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Chair

Mr. Marcel Proulx

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● (1600)

[*Translation*]

The Chair (Mr. Marcel Proulx (Hull—Aylmer, Lib.)): Welcome to the Legislative Committee on Bill C-38.

[*English*]

Pursuant to the order of reference of Wednesday, May 4, 2005, the committee resumes consideration of Bill C-38, an act amending certain aspects of legal capacity for marriage for civil purposes.

[*Translation*]

We're in the middle of a very active period of work. As I unofficially told you earlier, negotiations are being conducted as we speak.

[*English*]

I understand we are very close to a certain agreement, so we will suspend the committee, probably for 10 minutes or 15 minutes, and then we will come back.

● (1600)

(Pause)

● (1628)

The Chair: The committee will resume.

Before we go too far, let me introduce in an official manner our main witness of this afternoon, Ms. Lisa Hitch, who is senior counsel in the policy sector of the family, children, and youth section at the Department of Justice.

I understand, Ms. Hitch, that you are accompanied. You brought some help in case help is needed from other experts. They are Mr. MacCallum from the Department of Justice, Mrs. Kirby from Industry Canada, Mrs. Ritchie from the Department of Finance, and Mrs. Tromp from Canada Revenue Agency.

Thank you.

Pursuant to Standing Order 75(1), the preamble and clause 1, which is the short title, are postponed until later on in our meeting. That is the usual practice.

We will start with clause 2.

(On clause 2—*Marriage—certain aspects of capacity*)

Mr. Rob Moore (Fundy Royal, CPC): Mr. Chair, I have a point of order.

The Chair: Yes, Mr. Moore, on a point of order.

Mr. Rob Moore: I've only been here a year, but why do we have a witness as we do clause-by-clause consideration if our amendments are not in order?

The Chair: We don't know that yet. We don't know if your amendments are in order or not. It's to help out the members, not the chair, on any part of the bill—any commas, any paragraphs, anything at all. It doesn't mean that we will refer to the witness, but it means that Mrs. Hitch is there if we need help.

We're on clause 2. Shall clause 2 carry?

Some hon. members: Carried.

Mr. Vic Toews (Provencher, CPC): Isn't there an amendment to clause 2? No, I guess not.

No, it can't carry.

(Clause 2 agreed to on division)

The Chair: Shall clause 3 carry?

● (1630)

Mr. Vic Toews: I want to vote on these things.

The Chair: Do you want a recorded vote, Mr. Toews? Fine.

(Clause 3 agreed to: yeas 8; nays 4)

(Clause 4 agreed to: yeas 8; nays 4)

The Chair: We now have an amendment tabled by Mr. Toews, which is identified as CPC-9.

Would you move your motion, Mr. Toews?

Mr. Vic Toews: I so move.

I would like, on a point of order, first of all to have a ruling as to whether or not it is in order.

The Chair: The ruling on this is that your amendment proposes to add the concept of advocacy to the bill on same-sex marriage. According to Marleau and Montpetit, page 654, "An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill." Bill C-38 is about same-sex marriage, whereas this amendment is about advocacy, a concept not in the bill. In consequence, I must declare the amendment inadmissible.

● (1635)

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Mr. Chair, can I make a friendly amendment at this stage?

The Chair: Because we have ruled on this and declared this inadmissible, it cannot be amended. However, if you have unanimous consent, you can bring a further amendment. You can table a further amendment, but you can not amend this one.

Mr. Brian Jean: I'm sorry, Mr. Chair, I need a little further explanation on what you're suggesting.

The Chair: When you were talking of a friendly amendment, I assumed you would want to change a comma, a word, or a sentence in the amendment that was tabled by Mr. Toews. Because we have ruled on this that it's not admissible, it's off the table, but if you can obtain unanimous consent, you can bring another amendment to the table now that would not be exactly the same as the one we have just discarded.

Yes, Mr. Toews.

Mr. Vic Toews: Just on the same point of order, then, can Mr. Jean bring that amendment after we question the clerks as to why this is out of order?

The Chair: You cannot question the clerk as such. However, we are here in good faith to facilitate everything, and if you need an explanation, I can ask Mrs. Garbig to give us an explanation on this.

Let me go one step further, Mr. Toews. Out of good faith, let me explain that any decision can be appealed, in the sense that if you don't agree with the decision of the chair, you can ask for a vote on that decision. The vote is taken without debate, and in the event of a tie vote on an appeal, the decision of the chair is sustained. And I will not consider the overturning of a ruling as necessarily a matter of confidence towards me.

So you have a situation where the ruling has been made on a very technical basis. You can accept it or you can appeal it, and then there's a vote around the table, sir.

Mr. Vic Toews: Then on the same point of order, I ask at this point for the chair's ruling to be overturned. If that doesn't succeed, then Mr. Jean can move his amendment. I assume it's to remove the words “or advocacy”. He would then move that amendment and we could speak to it at that point.

The Chair: Except that for Mr. Jean to table his amendment, we understand that he has to have unanimous consent.

Mr. Vic Toews: So we can speak to the issue of unanimous consent.

The Chair: No.

Mr. Vic Toews: Let me get this straight. In this committee, essentially the clerk gives you an opinion, you accept that opinion, no one can debate or discuss or question that opinion, and if an amendment is proposed, no one can discuss or seek clarification of that either?

On the same point of order, Mr. Chair, I'm totally astounded by what is happening here today. We sat in this committee for four weeks or more hearing witnesses on these issues. We have heard witnesses state over and over again that they have concerns about their practices in respect to the definition of marriage. We have concerns about their beliefs in respect of the definition of marriage and their fear, as Mr. Kempling told us the other day, that they can't advocate in respect of their definition of marriage. We sat here and listened to these individuals. These individuals came here in good faith and the chair said nothing, the staff said nothing—

● (1640)

The Chair: We're not going to get into a debate, but let's get an explanation, okay? Let me ask Mrs. Garbig to give you an explanation of how we have arrived at this ruling in this particular case.

