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Chair

The Honourable Don Boudria

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● (1105)

[*English*]

The Chair (Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.)): Order.

Colleagues, today we're considering the report from the Subcommittee on PrivateMembers' Business on the matter of Bill C-268. As you know, the Subcommittee on Private Members' Business has recommended in its report that the private member's bill in question be not votable. It has outlined in its report the reasons why it has so decided.

Pursuant to our Standing Orders, we have this morning the sponsor of the private member's bill, who wishes, pursuant to our rules, to testify and to make his case, as it were, before the full committee. I guess we could call this an appeal to our committee in the matter of the first report of the subcommittee.

Mr. Moore, do you have a brief statement to make before colleagues have questions, and if so, would you like to do this now?

Mr. Rob Moore (Fundy Royal, CPC): Yes, thank you.

The Chair: Thank you, Mr. Moore. You may proceed.

Mr. Rob Moore: First of all, thank you for the opportunity to speak today. My private member's bill, Bill C-268, would, if passed, provide for a legislated definition of marriage for Canada.

I've reviewed the criteria for acceptance as a votable private member's bill, and I feel that this bill clearly meets all of the requirements set out in the Standing Orders.

First, bills must be within the federal jurisdiction. Section 91 of the Constitution provides that marriage falls under the federal jurisdiction. The proposed government legislation, which has been sent to the Supreme Court of Canada, also seeks to define marriage—in a manner different than my bill does, but it's clear that my bill does fit within the federal jurisdiction.

Second, bills and motions must not concern questions that are substantially the same as ones already voted on by the House in the current session of Parliament. There has been no such vote on any item of this nature in this Parliament, so it clearly meets that second requirement.

Third, bills and motions must not concern questions that are currently on the order paper or notice paper in terms of government business. Again, there is no question of this nature on the order paper or notice paper as an item of government business.

Clearly this bill meets those three requirements. It is equally clear that the bill meets the fourth requirement upon which the subcommittee denied its votability.

To say the least, I find the rationale for the subcommittee's rejection of votable status for my bill alarming. To suggest that this private member's bill is clearly in violation of the Canadian Constitution is to take on the role of justices of the Supreme Court, not parliamentarians.

It is the constitutionality of the traditional definition of marriage that is the very issue in the reference from the Attorney General of Canada put forward to the Supreme Court of Canada on January 28 of this year. The reference question states:

> Is the opposite-sex requirement for marriage for civilpurposes, as established by the common law and setout for Quebec in s. 5 of the Federal Law—Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

It appears to me that the subcommittee has prejudged the outcome of this important reference to the highest court of the land, and that to uphold the subcommittee's decision would be contemptuous of both the Supreme Court of Canada and the Attorney General of Canada. If the constitutionality of even the common law definition of marriage, let alone a legislated definition, were clear, there would be no need to ask the Supreme Court of Canada the question. The Attorney General has put a bona fide question to the court. Why would the Attorney General waste taxpayers' money and the high court's time to answer a question that clearly has been answered? It is abundantly clear that the subcommittee's determination is both premature and invalid.

Under our judicial system, a decision of a provincial court has application only within that province. The only court decision that applies to every province is the Supreme Court of Canada. The Supreme Court of Canada has not spoken on this issue. In fact, by the terms of the reference question, the opposite-sex definition of marriage remains the common law and is the definition most recently upheld by Parliament as part of the Modernization of Benefits and Obligations Act.

In this respect, the ruling of the subcommittee is in breach of the law passed by Parliament less than four years ago. The definition of marriage contained in this bill is the same one that is the law in four provinces and two territories in this country. Further, the B.C. and Ontario courts of appeal went to great lengths to emphasize that they were changing the common law definition of marriage, and that there was no legislated foundation for marriage to deal with. My bill contains a legislated definition of marriage that the courts have not yet dealt with.

Further still, the Quebec Court of Appeal refused to allow an appeal of the lower court decision due to the fact that substantially the same question that would be dealt in such an appeal was already before the Supreme Court of Canada in the reference case. As I have already mentioned, one of those questions in the reference case is the constitutionality of the traditional definition of marriage.

● (1110)

As honourable members know, oftentimes a provincial court of appeal is overturned in favour of a lower court decision by the Supreme Court of Canada. In both B.C. and Ontario there are lower court decisions that found the traditional definition of marriage was in fact constitutional. Further, the Supreme Court of Canada has never indicated in any ruling that the traditional definition of marriage was unconstitutional.

Finally, the option of legislating the traditional definition of marriage was contained in the justice department's discussion paper on this matter. To adopt the subcommittee's finding is to say that the Department of Justice put forward an unworkable option to Canadians in the discussion paper.

I'd like to conclude by saying that the Standing Orders do not say that a bill is non-votable because it may, or could, or likely, or possibly violates the Constitution. The threshold we must deal with is much higher than that one. A bill must, according to the Standing Orders, clearly violate the Constitution to be deemed not votable. And I submit that in light of the facts I have put forward, this bill falls short of this threshold.

I think it's important for members to remember and for Canadians to understand that allowing this bill to proceed through our democratic process in no way indicates support for the substance of the bill, but failure to do so does clearly indicate suppression of democracy.

I ask that this committee consider the spirit of the new rules on private members' business. By denying parliamentarians the opportunity to vote on my bill we are subverting the limited democratic gains we have made in this House. Further, I would consider it a breach of my rights as a parliamentarian for this committee to overstep its mandate and to deny my bill a vote in the House of Commons. We must remember that it is the role of Parliament to legislate, not to determine the validity of legislation. That role, in our system, is filled by the courts.

It is my understanding that none of the other 29 private members' bills considered by the subcommittee were denied votability. I ask that you give parliamentarians a chance to have their say on this important issue and not set the undemocratic precedent that whenever a bill the other parties do not like comes forward it would be rejected.

I thank you for taking the time to hear my submission and look forward to your questions.

● (1115)

The Chair: Thank you very much.

First on our list is Mr. Dale Johnston.

Mr. Dale Johnston (Wetaskiwin, CPC): Thank you, Mr. Chairman.

Thank you for your presentation.

I think we have to look very closely at the criteria on what makes a bill eligible for votability, or more precisely—I guess they're all votable—what makes them eligible for non-votability.

They must fall within federal jurisdiction, which this clearly does. They must not be on a subject that's dealt with in this Parliament, which this has not been. They must not duplicate a government initiative, which this does not. And they must not clearly violate the Constitution, and it's quite clear to me that it does not clearly violate the Constitution.

Therefore, Mr. Chairman, I think we should not only support the spirit of the agreement as was laid out for eligibility of votable private members' bills, but we should also support the letter of the agreement. Support it to the letter.

The Chair: Thank you very much, Mr. Johnston.

From the government side, any questions to the witness or any observation, for that matter?

[*Translation*]

Go ahead, Mr. LeBlanc.

[*English*]

Hon. Dominic LeBlanc (Beauséjour, Lib.): Thank you, Mr. Chairman, and thank you, Mr. Moore.

I guess we're neighbours in New Brunswick in constituencies. Your constituency adjoins mine, and in fact a portion of the riding you represent, I represented in the last Parliament.

I'm sensitive, Mr. Moore, to what you're advancing in terms of the role of Parliament, the ability of legislators to vote on matters, including private members' bills. Mr. Johnston enumerated a number of criteria upon which we should decide whether in fact a private member's bill is votable or is in order. Obviously, the criterion that has caused some concern, as I understood the subcommittee's proceedings and as Mr. Johnston said, was the issue of its clearly violating the Constitution. This would become the subject of discussion. Certainly from my perspective your bill would meet those tests presented by the other criteria that were enumerated.

Here's the problem I have, and it's a bit of a chicken and egg type of discussion. You said we would prejudge the Supreme Court if we were to render your bill non-votable. Could you not make the same argument by saying if Parliament were to suddenly legislate something like this now, while the Supreme Court is seized of the question—and it's a reference, it's not an actual appeal, and there's a difference—to some extent we would be prejudging the Supreme Court opinion that it's going to give us in answer to the reference? I'd be curious to hear from you how this contradiction might be answered.

