the fundamental inconsistency and incoherence of this bill.

When the Prime Minister rose in the House to inaugurate the debate, he said that times and perspectives have changed:

> That is as it should be. Our laws must reflect equality, not as we understood it a century or even a decade ago, but as we understand it today.

A moment earlier he said, “Our rights must be eternal, not subject to political whim.” Our Prime Minister in the House said that to inaugurate this debate. This is fundamentally incoherent. Those are two absolutely diametrically opposed positions.

This whole debate and this bill are characterized by that kind of incompetence and incoherence.

● (1725)

The Chair: Thank you.

If you will allow me, I'll use my discretion to offer Mr. Brown a question—a few minutes.

Mr. Gord Brown (Leeds—Grenville, CPC): I know we have to go. Thank you, Mr. Chair.

I have a quick question for Professor Farrow. I know it would be shocking to some to find that we actually hear a fair bit of rhetoric around here. There were two things you said that on the face of them would appear to be that. One was about the end of liberal democracy and the other about the rise of tyranny. I suspect there's something behind that. I'd like to hear a little, very quickly, about what led you to say that.

Mr. Doug Farrow: It leads back to Mr. Siksay's point again. It's a question of the state's interference in places it doesn't belong. One reason marriage commissioners don't ask people “Are you planning to have children?” is that they should not be obligated to give that answer to the state. It has nothing to do with the definition of marriage. It has to do with their right to privacy.

If you pass this bill, as I said before, you take the fundamental, basic relationships between human beings, which start out between mother and father and their own children, and turn them over to the lawyers and to the state: “legal” parent-child relationships, not natural parent-child relationships. That's what your bill knows it's doing in the consequential amendments. There are enormous ramifications that can only lead to that kind of tyranny down the road.

I'm not saying the drafters of this bill intended to introduce tyranny. I'm saying that if you follow that path, it can only go there. We need to have a serious discussion in this country about the long-term ramifications of those moves.

The Chair: Thank you.

Mr. Gord Brown: Thank you very much.

The Chair: Thank you very much to the witnesses for travelling to Ottawa to meet with us. We appreciate your cooperation.

For those who are interested, our next meeting is tomorrow afternoon at 3:30.

The meeting is adjourned.

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