Before we do that,

[*Translation*]

Mr. Ménard, do you have a point of order?

Mr. Réal Ménard (Hochelaga, BQ): It's not a point of order. I understand the committee's operating rules perfectly well.

I find it a bit unfair to say that the bill only concerns same-sex marriage. If you read it, you can see that the preamble refers to other considerations. You also find other considerations in the bill itself.

What's the purpose of our colleague Mr. Toews? If a statement like that had been added to the preamble, would it have been admissible?

The Chair: Wait a moment. First we're going to settle the point of order. We're considering the bill clause by clause. Let's first ask Ms. Garbig to give us an explanation, and then we'll see. Is that fine with you?

[*English*]

Mrs. Garbig, would you please help us on this?

Ms. Joann Garbig (Procedural Clerk): Thank you, Mr. Chairman.

By way of explanation, then, once the House adopts a bill at second reading, the scope of that bill is then considered settled. When amendments are being considered in committee, one of our rules of admissibility for amendments is that an amendment that goes beyond the scope of the bill as it was settled at second reading is not admissible. The amendment CPC-9, on which the chair has just ruled, refers to the concept of advocacy, which, as the chair has ruled, is considered to be beyond the scope of the bill.

Mr. Vic Toews: Let me just ask you a question, then. In the preamble it clearly states “Whereas nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs”, a clear reference to advocacy, right in the preamble. You're saying that because we don't use the exact word in the preamble and we have to find the exact word, it's therefore out of order. This is an outrage.

The fact that we sat here for four weeks listening to witnesses.... And I understand from one of the other legislative clerks that this bill is virtually unamendable, that this entire bill is in fact designed to ensure that no amendments can be made. We brought people from across this country to talk about the issues that matter most to them, and a parliamentary secretary to the justice minister knew all along that this bill was unamendable. We've insulted 60 witnesses who came here to give us technical evidence on the bill.

Mr. Chair, what did we come here for? Did we come here simply to hear 60 people spout off on a bill? It's an absolute outrage, Mr. Chair, that this type of narrow focus, that by saying it didn't say "advocacy", it should have said "declaration".... That to me is an absolute outrage, that the government knew this bill was virtually unamendable, we hear from witnesses from both sides of this issue, and then at the end of the day we're told, oh well, we'd like to help you but none of these are admissible. Quite frankly, that is a disgrace. It's a disgrace.

This committee, Mr. Chair, has obviously been a sham from the beginning—

● (1645)

The Chair: Mr. Toews.

Mr. Vic Toews: —an attempt by the Prime Minister to ram this issue through, to give the appearance of hearings when in fact the hearings were absolutely without any substance.

The Chair: Mr. Toews, I understand that your members, the Conservative Party, have known for a long time that the margin was very thin in this particular case.

We have a ruling. The ruling can be appealed. I've explained the procedure to you. It can be done right now.

Mr. Boudria.

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Chairman, I have a point of order. You will recall that as recently as last week I raised in this committee, before a witness who was testifying, that it was alleged we could have very broad amendments. My declaration was contested by Mr. Toews, saying that's not true, we have a lot more latitude. I said no; I said page 453 of Marleau and Montpetit.... I said it in the record of this committee last week. I referred to Erskine May, page 343 of the 22nd edition. I said all these things on the record last week in terms of the fact that an amendment can narrow but not broaden the scope of the bill. So to say these things were unknown to either a member of this committee or witnesses is not correct.

I think I know a little bit about how this place works. I knew all along, certainly, as one member, about how bills can be amended.

By the way, Mr. Chairman, just again on this point, if the committee had been a standing committee instead of a legislative committee—which is what you, sir, are chairing now—your margin for accepting amendments would not have been greater. It's identical in both committees. So if anyone says this was a flawed structure because it was a legislative committee, they should know our chairman would not have had an authority any different.

I support, obviously, what he's doing.

The Chair: Thank you.

Mr. Brown.

Mr. Gord Brown (Leeds—Grenville, CPC): Mr. Chair, I just want to ask a question. We've sat here and listened to all these witnesses. Were they all out of order through the whole process? What they were talking about was outside the scope of the bill?

The Chair: No.

Thank you.

Yes, Mr. Toews.

Mr. Vic Toews: This is on the same point of order. What Mr. Boudria said last week was an issue related to the Criminal Code. It was very clear. I asked whether we could have a ruling. I don't know if the chair has ever delivered any kind of ruling on that particular issue.

You will note that my amendments don't include any reference to the Criminal Code. In fact, I took heed of Mr. Boudria's comments, Mr. Chair. I didn't advance any amendment in that respect. But we never heard back from the chair on this. I requested this. As far as I know, I haven't received an opinion on this from the justice department or otherwise.

So now to suggest that because the Criminal Code would take us out of order—

The Chair: My understanding is that the clerk had discussions with your staff. It was suggested that the wording of the amendment be submitted to legal counsel, and the clerk says we have never heard anything further. When you discuss something with the legal counsel, we don't have access to it until it's tabled. We don't know.

Mr. Vic Toews: The point here, Mr. Chair, is that I never proceeded on that. I took Mr. Boudria's comments at face value. He indicated they were out of order. I said fine, I will move on, then. But the point is that—

Hon. Don Boudria: That is not what Mr. Toews said that day, and I'll get the Hansard to prove that what he's saying now is factually incorrect. He challenged me to say that what I said was wrong and that he could move amendments that were beyond the scope of what I said. He did not agree with me, and for him to pretend today that he did is a distortion of the truth.

● (1650)

Mr. Vic Toews: If Mr. Boudria would actually listen, Mr. Chair, to what I said—

Hon. Don Boudria: I have listened, and this is a Hansard of what you're saying right now as well.