You talked about a waste of taxpayers' money or time if the Minister of Justice didn't believe there was some need for clarity on these issues. I certainly supported the idea of a reference, and that's why I would support the concept that we wait until we have the benefit of the Supreme Court opinion before we would proceed to legislate.

As a final question, and it comes back to my earlier point about clearly violating the Constitution as a ground to decide that a *projet de loi*, a bill, should be non-votable, you do have the decisions of courts of appeal in six provinces, I believe. These courts have clearly said that the current definition is unconstitutional, in their view. In the absence of a Supreme Court decision overturning those courts of appeal, those decisions are the law of the land.

It's not a suppression of democracy. That was decided in 1982 with the Constitution Act. The courts, under the Charter of Rights, have the authority to find legislation or law, including common law, unconstitutional. It's happened in many jurisdictions.

In the absence of a Supreme Court decision to the contrary, I would submit to you that this is the law of the land, at least in a majority of provinces. Your bill, as I understand it, would violate that law clearly established by those courts of appeal. We probably agree on many of the same concepts, but we're coming at them from perhaps opposite angles. I'd be curious to see how you square that.

● (1120)

Mr. Rob Moore: Thank you for your question.

The Ontario and B.C. courts of appeal have ruled that the common law definition of marriage was unconstitutional. In Quebec, the lower court ruled that the definition set out in the Federal Law-Civil Law Harmonization Act was unconstitutional. The court of appeal, though, in Quebec did not hear the appeal because it said of this matter that substantially the same question is before the Supreme Court of Canada.

You're right, there are four jurisdictions in Canada, four provinces and two territories, where the traditional definition, the common law definition, is the legal law in those provinces. For example, you mentioned the province we share, New Brunswick. The law in the province says that the definition of marriage is the common law definition we have always known, the union of one man and one woman, for example.

In that case it is not clear, and that's why we have a Supreme Court. Arguments can be made to and fro as to whether the various courts of appeal decisions should then be appealed to the Supreme Court of Canada. Many would argue that they should have been.

The government at the time decided not to appeal those decisions and to put forward this reference question. That is one of the questions. The question is, is the traditional common law definition of marriage constitutional? The Supreme Court has not rendered its decision yet.

In my mind, I think that makes it unclear as to...it certainly makes my bill not clearly unconstitutional. If the Supreme Court, which you acknowledge is the highest court in the land, has not yet rendered its decision, we should not contemplate or prejudge what the Supreme Court is going to say.

Your first point, would we not be prejudging the reference, is valid. There is a reference before the court. However, we've seen comment from Chief Justice Beverley McLaughlin, who has said that the court should not be used in this manner, that legislation should come forward from government, or that an appeal should be taken. That's the appropriate manner. The court does not have the capability to make major decisions of this nature.

That said, the fact that there's a reference before the Supreme Court is not one of the criteria to deny votability to a bill. It might be in practice. It might be a reason why you may not want the bill to come forward, but it's not one of the criteria that the subcommittee or this committee can use as a determinant as to whether this bill comes to a vote.

The Chair: We'll have to come back to this round if you have more questions. We're way over time with this particular question.

[*Translation*]

Mr. Guimond.

Mr. Michel Guimond (Montmorency—Charlevoix—Haute-Côte-Nord, BQ): Thank you, Mr. Chairman.

Mr. Moore, I read your bill, which contains only three clauses. First I want to tell you that I sat on the Sub-committee on Private Members' Business, which has already rendered a first decision. The criteria we must rely on in determining whether a bill is votable have been established by the parties in the House of Commons. It might be useful to recall them.

Bills must not concern matters that are not under federal jurisdiction. Bills and motions must not clearly violate the Constitution Acts from 1867 to 1982, including the Canadian Charter of Rights and Freedoms. Bills must not concern matters that are essentially the same as matters on which the House has previously taken a position. Bills must not concern matters that are on the Order Paper.

It is my opinion—and it's up to you to convince me of the contrary—that your bill does not meet the constitutionality test or, more particularly, that concerning respect for the Canadian Charter of Rights and Freedoms. Have you examined the relevant sections of the Canadian Charter, Mr. Moore?

● (1125)

[*English*]

Mr. Rob Moore: Yes, I have.

[*Translation*]

Mr. Michel Guimond: Do you think your bill is consistent in all respects with sections 1 to 15 of the Canadian Charter?

[*English*]

Mr. Rob Moore: That's a valid question. The criterion this committee must consider is, does my bill clearly violate the Canadian Constitution, including the Charter of Rights?

I firmly believe that is answered in the negative, which is why I brought this appeal forward, because we're not going to have clarity as to the narrow question of the constitutionality of the common law definition of marriage until we have a decision from the Supreme Court of Canada. The Supreme Court will be the final determinant as to the constitutionality of that common law definition.

For a number of reasons I've already set out, my bill certainly does not reach that threshold of being clearly in violation of the Constitution. For one, the Supreme Court has not rendered its decision. The Supreme Court has been given this reference question by the Attorney General. It has not rendered its decision. I think for us to say that my bill clearly is in violation—not maybe, possibly, could be, should be, but is clearly in violation—of the Constitution is to prejudge the reference.

Further to that, the court is being asked about the common law definition of marriage. This is a legislated definition. My bill goes beyond just setting out and reaffirming the traditional definition. It's for a future court to consider. But we should not as parliamentarians prejudge what a court would do with a particular piece of legislation.

[*Translation*]

Mr. Michel Guimond: I don't understand you when you say that your bill doesn't violate the Charter since the Supreme Court hasn't rendered its decision. I don't know whether you're a lawyer by training, but I am. Being a lawyer isn't a guarantee of infallibility, but I want to tell you that, until the Supreme Court has rendered its decision, the decisions of the appeal courts apply. That is the current state of the law in Canada.

Where the Supreme Court rules differently, Parliament must adapt the statute to the decision that has been rendered. That's why we have to amend lots of acts. You say your bill is consistent with the Charter because the Supreme Court has not yet ruled. I'm sorry, but I have to tell you you're wrong.

Earlier you answered Mr. LeBlanc that the Quebec Court of Appeal had not ruled. I refer you to a March 2004 decision in which the Quebec Court of Appeal unanimously held that an organization that had challenged same-sex marriage before the Superior Court could not appeal from the decision rendered by the Court in 2002 under the Charter. The Court lifted the suspension imposed by the lower court, enabling same-sex spouses to marry legally in the province.

In Quebec, that decision is law. The Government of Quebec has accepted civil union so that same-sex spouses can marry. So allow me to disagree with what you've just said about the fact that the Supreme Court has not yet ruled.

● (1130)

The Chair: Mr. Moore, please.

[*English*]

Mr. Rob Moore: What you're talking about are two different thresholds. On one hand you're asking, is the traditional common law definition of marriage constitutional? That's not the question this committee is being asked to consider. It's whether my bill is clearly unconstitutional.

If we look at the Quebec appeal case, the reason the appeal was not allowed—one of the rationales the Quebec Court of Appeal used—is that the very question of the constitutionality of the traditional definition of marriage was in the Supreme Court. That's one of the rationales the Quebec Court of Appeal used to refuse an appeal. They weighed very heavily the fact that this very question that those who were intervening were trying to base their appeal on was in the Supreme Court.

So the Supreme Court is being asked the question, is the definition of marriage set out in the Federal Law-Civil Law Harmonization Act, and also in the common law...is it or is it not unconstitutional? They have not rendered their decision yet.

Further to your other point on some of the jurisdictions that have followed suit with what the Ontario and B.C. Courts of Appeal have done, those are the two courts of appeal that have ruled on this matter specifically. In Ontario there were conflicting lower court decisions, but the courts of appeal have ruled in this matter. Some other courts have followed suit, but in four provinces and two territories in this country the traditional definition of marriage remains as it always has.