Mr. Vic Toews: I'm talking.

What I indicated was that I took Mr. Boudria's advice, and that's in fact what I did. Obviously, I didn't come forward with any of those amendments. I didn't state I said it on the record; I know what I stated on the record. I went back, considered the issue, and decided not to proceed on that issue. So if Mr. Boudria suggests I stated I said that on the record, he's misleading this committee. If he would actually listen to what I said....

The point here, Mr. Chair, is that we're not talking about the kind of concern Mr. Boudria was raising. He was saying referencing another statute would not be in order. That's what he said. I'm paraphrasing, but that's what he said.

In this particular case we have a ruling from the chair, advised by the clerk, that even though the act itself refers to a declaration by members of groups, to use the term “advocacy” is so outside of the scope that the entire amendment will fail. Quite frankly, that's an outrage.

Hon. Don Boudria: Mr. Chairman, we are in fact witnessing a challenge of the chair here, so I move that the chair's decision be sustained—and I don't believe that's debatable.

The Chair: No, it's not debatable, so we'll take a vote.

[*Translation*]

Do you want a recorded vote?

Mr. Réal Ménard: Mr. Chairman, I would like some clarification on the decision. You said that the Conservatives' amendment was inadmissible because it was beyond the scope of the bill. This amendment's excessive nature stems from the use of the word “advocacy”.

The Chair: Just a minute, I'll stop you there. We can't have a debate on...

Mr. Réal Ménard: I only want an explanation.

The Chair: I understand. I'll explain by telling you that the amendment at issue concerns advocacy, which is a concept foreign to the bill. Consequently, the amendment is ruled inadmissible, period.

Mr. Réal Ménard: May I ask you a question?

The Chair: You may ask it.

Mr. Réal Ménard: Is there a way for the committee to entrench the principle of the amendment in the preamble, if it wishes to do so?

The Chair: We'll try to answer you.

Mr. Ménard, there's another problem with regard to the preamble. There can't be any amendment to the preamble, except where that amendment is made necessary by the passage of amendments to the bill. You can't do indirectly what you can't do directly. Trying to include it in the preamble wouldn't be any more acceptable.

Mr. Réal Ménard: I'm not questioning your remarks. I simply want to understand why we as legislators can't amend a preamble at the committee stage.

The Chair: Here's what Marleau and Montpetit state at page 657:

> In the case of a bill that has been referred to a committee *after* second reading, a substantive amendment to the preamble is admissible only if it is rendered necessary by amendments made to the bill.

Mr. Réal Ménard: Would it be impossible even if we were unanimous on this point, Mr. Chairman? In the House of Commons, we can do anything when there is unanimity. If we in this committee unanimously ask you to consider the amendment, can't you do it?

The Chair: The first thing you'd have to do then would be to overturn the Chair's decision.

● (1655)

Mr. Réal Ménard: You wouldn't take it as a personal attack?

The Chair: Absolutely not. You're too nice for me to imagine you attacking me, Mr. Ménard.

[*English*]

Hon. Don Boudria: I move the chair's decision be sustained on CPC-9. I guess that's the name of the motion.

[*Translation*]

The Chair: We'll move on to the vote.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Just a minute, Mr. Chairman. Will you give me a few moments? What exactly was the question?

The Chair: The point is to decide whether or not you want to sustain the decision of the Chair. If you want to sustain it, you vote yes; if you want to overturn it, you vote no.

Mr. Richard Marceau: Mr. Chairman, pardon me for asking the question now, but since it hasn't yet been explained to us, I'd like you to tell us what will happen if your decision is overturned.

The Chair: If you overturn the decision of the Chair that this amendment is inadmissible, the amendment will become admissible. You're right: the door is open to a debate on the amendment. Then you'll vote to determine whether or not you want this amendment to be included.

Mr. Richard Marceau: Pardon me once again, but I'd like to get a clear understanding of the situation. That's important. If your decision is sustained, will that prevent our Conservative colleagues from proposing something similar, without the words “or advocacy”?

The Chair: Provided they obtain unanimous consent for that purpose. We have a standing order, Mr. Marceau, under which 48 hours' notice is required. For an amendment to be made today, the unanimous consent of committee members is necessary.

Mr. Réal Ménard: [*Inaudible*] Everyone agrees.

Let's move on to the vote.

The Chair: That's indeed where we stand. The question is whether you want to sustain or overturn the decision.

Mr. Richard Marceau: If I support you, I vote yes, but if I don't support you, I vote no. Is that correct?

The Chair: If you vote yes, you support the decision.

Mr. Richard Marceau: Then it's no.

[*English*]

The Chair: Six yeas, six nays. In the event of a tie vote on an appeal, the decision of the chair is sustained.

(Motion agreed to: yeas 7; nays 6)

Mr. Paul Szabo (Mississauga South, Lib.): I have a point of order.

The Chair: I am sorry, you are not a member of the committee.

Mr. Paul Szabo: Could I get the consent of the committee to make a point of order?

The Chair: Is there unanimous consent for Mr. Szabo?

Some hon. members: Agreed.

The Chair: Go ahead, sir.

Mr. Paul Szabo: Mr. Chairman, the committee made a ruling that report stage motions had to be submitted by the 13th so they could be dealt with today. That rule, however, does not appear to apply to subamendments, so a subamendment proposed by a member here would not need unanimous consent. That would be my understanding.

As a consequence, the remedy for the clause you're presently dealing with could be made, if the committee agreed, by simply posing the subamendment at this time, and it may move this matter along. I ask whether or not a subamendment in fact can be in order and does not require unanimous consent to be made.

The Chair: There are specialists around the table who are much better than I am as far as that procedure is concerned, but my understanding is that because this has been declared unacceptable or inadmissible, the amendment, in clear terms, doesn't exist at this time for us. So if it doesn't exist, you can't amend it.

Yes?

● (1700)

Mr. Paul Szabo: Mr. Chairman, I understand that and I fully accept that. However, I heard many members say the words "in good faith". The position with regard to requiring unanimous consent was made with regard to making a further amendment, but there was no instruction given to the committee members with regard to subamendments. If in fact it is the case that a subamendment could be made without unanimous consent, then I believe that in good faith, if the members agree, a subamendment should be considered to be in order at this time and for future clauses if, as, and when necessary, with the consent of the committee—in good faith of the committee.

The Chair: No, unfortunately, Mr. Szabo, I don't agree with your understanding of the situation. Once an amendment has been ruled inadmissible or unacceptable, it doesn't exist, so it cannot be amended.

Mr. Jean, on a point of order.

Mr. Brian Jean: Mr. Chair, how does one make a friendly amendment if it doesn't exist?

The Chair: What you have to have—I repeat myself—is unanimous consent to bring an amendment.

Mr. Brian Jean: I'd like to propose that at this time, sir, a friendly amendment.

The Chair: Go ahead.

Mr. Brian Jean: I would seek unanimous support for the following and ask for consent to bring it forward, sir.

The Chair: You should read what you have so the members can decide in the knowledge of what you want to table.

Mr. Brian Jean: Proposed new clause 4.1 is "No person shall be deprived of any benefit or be subject to any incapacity, obligation or penalty under any law of Canada by reason of their religious practices or beliefs".

The Chair: Do you have a copy you could give us, or are you just—

Mr. Brian Jean: In bad writing, sir.

The Chair: If you can't come to the mountain, the mountain will go to you. No problem.

● (1705)

Okay, let me confirm the wording of the amendment, for which unanimous consent to table has been requested. It would read....

Mr. Vic Toews: Essentially what it would say—and I'm just discussing this with Mr. Jean—is that no person shall be deprived of any benefit or be subject to any incapacity or obligation under any law of Canada by reason of their religious practices or belief in respect of the definition of marriage as defined under this act—or, under this act.

Mr. Brian Jean: Except for.... The definition—sorry. You will note "incapacity, obligation or penalty under any law of Canada by reason of their religious practices or beliefs in respect of the definition of marriage under this Act".

Mr. Vic Toews: Solely.... Mr. Boudria in fact pointed out another word, and that is "solely" by reason of their religious practices. All right. Is that...?

The Chair: Let me just read this to see if we have it.

> No person shall be deprived of any benefit or be subject to any incapacity, obligation or penalty under any law of Canada by reason of their religious—

● (1710)

Mr. Vic Toews: Solely by reason.

The Chair: I'm sorry. Okay. No person shall be deprived of any benefit or be subject to any incapacity, obligation or penalty under any law of Canada solely by reason of their religious practices or beliefs in respect of the definition of marriage under this Act.

Mr. Brian Jean: I think that would take care of some concerns Mr. Siksay expressed to me.

The Chair: The procedure we have now is that Mr. Jean has requested unanimous consent for this amendment to be tabled. Does Mr. Jean have unanimous consent to table this amendment?

Just as a point of information, the next step would be to debate this amendment. That is just for clarity.

The request of Mr. Jean is for unanimous consent to table. Does Mr. Jean have unanimous consent to table this amendment? Agreed?

Some hon. members: Agreed.

The Chair: Agreed.

Oui, monsieur.

[*Translation*]

Mr. Richard Marceau: I'd like Ms. Hitch to tell us...

The Chair: Before we start the debate.

[*English*]

Mr. Jean has to move his amendment.

Mr. Brian Jean: I would so move, Mr. Chair.

The Chair: Now we're on to debate.

Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Before starting the debate, I think it would be interesting to get the opinion of one of the officials from the Department of Justice on the effect this amendment may have, if any.

[*English*]

Ms. Lisa Hitch (Senior Counsel, Policy Sector, Family, Children and Youth Section, Department of Justice): From a legal policy perspective, there would be three concerns with the wording.

The first concern is the definition of marriage. The reference back to the definition of marriage "under this Act" would accidentally, I believe, sweep in the possibility that polygamy could also be included, because the definition in clause 2 reads, "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." As such, that definition encompasses two aspects of legal capacity under federal jurisdiction, including the requirement that there be no previously existing marriage.

The second concern is the word "incapacity", which has no real, defined meaning in law, so there would be concerns about how it would be interpreted.

The final point is that there is no reference to the existing charter guarantees or the limitations in terms of balancing factors that are incorporated within section 1, so there is some concern that this might accidentally encompass hate.

The Chair: Okay. Let's wait just a second.

Yes, Mr. Jean.

Mr. Brian Jean: I would like to continue discussion, sir, and I would like to turn the floor over to somebody else until I have the process down pat.

The Chair: Okay, that's not a problem.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Thank you.

Ms. Hitch, I'm going to take advantage of your presence here. Pardon me, but I don't think I clearly understood your first point. How would the wording of Mr. Jean's amendment make polygamy possible? If the words "in respect of the definition of marriage under this Act" had been deleted, I could have understood why one might think polygamy might be possible, but, since those words are there, I don't understand how that possibility might exist.

Furthermore, are you telling us that, if this amendment were carried, that might lead to legislated polygamy in Canada?

● (1715)

[*English*]

Ms. Lisa Hitch: On your first question, it's as a result of the definition, as I said, in clause 2 of the bill, which incorporates two of the branches of legal capacity within federal jurisdiction, the first by referring to "persons" without any modification in terms of gender, thus overruling the common law on the bar to marriage by persons of the same gender, and the second by referring to two persons, "two persons to the exclusion of all others", which is the language used in the common law to prohibit marriages when there's a previously existing marriage—in other words, the issue of polygamy. The way the definition in proposed paragraph 2(a) is structured incorporates both elements of legal capacity, so a circular reference to the definition under the act bears that risk.