So to suggest that my bill is clearly unconstitutional.... I do not believe my bill comes anywhere near that threshold, and it is under the threshold.

[*Translation*]

The Chair: Thank you.

Mr. Godin, the floor is yours.

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Mr. Chairman. Mr. Moore, thank you for appearing before the committee.

As you can see, we're not sitting in camera today. I've come back to this question because the newspaper said that holding in camera meetings on a subject such as this was undemocratic. Did you know that your party approves of these in camera meetings and was one of the political parties that put the system in place?

[*English*]

Mr. Rob Moore: As for those provisions that provided for in camera...I think your colleague Mr. Broadbent agrees with me that when a subcommittee is deciding whether or not a member of Parliament's bill can be votable, that should be as open a process as possible. In light of experience now, in light of the fact that I was not able to attend that meeting or given a really detailed rationale for the decision, I firmly believe that should be held in public. I see that as a way of Canadians not being able to have access to what's happening behind the scenes in the democratic process. But whether it is in camera or not, the issue we're dealing with today is whether my bill meets that very high threshold.

I noted that the subcommittee, to my knowledge, has not deemed any other bills non-votable. There can be all kinds of reasons why people don't want to have a vote on this in the House—that it's before the Supreme Court, that it's a divisive issue, that they don't know how they may vote on it. All of those reasons are fair enough as to why you may not want to have a vote in the House, but that's not in the criteria set out in the Standing Orders. The Standing Orders set an extremely high threshold for Parliament to be denied debate and a vote on a private member's bill. I feel my bill falls well short of that threshold.

● (1135)

Mr. Yvon Godin: But on the record for Ed Broadbent, did he not say that on the surface of it this should be public. There's a difference between “on the surface of it” and “I agree that it should be public”. I just want to go on the record with that because that's the discussion I had. There's a difference between “on the surface” and “agree”.

As my responsibility as a member of Parliament, do I have the right to interpret that article, and, in my view, if I feel it violates the Charter of Rights and Freedoms, do I have the right to make that decision as a politician? Is it anti-democratic for me as a member of Parliament on committee to make that decision?

Mr. Rob Moore: I believe we've had a change in the procedures for private members' business. The strong presumption is that they'll all be votable. There are criteria that were agreed to, and some members have acted on that criteria. My appeal today is because my bill does not fit into one of those criteria. The criterion question is whether it's clearly unconstitutional.

In a country like Canada that has a Supreme Court that has not given a definitive answer on this question, I would ask us this. Where we have a separation of powers, where we have a parliamentary branch and a judicial branch, are we, as parliamentarians, going to take on the role of judge also?

The Supreme Court of Canada has been asked its opinion on the constitutionality of the common law definition of marriage. It has not ruled on a marriage act of this nature even. So we're taking several jumps ahead, as parliamentarians, to guess that maybe my bill is clearly unconstitutional. I'm here today because I feel it does not meet that criterion and that it is not clearly unconstitutional.

Mr. Yvon Godin: Okay, but, Mr. Chair—

The Chair: We'll be back.

Mr. Yvon Godin: Has it already gone by?

The Chair: Already, yes, but we'll put you on for another round, Monsieur Godin.

I have a few questions for our colleague, for our witness.

Would you agree, Mr. Moore, that once the courts have adjudicated on this issue and there is no appeal, that's valid law?

Mr. Rob Moore: When the court in Ontario or Quebec has adjudicated and there is no appeal, that's the law in Ontario or Quebec. That does not preclude legislation being introduced that impacts on that law and it does not prejudge any decision of the Supreme Court of Canada.

I have to emphasize again that throughout Canada our various jurisdictions are split on this issue.

The Chair: But if I may, you do agree that the decision by the court when not appealed is valid. Is it not true that the courts have ruled it in those jurisdictions as being unconstitutional?

Mr. Rob Moore: The courts of appeal in Ontario and British Columbia have ruled that the common law definition—and they went out of their way to emphasize that it was a common law definition and not any legislated definition—was unconstitutional. That in no way infers that my legislated definition is clearly unconstitutional, especially when the Attorney General of Canada, to get clarity on this issue, to get finality on the question, has put this question by way of a reference to the Supreme Court of Canada. The Supreme Court has not rendered its decision, and I think we're being presumptive as parliamentarians to guess—and it's a guess—how the Supreme Court is going to rule on that. If the Supreme Court answers that—

The Chair: But may I suggest to you that's a different issue, sir. The issue before us is whether something is unconstitutional. I think you've just agreed with me that a number of courts in Canada have said that is the case. Whether or not the government seeks a reference does not change our Standing Orders.

At the present time, as we're speaking now, would you not agree that in those jurisdictions the definition that you are seeking to amend is unconstitutional today?

● (1140)

Mr. Rob Moore: As I emphasized in my speech, the courts of appeal in both of those jurisdictions went to great lengths to distinguish a change in the common law from a legislated piece. A court has not contemplated that. The Court of Appeal in Ontario and the Court of Appeal in British Columbia have not contemplated that. The Supreme Court is the highest court in the land. It has been asked this very question. I guess I would put it this way. If it was clear law, if what you're inferring, possibly, makes it somehow clear law, then why would the Attorney General of this country ask the Supreme Court that question? Why would he ask a question that he knows the answer to? The answer to that is, he wouldn't. If it was a question that needs to be determined—

The Chair: I'll recognize another questioner, but with respect, we do not have as one of our criteria whether or not there is a reference before the court. What is before us is whether or not something is constitutional.

Mr. Reid.

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Thank you, Mr. Chairman, and thank you to our witness for being here.

The criterion listed in the Standing Orders is as follows:

> Bills and motions must not clearly violate the ConstitutionActs, 1867 to 1982, including the Canadian Charter ofRights and Freedoms.

It seems to me that when this provision of the Standing Orders is applied to the Canadian Charter of Rights and Freedoms it would preclude certain kinds of bills and not others. I would think it would reasonably be understood that it would preclude the use of a private member's bill that invokes section 33 of the Charter of Rights. That's the notwithstanding clause. I think that probably was within the intent of those who wrote this particular standing order.

However, this bill does not contemplate doing that. This bill contemplates, effectively, using the provisions laid out in section 1 of the Charter of Rights and Freedoms. Section 1 says:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In short, something that was impermissible under the common law may in fact be permissible as a restriction on the absolute understanding of rights, if it is prescribed by law and is found to be demonstrably justified in a free and democratic society.

That said, on that basis, had I been present and been a member of the subcommittee, I would have voted in favour of the permissibility of this bill going forward.

I want, though, to address the question that our chair raised in his intervention. It seems to me that one of the glories of our system of various appeal courts, going up to a single Supreme Court, is that it is possible, in a transition phase, for legislation to be impermissible in certain jurisdictions and permissible in others. But until the court of final appeal has ruled—and that's the Supreme Court—there is in fact no definitive statement that something is clearly and demonstrably against or impermissible under the Charter of Rights and Freedoms. That would be true even if the courts were dealing with a legislated definition of marriage, which they emphatically are not, meaning these are two separate issues.

So those are some considerations to take into account, and I'll invite our witness to comment on them in just a moment, but first I want to say something about the subcommittee.

This committee met in camera. That's something that's discretionary. It doesn't have to be in camera. It chose to do so.

The members of the committee did not avail themselves of expert advice.

The members of the committee and the committee as a whole met and dealt with all private members' business at the same time, without any of the individuals who put forward the pieces of legislation being present to present arguments in favour of that.

That includes myself. I have a piece of private member's legislation. I didn't know it had been discussed until I came to this meeting this morning and learned about that. So this group, this subcommittee, meets with the definition of a court or Star Chamber. People are not present at their own trial. We have a situation in which it is meeting in camera secretly so that members of the committee can't even say what went on there without breaking the rules of secrecy of the committee. It seems to me that this is a fundamentally dysfunctional way of dealing with this kind of business.

I would strongly suggest to this committee that we ensure that future meetings do not occur in camera and that MPs have the right to be present, to present evidence and indeed to correct misconceptions, which appear in this case to be have been operational in the decision.

That said, I'll ask our witness if he has any comments.

● (1145)

The Chair: Before the witness answers, Mr. Reid, it's my understanding that the subcommittee has always met in camera. We are quite free to change the rule, but with respect, to accuse colleagues who've utilized the procedure that has existed for a long time as somehow being disrespectful of others....

I invite colleagues to be careful, because I think the colleagues who sat on that subcommittee did a conscientious job. We may agree or disagree with them—and I'm not one of them; I didn't sit there—but we should be careful how we accuse colleagues.

[*Translation*]

Mr. Guimond has a point of order.

Mr. Michel Guimond: Thank you, Mr. Chairman.

I want to start a debate with Mr. Reid on this subject, but I would like to point out to him that the rules governing members' business were accepted by all parties, including that of my colleague Mr. Johnston, who sat with me when we amended the Standing Orders. If you want to repudiate what Mr. Johnston did at the time... In any case, these rules aren't fixed until the end of time. If they can be improved, if there is a way to improve them, we'll see about that. It's a principle that you shouldn't throw out the baby with the bath water. Don't try to divert the discussion onto the fact that this was done in a small committee in camera. That's how we operate under the new rules. If you want to suggest something else, submit it to the committee and we'll examine it.

The Chair: It's never a good idea to discuss changes to the rules on a point of order. It's not good for the process. If the committee wishes, we'll consider this question one day so that we can reflect on it carefully. We must be respectful of colleagues who take the time to sit on this sub-committee and who, until proven otherwise, do so in very good faith and in whom I have confidence as the chair.

[*English*]

Just a second. We have two more points of order. Monsieur Godin has one and there's one over here.

[*Translation*]

Mr. Yvon Godin: Mr. Chairman, I entirely agree with you that we have a witness to whom we should listen. However, it is intolerable that we should be accused of certain things. When we considered the Pankiw case, we did so in the same way, and we were never accused of doing so behind closed doors. The witness who was here today is able to present the case to the committee, and that's how it works. It's unacceptable that we should be accused of...

The Chair: We can come back to this another time. Are there any other points of order or can we discuss the answer Mr. Moore wants to give?

[*English*]

Oh, you had another point of order here.

Mr. Jay Hill (Prince George—Peace River, CPC): This is just a correction, because I don't want to leave your definition of what happened before with the old process.

The old process did have every MP who was selected or whose name was drawn appear before that committee to answer questions from that subcommittee. Then they did meet in camera after that to determine which bills, if any, would be votable.

I just want to make sure everybody clearly understands that this is a different process we have now, and Mr. Reid is quite correct in the sense that none of the members are allowed to appear before the subcommittee to defend their legislation before a decision is made. So that is different.

[*Translation*]

The Chair: Mr. Godin, go ahead.

[*English*]

Mr. Yvon Godin: A statement is made and it has to be corrected both ways.

Yes, on the old procedure, I agree with Jay, but after that, when we came out with the new procedure....

I'm talking about the one about Pankiw, which was done the same, under the new procedure, which your party agreed to. Your party agreed to this procedure under the new one.

The Chair: I would suggest to colleagues that we should perhaps listen to our witness, who's obviously prepared to present his case before us, and judge the merits of it, rather than anything else. With your permission, why don't we hear Mr. Moore answer the issue that was raised by Mr. Reid—that is to say, of course, these issues involving the merits of the bill.

Mr. Rob Moore: It raises an important distinction, as I mentioned, between something being constitutional and something, as is required here, not clearly violating the Constitution.

There has been no ruling as of yet, and as I've said, the Supreme Court of Canada has been given this valid question that parliamentarians may have wanted the answer to, that Canadians are interested in. The Supreme Court, through the Attorney General, put forward this reference. They've not rendered their decision. They've not rendered a decision whether the common law definition of marriage is constitutional.

I would suggest this committee go beyond even a higher threshold, where the onus is not so much for me to say whether or not my bill is constitutional, but it's for the committee to look at the criteria and say, this bill clearly violates the Constitution. I think that's an important decision. If we are going to sit here as a committee, especially when it's a subcommittee, and say, I've seen this bill and there are new components to it, or, I've taken a look at this bill and I've determined that it clearly violates the Constitution....

My suggestion to the committee is hold on a second; let's look at this. This is the question the Minister of Justice, with advice from the Department of Justice, has put to the Supreme Court. They have not rendered a decision. What we're saying as a committee, or what I hope the committee will not say, is that we don't really need to hear what the deliberations were; we don't really need to hear back from the Supreme Court; we've already decided. That is the threshold that this committee would be going beyond to deny my bill a vote.

It's a piece of legislation that has never been considered. It's dealing with a matter, a definition, that even at common law—and there is a distinction—the Supreme Court of Canada has not determined.

Across our multi-jurisdictional country we have this as the valid law in six of our provincial and territorial jurisdictions.

● (1150)

The Chair: Madam Redman is the next person who wishes to intervene.

Hon. Karen Redman (Kitchener Centre, Lib.): Thank you, Mr. Chair.

I've followed along very closely, Mr. Moore. Obviously this is something you've given a lot of thought to. I understand, I think, your line of logic; it just seems to me to be somewhat flawed.

You're referring to the fact that there is no legislative definition. I don't think anybody would disagree with you that there's not. In lieu of that, clearly the common law definition is what the courts have to deal with. To use that argument as one of the inroads into the basis of the legislation in both B.C. and Ontario, when it has been upheld by those courts of appeal....

The reference to the Supreme Court is not an appeal, it is a reference. From your comments, it sounds to me like you feel this might be quite important. While I wouldn't disagree with you, it's not binding; the rulings of the lower provincial courts would still stand.

In terms of bringing a bill at this point in time, it would seem just as plausible that the reference to the Supreme Court would say that indeed the provincial courts are right and that this is unconstitutional. If this is an important piece of information, why wouldn't you withdraw this piece of legislation, wait until we have the reference ruling from the Supreme Court, and then deal with it?

Mr. Rob Moore: That's a good question, but you see, it's dealing with something that I think is quite distinct from what the committee has been charged to deal with—that is, and you've suggested this, it's plausible that the Supreme Court could rule similarly to how, for example, the Ontario Court of Appeal has ruled. It's plausible, it's possible, but it hasn't happened; therefore, the law in Canada is not clear.

As I already mentioned, those decisions are binding on the common law definition in those provinces where they've taken place. But to suggest that somehow, because some of those provinces have followed suit with what Ontario has said, or looking at Ontario or B. C. specifically, then my bill is clearly unconstitutional....

Even if there were a Supreme Court decision, it wouldn't necessarily mean my bill would be clearly unconstitutional. There are two to three hoops, logical hoops, you'd have to jump through that I don't think should be jumped through by this committee.

One, you have to prejudge what the court is going to say. I think we all agree that on matters of questions of law, the Supreme Court is the highest court in the land. And it is. They've been asked this question on the common law definition and they haven't answered yet. It's not for us to guess what they're going to say. If the Supreme Court should rule that the common law definition of marriage is....

Let's say the answer they give to the reference is, “Yes, it is, it's unconstitutional”, that still doesn't make my bill clearly unconstitutional. That would be for some future court, at some future time, to consider. They are dealing specifically with the common law definition, and they haven't answered the question.

What I'm saying is that the committee, to rule against my bill being votable, has to jump several steps ahead of where we are right now, and I just don't think it's advisable to do that. I don't think it's right to do that. The wording is very clear, and it's a very high threshold. I would ask for members to consider that threshold, to look at the bill, and to see that we should not be putting ourselves in a position of the Supreme Court on a question they haven't even been asked yet.