[*Translation*]

The Chair: Is that fine with you, Mr. Marceau?

[*English*]

Yes, Mr. Toews.

Mr. Vic Toews: I'm having a lot of problems following that. The amendment says this: "No person shall be deprived of any benefit or be subject to any incapacity, obligation or penalty...". Is that what it is?

A voice: No, sir, it's...

Mr. Vic Toews: Let me just see what the amendment is: "No person shall be deprived of any benefit or be subject to any obligation or penalty"—is that what it is?—"under any law of Canada by reason of their religious practices or beliefs solely in respect of the definition of marriage under this Act".

I'm a lawyer; I practised for many years. When it says "under this act", I would go to the definition of marriage under this act. Now, where would the definition of marriage be? Well, there it is in clause 2—and this is the section that's already been passed on division—"Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." I see no other definition of marriage under this act. It's two persons. Polygamy, I understood, was more than two persons, so I don't see how this is a circular argument at all. This has got to be one of the clearest examples of definition of marriage. I simply don't follow that, unless I'm missing something. Where does it say, anywhere in this act, that marriage is anything but the union of two persons? Where's the suggestion that it's more than two? Where?

The Chair: Are you asking your question to Mrs. Hitch?

Mr. Vic Toews: Through you, Mr. Chair.

The Chair: Mrs. Hitch.

Ms. Lisa Hitch: I understand it is not a simple interpretation and, as I said, it's a risk, but in my understanding, the reason for adding this proposed clause 4.1 is to encompass persons who will practise and believe a definition of marriage that is encompassed, certainly, within clause 2, but is a definition of marriage that does not encompass all of clause 2. In other words, it would be to protect people who believe that marriage has an opposite-sex requirement. The opposite-sex requirement is not contained in clause 2, and yet it does say that it would be two persons to the exclusion of all others. The reference to "persons" could be open to interpretation as either two persons of the opposite sex or two persons of the same sex.

I'm just identifying that there is a risk—that because there is that reference, there is also, within there, a reflection of the main common-law reference to the requirement for legal capacity, which is that it only be two persons with no previously existing marriage. It's not codified anywhere else in the civil law, although, of course, there is the polygamy prohibition in the Criminal Code.

Mr. Vic Toews: So what you're saying is a judge is going to have to somehow get around the polygamy prohibition in the code. What I hear from your argument is if we go to clause 2, the existing clause we just passed, somehow that definition in itself inherently contains the germ of a polygamist relationship.

● (1720)

Ms. Lisa Hitch: I think I'm saying the opposite, with respect.

Mr. Vic Toews: All right, all right, so you're saying the opposite. You're saying it does not bear any germ of polygamy, and I use that in a figurative sense. It does not bear the germ of polygamy in there, and yet when we refer to the definition of marriage in clause 4.1, we are somehow incorporating a polygamist concept. I'm having a big problem following this.

The Chair: Do you have any more comments on Mr. Toews' comments?

Ms. Lisa Hitch: Not unless there's a question, no.

The Chair: Mr. Boudria.

Hon. Don Boudria: I'm not saying I would agree with it, but I'm just wondering if it would be better if this motion—and that is an odd way of putting it, but I will anyhow—had read in the end, "by reason of a person's belief that marriage is defined as 'the union of one man and one woman'". In other words, it doesn't supersede the other; it just says that if you also think this other thing, that in itself doesn't solely, by virtue of that, make you a person who could have all these penalties that are feared. Do you follow what I'm trying to say? Would it have been less problematic, worded that way?

Ms. Lisa Hitch: I think that would address any risk.

Hon. Don Boudria: I see. That's interesting.

Maybe I can repeat that for the benefit of colleagues. I'll try to read the motion of my colleagues, and please correct me, because I may have it wrong:

> No person shall be deprived of any benefit or be subject to any incapacity, obligation or penalty under the law of Canada solely by reason of their practices or beliefs that marriage is defined as 'the union of one man and one woman'.

Isn't that what my colleagues are really trying to say anyway? If it is, and if it is less problematic said that way.... It just says that if you also think marriage is one man and one woman, as well as the definition of any two people, providing the other criteria are met—that we all understand, of course—that belief in itself, solely, won't mean you will be penalized, and all those other things that are said in the bill.

I'm just wondering whether that makes it better and removes some of the objection.

The Chair: I think it does.

Mr. Jean.

Mr. Brian Jean: I would certainly amend my amendment to reflect that, because I think it's stronger language that is more certain to all the participants, but I'm not certain, at this stage, if that would be the case.

Do I have the floor, Mr. Chair?

The Chair: Yes, you do.

Mr. Brian Jean: Ms. Hitch, if I'm understanding your argument—which is difficult for me right now—are you suggesting it may be a benefit for people to be in a polygamous relationship, and therefore, under this particular wording, that they're being deprived of a benefit because their religious beliefs suggest they should be able to have polygamy as a way of life? That's the only way I can see your logic.

Ms. Lisa Hitch: No. I apologize. It's more that there would be benefits such as, for example, charitable registration, which has been discussed extensively by this committee and before this committee. I suppose the concern from a legal policy perspective is that it is also expressing a belief about the definition of marriage that could be interpreted as the definition of marriage in clause 2.

Mr. Brian Jean: Again, because they have a religious belief that they want to be polygamous, it doesn't necessarily mean they have the right to do so. In fact, the Criminal Code is very explicit in relation to that.

Ms. Lisa Hitch: Agreed. It's the use of the word "practice".

● (1725)

[*Translation*]

The Chair: Mr. Ménard, over to you.

Mr. Réal Ménard: Are we talking about the addition Mr. Boudria made? No.

The Chair: As I understand it, Mr. Boudria was thinking out loud.

Mr. Réal Ménard: You can't prevent him from thinking?

The Chair: He was getting the lay of the land.