● (1155)

The Chair: We'll have to return to that.

The next questioner is Mr. Hill.

Mr. Jay Hill: Thank you, Mr. Chairman.

The Chair: Perhaps we could keep the exchanges briefer. People are kind of missing the opportunity for a second question and answer.

Mr. Jay Hill: Thank you for that intervention, Mr. Chairman—I think.

I want to pick up a little bit on my colleague Mr. LeBlanc's earlier statement, and more recently Ms. Redman's comments, in the sense that they seem to be suggesting, Mr. Moore, that you consider withdrawing the bill, or that somehow it shouldn't be deemed votable because the Supreme Court may rule on this in the future.

I want to have one short rebuttal. I've been here 11 years now. If the government used that same criterion for their own legislation, half the time they wouldn't bring it forward at all. Many times I've been in the chamber and seen very accomplished lawyers—and I admit, I'm not one—make solid arguments that if a bill, a government piece of legislation, goes forward in its unamended form, the courts will overturn it. If we used that criterion for every piece of legislation in this place, there wouldn't be a lot of legislation being passed. We'd be second-guessing the Supreme Court on every piece of legislation.

Yes, we should think about whether this is constitutional, but to use the argument of Mr. LeBlanc and Ms. Redman, that somehow if there's any worry that they may or may not rule this way we should withdraw the legislation, I suggest that would mean the government itself would be withdrawing a lot of their legislation.

I want to ask the witness, through you, Mr. Chairman, if he has had any other legal opinion brought forward on the constitutionality, or the potential constitutionality. I think he makes a compelling case in the sense that we want to be very sure that what we're dealing with here is wording that is clearly unconstitutional, as the witness has said.

Have you availed yourself of any other legal opinions that would support your appeal to this committee today?

Mr. Rob Moore: Yes, I have received a legal opinion on it from a constitutional lawyer. I've submitted it to members of the committee. I trust you have all received it. If not, I can certainly provide it.

You make a good point—

The Chair: Sorry to interrupt you, Mr. Moore, but if you submitted that documentation, our clerk and our researcher have both informed me that they didn't receive it.

Mr. Rob Moore: I think perhaps it was sent individually to members.

● (1200)

The Chair: Thank you. Please proceed.

Mr. Rob Moore: I have provided that legal opinion, and I certainly apologize if some members haven't received it.

You make a good point: Parliament is the highest legislature in the land, and it is the role of a legislature to legislate. That's what we do. As parliamentarians, we're lawmakers. It is the role of the courts in our system—we have a separation, with a legislative branch—and the judicial bodies throughout the provinces and at the federal level to interpret laws. They interpret the laws that we as legislators put forward.

Under our system, with the Charter of Rights, there's what's known as charter dialogue between the courts and the legislatures, but it is the role of the court to interpret that law. In this case, the highest court in the land is the Supreme Court.

You're right, they haven't made that determination, and it would be wrong, I believe, for us as parliamentarians to begin going down that road of second-guessing everything we do and taking on the role of the court ourselves. That's not our role. That's why I think the threshold here was set so high. As I mentioned earlier, it wasn't that this might, or could, or likely would violate the Constitution, or don't go there if it possibly, or, with all certainty, may. The question is more, does it *clearly* violate the Constitution?

I don't think we're equipped at this point at all, for the reasons I mentioned, to make that determination. If it falls short of that threshold, then honourable members have to allow our democratic process to work, have to allow the bill to proceed. Members have to be able to debate and vote on these important matters of private members' business.

The Chair: I'm going to have to change rounds again, as I indicated.

Mr. Casey.

Mr. Bill Casey (Cumberland—Colchester—Musquodoboit Valley, CPC): Thanks very much.

I'm not familiar with all the legal arguments here, but I look around the table and I see 13 members. I don't know how many lawyers there are. I think there's only one on this side and I don't know how many—there are three over there. So this committee has four lawyers and we're trying to decide whether this is not constitutional or clearly unconstitutional in about an hour, when the Supreme Court has had it for almost a year and the Attorney General of Canada doesn't know whether his bill is constitutional or not. I don't see how this group of amateurs can make this decision.

We're not judges. We are amateurs relative to the Supreme Court judges who have been working at this for almost a year. How can we determine that this is unconstitutional when they can't determine it in almost a year and the Attorney General of Canada doesn't know? How can we be that presumptuous to do that in an hour or two? I don't understand how we can do that.

Would you comment on that? Can you see how we are equipped? A minute ago you said we're not equipped to make this decision. I don't think we are either. I don't think we're equipped to make this decision that it is clearly unconstitutional. If all these other learned bodies and the Supreme Court cannot make the decision, how can we come to this conclusion?

Mr. Rob Moore: That is a good question. That's why I brought this appeal forward and why I had to express a bit of dismay that this was the role we were taking on, when the courts in the land are not universal, when the Supreme Court has not answered the question. And you're right, they've had it and they've considered it and there have been deliberations and hundreds of submissions. There are nine justices on that court yet they haven't come forward with that decision. You're right, if committee members were to find that this bill was clearly unconstitutional, they would be jumping right over those deliberations and saying, we don't need to hear what the learned justices have to say; we've already determined that this is clearly unconstitutional. As I mentioned before, there are a number of hurdles we would be jumping over that we're just not there yet.

Mr. Bill Casey: The other argument, and again it's not a legal argument but it's a common sense argument, is that half the provinces and territories have established one ruling on this, half have another ruling or haven't made a ruling, and the Supreme Court of Canada hasn't made a ruling. So clearly, it's not clear whether it's unconstitutional or not.

Again, I come back to this committee. I don't know how we can say this is clearly unconstitutional when there's such a diverse opinion across the country in different provinces and territories and even with the Supreme Court.

● (1205)

Mr. Rob Moore: That's right, and as I mentioned, in my home province of New Brunswick, in Newfoundland, in Prince Edward Island, in two of the territories, and in Alberta, this definition at common law—what I've put forward as a legislated definition—is the law in those jurisdictions.

The decisions that have been referenced in other provinces are not binding on those jurisdictions. It's only the Supreme Court of Canada that can render a decision that is valid in all of Canada, and the Supreme Court, even by way of this reference, which is non-binding, hasn't answered the question.

I want to reiterate, too, that the question the Supreme Court is answering is set at a lower threshold than the question this committee is being asked. So it's a huge stretch for the committee to take on the role of the Supreme Court justices in a question they haven't even been asked yet. They're being asked one question on the common law definition. They haven't even been asked the constitutionality of my bill as a whole. For the subcommittee or the committee to say we've looked at your bill, it's unconstitutional....

The Chair: Okay. We'll come back for another round. We've expired the time for this round.

There is a colleague who's here and not a member of the committee. With your indulgence, he's asked to be recognized, if you colleagues will agree. Do you agree?

Some hon. members: Agreed.

An hon. member: Do you want a vote?

The Chair: No. He wants to ask a question.

Mr. Hiebert, please proceed.

Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC): It appears to me that if anything is clear, it is that there is no clarity on this issue. We have conflicting legal opinions from constitutional lawyers saying different things. We have different provinces having different laws in the country. We have the justice department putting forward different options to the Attorney General of Canada and we have the Supreme Court of Canada yet undecided on this issue. So the only thing that is clear on this common law definition, not Mr. Moore's legislated definition, is that there is no clarity.

I think it is absurd that this committee is even considering suggesting that there is such a definitive opinion in the country that they can state with authority that this legislated definition, not the common law definition that everybody else is talking about, is clearly unconstitutional.

I would like our witness to elaborate a little bit, if he could, on the fact that we have experts in the field—constitutional lawyers—who have addressed the Supreme Court of Canada on a number of different cases and who have brought forward to this committee and its members statements suggesting that the constitutionality of the common law definition is not in place. You've referenced it but you haven't really elaborated on it. Again I need to distinguish for the committee that there's a common law definition and then there's the legislated definition. Would you please comment?