Mr. Réal Ménard: I ultimately agree that no one should be penalized by the fact that it promotes heterosexist marriage. That's ultimately what's being said. An express reference to a man and a woman would be added.

However, I want to ensure that won't constitute an incentive to engaging in a certain form of disobedience with regard to this bill. It doesn't trouble me if heterosexist marriage is promoted in churches or other places of worship, in the halls of the Knights of Columbus or any charitable organization, provided, of course, that's not perceived as an incentive to disobey the law we are proposing to pass. If I'm reassured on that, I won't see any objection to voting as Mr. Boudria proposes.

The Chair: Mr. Boudria hasn't proposed anything yet.

Mr. Réal Ménard: But he's thinking out loud as well.

The Chair: He's thinking out loud, and that's fine. So try to think out loud with Ms. Hitch.

Mr. Réal Ménard: You know, I don't always get women's attention, Mr. Chairman, but I have to live with that.

The Chair: You suggested the other day that's a longstanding problem.

Ms. Hitch, the floor is yours.

[*English*]

Ms. Lisa Hitch: I think that takes me back to my third concern, which is that there is no reference in this provision that would take it back to the charter protection and the balancing that is being done between section 2(a) and section 1. The concern is that practices are not linked, necessarily, to belief. The general charter language is usually the exercise of the fundamental freedom of conscience and religion, so the reference to practices and beliefs doesn't seem to link it back to the existing charter protection and the balancing in section 1.

Mr. Brian Jean: I'm sorry, Mr. Chair. I was out of order.

The Chair: Yes, go ahead.

Mr. Brian Jean: I would be prepared to accept that language in this amendment in respect of the wording of the charter. Is it "the exercise of..."? I'm sorry, Ms. Hitch; could you...?

Ms. Lisa Hitch: Perhaps "the exercise of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms".

Mr. Rob Moore: Mr. Chair.

The Chair: Yes, Mr. Moore.

Mr. Rob Moore: I'll direct this to the witness.

If we include that language, then would the amendment not merely be something along the lines of what we already have in clause 3, which is just restating the protections in the charter—just restating that, and not going anywhere beyond that? If we're just acknowledging that, yes, the charter protects religious freedoms—if we're just restating that—then it's completely unnecessary. It's redundant.

I think what we're trying to attempt here is to provide some protections that go beyond that. I would think your suggested wording is merely restating the current common law under the charter, the interpretations that have come out of the charter. It would not do anything beyond. Its being in there would serve no greater benefit than leaving it out. Isn't that what you're saying by suggesting that wording? It was something along the lines of "as recognized under the charter".

Ms. Lisa Hitch: Again, I wasn't really suggesting "as recognized", but I certainly understand your point. It's just that the way it is now, all I'm identifying is a policy concern that, legally, there's no suggestion that there's any limit whatsoever on practices or beliefs with regard to the definition of marriage. The concern is that all the usual balancing that would have been done under section 1 of the charter with regard to hate speech, whether it's a civil or criminal standard, it is just not necessarily there.

Mr. Rob Moore: But that balancing would take place if nothing was there. That's my point. We don't want to merely restate the obvious; we want to provide, or at least I would like to provide, some substantive protection for people based on the evidence we heard. We've already heard about how clause 3 of the bill is restating the current law under the charter. In law, we can go beyond that protection.

So I would suggest that the language you propose would not in fact provide any further protections than already exist, and I don't think what we're trying to accomplish here is just to reword or restate what are already the current protections available under the charter.

● (1730)

Ms. Lisa Hitch: I hear what you're saying. I suppose all I can do is reiterate that the legal policy concern is that the way it's worded at the moment, it goes so far beyond what the charter does there are no effective limits to it, or certainly not within the four corners of this.

The Chair: Excuse me.

Mr. Siksay.

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

I just want to say that given the concerns Ms. Hitch has expressed about this amendment, I do have very grave concerns about it.

I might be way off base with my question, Ms. Hitch, but I'm wondering, in light of what you've just been saying, by this kind of amendment are we setting up a line of defence for, say, a gay-basher who has a very strong belief in an opposite-sex definition of marriage?

Ms. Lisa Hitch: Hopefully, the word "solely" would take us a long way to dealing with an extreme situation such as the one you're setting out. Of course, there would be something beyond a belief in a vision of marriage that would be involved in something as serious as a gay-bashing incident, but I think there are some concerns about whether practices and beliefs would be gaining an insulation from some of the other limitations that would generally be within a section 1 analysis.

Mr. Bill Siksay: Thank you.

The Chair: Mr. Toews.

Mr. Vic Toews: I fail to understand how giving people freedom to do things could ever invoke the charter. The charter is designed to act as a brake on government actions. This has nothing to do with....

I mean, it's ironic that in this country we actually have to give people freedom. Because the courts and human rights commissions have taken away so much freedom from people, we actually have to legislate freedom in this country. You would think that freedom in this country would mean the absence of government restraint.

My understanding of what the charter does, and I've practised constitutional law for many years, is that it establishes a floor of rights that the government cannot interfere with. The government cannot go and subject an individual...below that floor of rights. In that sense, the Charter of Rights establishes the lowest common denominator, but it is always open for governments to grant freedom, to grant rights. What we're saying here, whatever the charter provides, is that solely by reason of their religious practices or beliefs, they're not going to be under any incapacity, obligation, or penalty.

Quite frankly, I don't understand how this could ever violate the charter. The charter isn't a restriction on individual rights, it's a restriction on government. We see governments coming in and taking people's freedom away every day in this country, and what you're trying to tell us is that if we give people freedom, we're sort of violating the charter. That's the argument you're providing.

The Chair: Did you want to make a comment, Mr. MacCallum? Go ahead, sir.

Mr. Raymond MacCallum (Counsel, Human Rights Law Section, Department of Justice): If I interpret the intent of this amendment correctly, what it purports to do is grant protection against any penalty being imposed under federal law. For example, we've mentioned hate speech. If you characterize criminal prosecution for espousing hatred as a penalty imposed under the Criminal Code and therefore under federal law, a reasonable interpretation of this is that this provision....