Mr. Rob Moore: It's true. Various legal opinions have been put forward, some even as to the constitutionality of the common law definition. That recognizes that this hasn't been universally applied across the country, that there were arguments made. We have to remember, in this Supreme Court reference, representatives from all over Canada made submissions to the court, to the justices of the Supreme Court, that the common law definition of marriage was constitutional. As it always has been since Hyde v. Hyde—that's the first case on the matter—as it has always been recognized in common law, submissions were made to the court that this was still a constitutional definition.

You're right, the court has not ruled on that yet. There is a divergence of opinion, which is why I would have to emphasize that this committee look at the very high threshold that's been set and find that we cannot act as judges in this matter and take those extra steps to work the democratic process.

● (1210)

The Chair: Okay. Do you have a further question? If not, I'll go to the next questioner.

[*Translation*]

We'll start the second round.

Mr. Guimond.

Mr. Michel Guimond: Thank you, Mr. Chairman.

I should have made a point of order earlier. I want to tell Mr. Casey that my intention in making the following comment isn't to hurt him. I simply want to set the facts straight. It suits the government just fine every time the opposition is divided. It's the divide-and-conquer principle.

Mr. Casey said there were four amateur lawyers here. I can't deny the courses I've taken. I didn't get my degree out of a box of Cracker Jacks; I did my courses. I want to tell Mr. Casey—and here comes the cannon ball—that I know he was a car salesman. Should you be a car salesman in order to be a good MP? I'd like to know that because, if that's the case, I'm going to buy a care dealership.

We should avoid calling each other amateurs. Good faith should be assumed. We're looking for the truth. We're assessing criteria. Could we stop calling each other amateurs if we don't want to be called a used car salesman?

The Chair: Mr. Guimond, those are remarks I made earlier. I asked all colleagues to be respectful toward one another.

I come from a very modest background, and I consider myself the equal of all my colleagues who have received different training from my own. All members are equal. As parliamentarians, we are bound to have different judgments on matters depending on our previous profession. It's not an eligibility criterion. We are all equal. If we could listen to the testimony...

[*English*]

Order, please. There is one meeting going on here, not two.

[*Translation*]

If we could listen to the testimony of the witness then judge its merits, that would be more useful than judging amongst ourselves. I therefore ask all my colleagues to stick to the matter before us.

[*English*]

Mr. Bill Casey: I just have to respond a little bit, that's all. It's not going to be bad.

The Chair: Mr. Casey, nobody has to respond to that. I wish we would stop attacking each other and get on with the issue. It's far more productive.

Mr. Bill Casey: He just referred to me as a used car salesman, if I understood that correctly. I was a used car salesman and I'm proud of it, but I don't pretend I'm a Supreme Court judge. Lawyers can't pretend they're Supreme Court judges either. That's my point.

The Chair: With respect, that is not a point of order.

As I indicated, we are all proud of the positions in society that each one of us held previously, I'm sure, as I am proud of mine. We are equal here as members of Parliament, to adjudicate upon an issue presented to us, not on each other as MPs. So why don't we listen to the response of the witness to the issue brought to us, not to the comments we've been making about each other?

Colleague, will you please address that point?

Mr. Moore.

Mr. Rob Moore: Out of that exchange, the only thing I would—

[*Translation*]

The Chair: Mr. Guimond, go ahead.

Mr. Michel Guimond: Is the witness able to answer a question I haven't asked? Since the floor is mine, I'm going to bring things round full circle by saying that perhaps we should dismiss the 308 members and have the nine Supreme Court judges sit here, and everything would be fine. I don't claim to be a Supreme Court judge. In any case, I don't want to be one because I don't want any political reward.

Mr. Moore, I'm going to give you a second chance to convince me. That means you didn't manage to convince me the first time. Furthermore, in your answers to colleagues' questions, you used what we in Quebec call the elastic band technique. You've stretched the elastic band a bit too far.

I'm going to give you a chance to get it right. You said that, even if the Supreme Court ruled against the definition, that wouldn't necessarily mean that your bill is unconstitutional and that another authority would then have to rule. Is that what you told Ms. Redman earlier? Is that what you meant?

● (1215)

[*English*]

Mr. Rob Moore: The courts in Ontario and British Columbia went to great lengths to distinguish between changes to the common law and to legislation. What I would suggest is, one, that the Supreme Court, as we mentioned, has not ruled on this issue of the common law definition; and two, depending on that ruling, depending on the criteria they set out in that ruling, depending on the narrowness or the broadness of that ruling, again, my bill would not necessarily be unconstitutional.

What I'm saying is that the hoops the committee would have to jump through to declare my bill unconstitutional are, one, to prejudge the finding of the Supreme Court that the common law, traditional definition of marriage is unconstitutional; and two, to take it upon itself to determine exactly what that ruling is going to say. Does that ruling leave any wiggle room, etc.? There could be all kinds of determinations when it comes to answering that question. It won't be a yes or no answer. There will be hundreds of pages in that decision, I would suggest. So we'd have to jump through those multiple hoops, and I do reiterate what I said. We don't know the nature of the ruling of the Supreme Court on this matter, and depending on how they rule, my bill may still not be declared unconstitutional, and that's not the question we're tasked with today.

I do want to mention that in some of that exchange we've had, what was emphasized is that we are all members of Parliament. I agree with that. Everyone around this table is a member of Parliament. The question we're being asked in this criteria is, does my private member's bill specifically and clearly violate the Constitution? The Supreme Court of Canada, which is charged with making those kinds of determinations, has not rendered its decision, so I'm saying we would be taking upon ourselves the role of justices of the Supreme Court of Canada to say, one, we've already ruled for you on the common law definition; and two, to suggest that this specific piece of legislation is unconstitutional.

[*Translation*]

The Chair: Pardon me, sir.

Ms. Boivin.

I would ask committee members and the witnesses to ask brief questions and, especially, to give brief answers. Otherwise members will be forced to speak a number of times. I would ask for the witness's cooperation as well.

Ms. Boivin.

Ms. Françoise Boivin (Gatineau, Lib.): I also have tell my colleague Mr. Casey that I didn't get my law degree out of a box of Cracker Jacks either and I'm very proud of it.

That said, there is no worse or bizarre theory than the one that so many consultants say such and such a thing. You can find just as many you will say the contrary. In my opinion, Mr. Moore, that won't automatically make unclear a statute and a situation which are in other respects very clear. We can start writing all kinds of things and we can cite various principles left and right. However, Mr. Guimond told you earlier that it was up to you to prove that your bill does not clearly violate the Charter. We have decisions by Superior Courts, final appeal court decisions, which I imagine you respect, and we have a Charter of Rights and Freedoms that seems clear to me. I find it hard to see how your bill doesn't clearly promote inequality because you're making an exclusion. Your text is so simple and so clearly written that the inequality is apparent the moment you read it.

● (1220)

[*English*]

Mr. Rob Moore: That question has crossed over into the debate on the merits of the bill, but that is not what the subcommittee or the committee is charged with. If my bill is votable, I fully expect that there will be members who'll vote for it and members who'll vote against it, and there will be a debate on the merits of the bill at that time.

To get to your question, it is not for me to prove that my bill is unconstitutional. According to the Standing Orders, the onus is on this committee to prove that my bill is clearly unconstitutional. That is a question this committee would have to answer. To answer that question in the affirmative, it would have to answer a question the Supreme Court of Canada has been asked and has not answered.

I do respect the charter and I do respect the courts, but they haven't delivered their answer. As committee members around this table, you would say you will answer the question for them and will answer the next couple of questions for them beyond that. As you know, they're being asked a specific, narrow question about the common law definition of marriage. So the onus in fact is on the committee.

[*Translation*]

Ms. Françoise Boivin: Your bill excludes classes of persons.

[*English*]

Do you not see that, or do you think it is legal to do so in Canada?