You can characterize your espousal of those views as being a religious practice or belief in relation to same-sex marriage. This provision would provide some sort of shield against the prosecution, because it says, very clearly, no penalty can be imposed for the espousal of those religious practices, even, arguably, if they can be interpreted as constituting hatred.

That's the concern.

● (1735)

Mr. Vic Toews: But if you actually go to the hate crime sections, there's a specific exemption for religious practices already, as I recall, in Bill C-250, in sections 318 and 319 of the Criminal Code. That exists already.

So in that sense, we're not interfering in any way with what already is a limitation in the hate law section of the Criminal Code. I think most of us would be very surprised here to say that solely by reason of their religious practices or beliefs, somebody could actually be advocating hate under the Criminal Code, when we already have that exemption in Bill C-250, in sections 318 and 319.

[*Translation*]

The Chair: Mr. Boudria, I believe you wanted to continue thinking out loud.

[*English*]

Hon. Don Boudria: Yes. I'd just like to further the thoughts of a while ago on this issue. I'm going to take advantage of the votes to further consult and so on.

If it said, perhaps after the word “beliefs”, that marriage is defined as the union of one man and one woman, and of course with the word “solely”.... In other words, just because you think it's one man, one woman, it doesn't give you grounds for gay-bashing, to use the example raised by one of our colleagues across the way, because it's only the word “solely”.

Now, if it's worded that way—again, we've talked to Ms. Hitch before—is that better than all those other words that were there? The reference to definition of marriage is removed, because it only offers one alternative. In other words, if you still think that marriage is one man and one woman, that in itself, or that “solely”, providing there are no other things that....

Is that kind of wording better? I can actually read the whole thing now.

The Chair: May I interfere, before we go too far? We have seven minutes left before votes in the House, and I would suggest.... Actually, I will not suggest: we will suspend until after the votes.

Now, when we come back from the votes, for members, staff, and witnesses we have very healthy sandwiches. After about 15 minutes, we will get back to this.

I want to remind all members and all witnesses that we have to report results from this committee tomorrow morning at 10 o'clock. So if we have to, we could maybe have a healthy breakfast, but I would strongly suggest that whatever you've been thinking aloud, maybe you could put it on paper to make it a little bit easier for all concerned when we come back.

Mr. Vic Toews: Very briefly, though, the agreement was that clause-by-clause was to be finished on the 15th.

The Chair: We have to report back tomorrow morning.

[*Translation*]

Ms. Boivin, you asked to speak. Did you have a point of order? Was it resolved?

Ms. Françoise Boivin (Gatineau, Lib.): We've gone so far now that's been resolved.

The Chair: That's good.

[*English*]

So we'll suspend for the votes and 15 minutes of healthy sandwiches.

● (1739)

(Pause)

● (1904)

The Chair: The legislative committee on Bill C-38 will now resume.

Before going too far, I have to make a correction to my earlier statements. On looking at the minutes of the proceedings of meeting 7, on May 30, 2005, we decided that the concluding date for hearing of witnesses would June 14, that clause-by-clause consideration be terminated no later than June 15, and that the bill be reported to the House no later than June 16, 2005.

So, in essence, what this says is that we must be done by midnight, unless—

● (1905)

Mr. Vic Toews: I understand.

The Chair: Thank you. I just wanted to correct my mistake.

We have been discussing an amendment tabled by Mr. Jean, and were considering Mr. Boudria's thoughts.

Hon. Don Boudria: I'm not putting forward the amendment that I had reflected upon. I'm not putting it.

The Chair: So you've shut down your thinking in that regard?

Hon. Don Boudria: No, that's not the same thing.

The Chair: Monsieur Ménard, and then Mr. Brown.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, in view of the fact that we've heard a lot of views on the question, could you check to see whether the committee wants to proceed with a vote on the amendment? That's called the previous question.

The Clerk of the Committee: The previous question can't be moved during a meeting of the committee.

The Chair: We can't do that in a committee meeting, but I understand your intention.

[*English*]

Mr. Brown.

Mr. Gord Brown: Thank you, Mr. Chair.

I'd like to move a friendly amendment, with the approval of the mover of the subamendment, and I'm going to call upon him to read that friendly amendment.

The Chair: Because you wouldn't want to choke on your coffee, or something like that. I appreciate that.

Go ahead.

Mr. Brian Jean: It would read:

> For greater certainty, no person or organization shall be deprived of any benefit or be subject to any obligation or penalty under any law of the Parliament of Canada by reason of their religious practices or beliefs that marriage is the union between a man and woman to the exclusion of all others.

Mr. Vic Toews: My concern is that some judge may say, well, it wasn't "solely" because of this, but it was also because of that. I've seen that kind of thing. So, quite frankly, it's just too restrictive with the word "solely".

The Chair: Mr. Brown, do you want to share with the other members of the committee the exact wording of your amendment?

● (1910)

Mr. Gord Brown: That was it.

The Chair: Oh, okay. Here's the wording:

> For greater certainty, no person or organization shall be deprived of any benefit or be subject to any obligation or penalty under any law of the Parliament of Canada by reason of their religious practices or beliefs that marriage is the union between a man and a woman to the exclusion of all others.

Is that the wording?

Mr. Gord Brown: That's it, Mr. Chair.

The Chair: Thank you.

Mr. Toews.

Mr. Vic Toews: Thank you very much.

I'm very concerned about the direction of this bill, as I've indicated. We have been told informally that all of our amendments are out of order.

The Chair: You have?

Mr. Vic Toews: Yes, informally.

The Chair: Informally.

Mr. Vic Toews: Yes, I want to make that clear. If the chair wishes to confirm it in a formal manner, he can do so, but I've been informed, informally, that all our amendments, other than the one that is a referral after three or five years, are out of order.