Mr. Rob Moore: Not at all. I don't see that. But, again, you're talking about a debate on the merits of the bill, a debate on—

Ms. Françoise Boivin: That's what we have to decide, Mr. Moore.

Mr. Rob Moore: No, you don't, actually.

Ms. Françoise Boivin: We have to see if it's clearly against the charter.

The Chair: Order, please. One person at a time. Hansard is going to have a hard time recording this. Let's hear the witness, please.

Mr. Rob Moore: That's not a criteria of the Standing Orders. The Standing Orders are to determine that a bill is clearly unconstitutional. Whether the bill is exclusive or inclusive or violates someone's charter rights or doesn't violate someone's charter rights, those are determinations that the courts are going to make. I am not here to debate the merits of my bill. There are obviously strong feelings on both sides, but the fact that someone may feel one way or another about the bill is not a criterion on it being votable.

An hon. member: Hear, hear!

[*Translation*]

The Chair: Mr. Godin, over to you.

Mr. Yvon Godin: Thank you, Mr. Chairman.

Mr. Moore, you're telling us that it's up to us to prove it. If it were up to us to prove it to you, you wouldn't be here trying to convince us. I don't think you're familiar with the Standing Orders. It's up to you to prove that your bill meets the criteria.

[*English*]

An hon. member: That's nonsense.

Mr. Rob Moore: Is that a question?

My response is that I've obviously read the Standing Orders very carefully. I'm here as a witness to dialogue with you on your deliberations—

Mr. Yvon Godin: To do what?

Mr. Rob Moore: —but it's clearly not up to me; it's up to you to determine the question. The following are answers to the four criteria. The standing committee will determine that bills and motions must clearly not violate the Constitution Act. It's up to the committee to make that determination.

● (1225)

[*Translation*]

Mr. Yvon Godin: You're here on appeal. If you're saying that it's not up to us but to the court to decide how the act should be interpreted, why have we included in the document an element that requires us to make an interpretation? When I say I don't find this clear, I'm interpreting. In one way or another, I'm interpreting. Do I have a right as a politician, as a member, to interpret? Under the Standing Orders, the committee has to make a decision. Are you telling me I don't have that right?

[*English*]

Mr. Rob Moore: In fact, you have every right to act under the Standing Orders that have been set out for you. What I'm saying is that—

Mr. Yvon Godin: But, Mr. Moore, do I then have the right to interpret?

Mr. Rob Moore: What you're taking upon yourself—

Mr. Yvon Godin: I just want the answer. Do I have the right to interpret?

Mr. Rob Moore: No, you—

Mr. Yvon Godin: I don't have that right?

I don't have any more questions.

The Chair: One more time, colleagues, it's very difficult to record this for Hansard when more than one person is speaking at once.

Mr. Scott Reid: On a point of order, Mr. Chair—

The Chair: Just a second, please.

Would you not want the witness to finish his answer first? Then I'll answer you and we'll recognize your point after.

Mr. Scott Reid: The point I was about to make is that I think the witness is being asked to comment on our mandate as a committee, as opposed to being asked to comment on the case to be presented to the committee. It seems to me that's outside what's he's been asked to do.

The Chair: The witness can answer what he likes, and if that's how he feels, I'm sure he'll tell us.

Please proceed.

Mr. Yvon Godin: As a member of Parliament, I raise the question that needs to be asked for myself.

[*Translation*]

The Chair: We'll let that drop, and the witness will answer as he wishes. Go ahead.

[*English*]

Mr. Rob Moore: On the question of the reference, why did we...? There were many ways the government could have proceeded. They chose to ask a question of the Supreme Court, but that does not preclude a private member, it does not preclude the government, from introducing legislation now.

The government could table its own legislation now and wait for the Supreme Court of Canada reference. There's nothing in law that prevents me as a private member from introducing legislation on a matter that the court is dealing with.

Mr. Yvon Godin: But does that preclude me as a member of Parliament from making an interpretation that it violates the Charter of Rights? Do I have the right to make that interpretation?

Mr. Rob Moore: What I've said very clearly is that if that's your interpretation, in making that distinction you are going beyond what the Supreme Court of Canada does. When we consider whether something is constitutional or unconstitutional—we have a system of law in Canada—it would be based on interpretations that we as parliamentarians have not been tasked to make.

This question is very clearly before the Supreme Court. It's the highest court. It has not answered the question. So what you would be saying is you don't need to hear what they have to say; you'll answer the question for them.

[*Translation*]

The Chair: Mr. Godin, is that all right for the moment?

[*English*]

Madam Redman, you're next.

Hon. Karen Redman: Thank you, Mr. Chair.

I do believe this has received a very full debate, so this is more a point of clarification to a comment Mr. Hill made and actually to part of the discussion that was made earlier.

I refer to the powers, duties, and functions of a minister. This is specifically from the Department of Justice. I will read part of subsection 4.1(1), which says:

> ...every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

To clarify that, this is a filter through which there is an obligation for the minister and the government to put every piece of legislation that comes before the House. I simply wanted to clarify that. Thank you.

The Chair: Is there anything else? Does the witness wish to react to that?

Mr. Rob Moore: What I would say to that is nothing in that precludes the government from introducing any legislation. In our judicial system, that final determination, regardless of any advice that comes forward from department lawyers, will be made by Supreme Court of Canada judges on the constitutionality.

I use, for example, any Criminal Code provision. Of course, department lawyers will look at it and discuss how this may or may not go, but the final determination isn't made until the last court of appeal has made a ruling on the matter.

The Chair: Thank you.

Next questioner then—I'm trying to move things along here—Mr. Johnston.

Mr. Dale Johnston: Very briefly, Mr. Chairman, thank you.

I think as a committee we have to be very careful not to use this clearly unconstitutional criteria as a sort of catch-all way of eliminating things that we would rather not deal with. I certainly hope that's not what is happening here.

I also further think that if members believe the bill is unconstitutional as a criteria for it to be not votable, why don't they allow it to be votable, go into the House and put it to the test, and if they don't like the bill when it gets there they can vote against it in the House?

I think the witness has made a very compelling case for the bill to be votable, and, frankly, I don't see the other side making a good case that it is unconstitutional. That's simply a comment; the witness can comment if he likes.

● (1230)

The Chair: I think you've made that point and I think it's been addressed several times. Do you want to say something briefly to that before I go to the next one?

Mr. Rob Moore: I do appreciate the comment, because I know there may be the impression among people who are watching that if the committee allows this bill to be votable, then the committee supports the content of the bill. I would be the first to say that's not the case. That's why we have a democratic system. That's why we have votes. That's why we have input from Canadians. I would be the first to point that out. This is bringing a bill forward by a private member for debate and a vote in the House.

[*Translation*]

The Chair: Mr. Guimond.

Mr. Michel Guimond: I'd like to comment on that last comment and on that of Mr. Johnston, who knows how much I appreciated working with him when he was whip. I also appreciate working with Mr. Hill. We have good relations, even though we sometimes disagree.

I want to tell you that, in my heart of hearts, I believe that the rights guaranteed by the Charter of Rights and Freedoms aren't negotiable. If we say that this shouldn't have to meet the Charter test completely, what's preventing members from introducing bills promoting discrimination on the basis of race, language or ethnic origin? As a minority Quebec Francophone in your country, Canada, I can't accept that. That won't work. There are no possible concessions on rights guaranteed by the Charter. That's why this section exists. I've heard the word "clearly" about 158 times since the meeting started. I want to tell you I've had enough.

I won't play the advocate here, but I'm going to pick up the dictionary. Even people who aren't lawyers can consult it. The definition of "clearly" states that it's an adverb meaning "in a clear manner". Now you have to go to the definition of "clear" to see what's clear and what isn't. It states that "clear" means "free from obscurity or ambiguity: easily understood".

Section 15 of the Charter of Rights and Freedoms states: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, in particular, without discrimination based on...

The words "without discrimination" constitute a very broad criterion. However, the framers of the Charter wanted to circumscribe the types of discrimination by adding the words "in particular, without discrimination based on race...". Otherwise it could be decided that one particular race is not welcome here. Are we going to return to the era of apartheid, when blacks had to sit at the back of the bus in South Africa?

I'm not saying your bill is headed in that direction, but that's why there are guarantees. There can be no discrimination based "on race"—everyone is equal—"national or ethnic origin, colour, religion, sex, age or mental or physical disability". To my knowledge, there are two sexes: in the human species, there are men and women. That's still a matter of opinion.

I'll give you my opinion on your bill in a few minutes. I consider your bill with respect. I have nothing against you, Mr. Moore. However, your bill is discriminatory because the highest courts in Quebec, among others, have ruled: that's the current state of the law. As a legislator and parliamentarian, I think, as do all my parliamentary colleagues, that your reasoning means that as long as the Supreme Court has not confirmed all bills that don't clearly define the right... We don't stop passing all kinds of laws that will never get to the Supreme Court. Bill C-5, which we're going to pass...

● (1235)

The Chair: Excuse me, Mr. Guimond. There's almost no time left for the answer.

An hon. member: I have a point of order.

The Chair: I don't see how you can have a point of order. You're not a member of the committee and you aren't a substitute either. I can't give you the floor. I'm sorry.

Mr. Moore, if you have anything to add, do so briefly. I believe the members want to make a decision in the matter.

[*English*]

Mr. Rob Moore: I appreciate what you're saying. Obviously, some of what you're saying is getting into the merits of the bill or particular preferences that you may or may not have as far as supporting the bill is concerned, if it came to a vote. It may not be a bill that you would support in the House, but the threshold, and what we're considering here today, and it has been stated over and over... and the reason you're hearing "clearly" over and over is that that's the modifying word. It's not, as I said before, may, or might, or could, or should, or probably; it's clearly, which creates a higher threshold. I would submit that if it were so clear, then with advice from the Department of Justice our Attorney General would not have asked this question to the Supreme Court. The Supreme Court has not provided its answer. Therefore, in Canadian law, it is not clear.

It's ridiculous to ask a question that is clear. If the Supreme Court has not delivered its answer to that question, if the Attorney General asked the question, then I would submit that we should not, as parliamentarians, at this committee level deny the democratic process, deny a vote on a bill that does not meet that threshold because someone may not like it.

The Chair: Your time has long since expired, again, colleagues.

Mr. Hill, you had a question. Is it the last question? I'm trying to draw a consensus here.

Mr. Jay Hill: It's the last one, perhaps, for me, unless somebody else intervenes and that raises another issue in my mind. But at this point it's the last question, Mr. Chairman.

I wanted to return to this presumption we had a debate about earlier, because I want it very clear. If my understanding is correct, when we changed the process of how we deal with private members' legislation, under the old system—and I don't remember the exact number, but there were something like 11 criteria that the private member had to meet—we went, as private members, and I did on a number of occasions, before a subcommittee and presented our case for why our bill or motion should be made votable. Under this new system, which we tried on a trial basis in the last Parliament, we reversed the onus. What we said was we're going to presume that all private members' legislation is votable, unless the subcommittee determines otherwise, on very narrow criteria.

So I take exception to my colleagues on both sides who have stated, or seem to be intimating, that the onus is on our witness, the onus is on the private member, to prove that his bill should be votable. That's not my understanding of why we changed the process. The presumption is on the committee, as our witness has stated, to clearly show—there's that word again—that the bill does not meet the criteria. I don't believe, as the witness doesn't, that they've been able to determine that.

The Chair: Are we going to—

Mr. Yvon Godin: No. Just a point of...I don't know what you want to call it.

The Chair: I think I'm going to recognize that as a point of order.

Mr. Yvon Godin: I still believe witnesses are appearing in front of the committee and not the committee appearing in front of witnesses.

The Chair: That's not a point of order, with respect.

I think we're debating now whether we like the rules we're administering. Whether we like them or dislike them, we're still administering them, and that's what we're going to be called upon to vote on. May I suggest that we proceed now with the motion, and members will vote according to the way they wish.

The motion, the draft motion, if someone cares to produce it, is that the first report of the subcommittee on private members' business be concurred in.

Does anyone wish to move that motion?

● (1240)

Hon. Karen Redman: I so move.

The Chair: Seconded by Madam Boivin.

(Motion agreed to)

The Chair: Colleagues, please, I need your attention for a very brief period of time.

We do have a question of privilege referred to us by the House. As you will recognize, we must give this our top priority. The only reason it wasn't dealt with today is because it was given to us too recently, so we couldn't in fact take an action today.

The question of privilege, colleagues, deals with someone who published material alleging that somebody else who's not a member of Parliament is a member of Parliament. I would propose that we do this next Tuesday. Of course, we're going to ask the person who raised it in the House to speak to it, and that's a colleague of this committee.

Second, would you wish to invite the person who has in fact put together this pamphlet? Can I get you to react to some of these things?

Mr. Johnston.

Mr. Dale Johnston: In view of the fact, Mr. Chairman, that the President of the United States will be here on Tuesday, and that one of the witnesses we would want to talk to, I'm sure, would be Mr. Speaker, who will probably be tied up on Tuesday, I wonder if we could put this off until Thursday.

The Chair: Is there general agreement to doing it Thursday as opposed to Tuesday? I think that's still doing it expeditiously.

The second item is, do you wish for anyone to contribute to that? Do you wish to have the Speaker present?

Some hon. members: Agreed.

The Chair: Do you wish to have the person who put together this pamphlet invited?

Some hon. members: Agreed.

The Chair: All right.

Monsieur Guimond, you wanted to speak to this.

[*Translation*]

Mr. Michel Guimond: Have you decided about the Speaker?

The Chair: If you agree that the Speaker...

Mr. Michel Guimond: The Speaker or the clerk.

The Chair: I'm told it would be the clerk instead. Mr. Johnston, would you agree that it be the clerk? It's normally the clerk, from what I'm told. So it'll being the clerk.

Do you also want us to invite the person who published the documentation in question?

Mr. Michel Guimond: First, I would have wanted to suggest the clerk, and the former member concerned, Serge Marcil. Then we can make a decision.

The Chair: If I understand correctly, it's not alleged that Mr. Marcil published this documentation. Is that correct? It's a third party.

Mr. Michel Guimond: Yes, but that's been judged. Don't try to answer me right away that Mr. Marcil had nothing to do with it.

The Chair: No, no. I'm saying nothing of the kind.

Mr. Michel Guimond: The Chair found that Serge Marcil usurped the title of member. That was the meaning of my question of privilege. So before inviting the organization in question, I would suggest that we first hear from the clerk and Mr. Marcil and that we reserve the opportunity to hear additional witnesses.

The Chair: Is that what the committee wishes?

Some hon. members: Agreed.

The Chair: Agreed. So we'll invite those two persons for next Thursday.

Are there any other issues you wish to bring to my attention, Mr. Clerk?

The Clerk of the Committee (Mr. Jeremy LeBlanc): I simply wanted to check to see whether we were cancelling the meeting scheduled for November 30.

The Chair: As a result of the presidential visit, we'll have no meeting on November 30.

That said,

[*English*]

there's one further point before you leave. Mr. Johnston seeks the floor.

Mr. Johnston.

Mr. Dale Johnston: I would like a bit of a clarification on this publication that we're going to be dealing with on Thursday. When I was on the Board of Internal Economy, it seemed to me that we dealt with those there, from time to time—

The Chair: Mr. Johnston, the Speaker has ruled on it. The Speaker has ruled prima facie privilege, which refers it to this committee.

● (1245)

Mr. Dale Johnston: All right.

The Chair: I ask that someone move the adjournment. Madam Redman.

The meeting is adjourned.

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