In fact, this is very, very disconcerting, that the promises the Prime Minister made to the people of Canada and to members of his own caucus that these protections would be placed into the act.... Now we know—and again, I was informally informed—that this bill is virtually unamendable. So we're placed in a position, after having listened to witnesses for 60 days, that in fact it was simply a charade. What the Government of Canada was doing was simply putting on a show for Canadians. There was no ability to amend this legislation. The Prime Minister's promises that religious freedoms and other freedoms would be protected are clearly shown to be false.

The amendment that my colleague has put forward is certainly not as strong as I would like to see it. What it does is essentially allow people or organizations to not be subject to a penalty in respect of their religious practices or beliefs. What an amazing situation that in the country of Canada, all we are willing to do is simply protect religious practices or beliefs—practices or beliefs within the four corners of a church.

But as Mr. Kempling, one of the witnesses here, found out, if you dare to take your opinions into the public square.... He was a candidate for a political party—not my political party, indeed none of the political parties represented here. He was a member of the Christian Heritage Party, a nominated candidate, who wrote a letter to the editor expressing his party's point of view about the definition of marriage. The human rights commission held him liable for that and upheld the three-month suspension by the B.C. Teachers' Union, basically saying that his religious beliefs and practices simply could not be communicated—he couldn't advocate in that respect.

When I first raised that case a number of years ago at the justice committee, everyone said this is an aberration—"Don't worry, the courts will fix this problem". So it went to the trial level of the B.C. Supreme Court, and what did the B.C. Supreme Court do? In fact, it upheld the B.C. Human Rights Tribunal. Well, that's aberration, trial division judgment....

One or two days ago, on June 13, the B.C. Court of Appeal, in a unanimous judgment, said that Mr. Kempling didn't have the right as a political candidate—that's the context—to express his party's views on the definition of marriage. It is a shocking state of affairs in this country.

● (1915)

Now, the word "advocacy", which we had proposed be put in there, would have protected people like Mr. Kempling. It would have given him the right to advocate, whether we agree with that or not. It would have given that right. But the way the government drafted this bill, making it virtually unamendable, I would say was a very deliberate choice on the government's part, given that they have the lawyers; they knew what they were doing. Then they send it to a special legislative committee. Why? Well, the numbers, the formation here, are different from a regular committee. It's all part of a plan to get this through without amendment.

Of course, the Prime Minister says to the people of Canada, more importantly his own backbenchers, oh, don't worry, we'll make an agreement. We'll make one of these backroom-deal agreements that we'll get these amendments through to protect people. Well, we haven't seen that protection.

This will basically protect people inside their churches, but woe betide those people who dare go out into the street and actually express their views on a fundamental matter of social policy in this country. We've already heard other witnesses branding those who support traditional marriage as being similar to racists. That was the position of the Unitarian Church of Canada. So we know where this is going. And we saw exactly where it went with the B.C. Court of Appeal, when it came out with its decision on June 13. “These people are really kind of equivalent to racists” is what this is all about. So the B.C. Court of Appeal, in an astounding judgment, upholds the suppression of free speech in this country.

Now, Mr. Kempling testified that he found work as a truck driver. If he wants to challenge the B.C. Court of Appeal.... And in that decision we see again the classic example of how, when equality rights and religious rights collide in this country, equality rights trump, because equality rights are the new religion of the courts. Courts don't come into these matters without any values; they have values. The values that they bring to these judgments are the personal values of the judges. Their new religion is equality rights under the charter, and religious rights in this country—and the expression of those religious rights—simply don't measure up. It's absolutely amazing.

Mr. Kempling then is placed in a position where he has to go to the Supreme Court of Canada. Now, he doesn't get the benefits that gay activists and other left-wing organizations get of government funding to go to the courts. We heard one of the gay organizations received money under the court challenges program. Do you think Mr. Kempling will get any money from that program? No, because he supports a position that is not politically correct, insofar as this government is concerned.

Mr. Kempling will probably have to raise $200,000 to $300,000 to go to the Supreme Court of Canada to protect his right of free speech because the courts have not provided that to him and because of the underhanded way this government brought this bill forward. We cannot afford Mr. Kempling and others in the federal jurisdiction the right to the protection they're entitled to.

The argument that we have to be careful that the charter is respected.... Of course we have to be careful that the charter is respected. But what I said in earlier remarks is that the charter establishes a floor; it doesn't prevent governments from giving more protection. It's inconceivable that government lawyers would come to this committee and say that if we give people more freedom, it will somehow run afoul of the charter. What a twisted view of the charter.

● (1920)

The charter was intended to protect people against governments and abusive tribunals like the B.C. tribunal, and abusive colleges like the B.C. College of Teachers, which stripped this man of his job. And yet we sit idly by and say, well, in a free country, people shouldn't have the right to simply talk about the fundamental values they care about.

So we look at this kind of an amendment that covers, as I say, the inside of a church, but probably not the outbuildings of that church and not, as we'll find out, the marriage halls the Knights of Columbus and other groups hold functions in. It certainly won't protect Bishop Fred Henry, who was threatened by a person from the Canada Revenue Agency, who phoned “coincidentally” during the course of an election to remind this bishop of the Catholic Church what the law stated. If anyone thinks it's a coincidence, of course it's not a coincidence. I have no reason to doubt Bishop Henry when he says he was threatened; I believe Bishop Henry.

Now we hear activists across this country saying they will move to deprive these organizations of their charitable tax status, because why should governments be helping these—and I'm paraphrasing here, though I think these were the words they used—organizations that spread bigotry? So in this country now, because of the government's bill, these individuals can say that those who defend the traditional definition of marriage are simply bigots, and that they should be deprived of government support through their charitable tax status.

One of the things, Mr. Chair, that I find so amazing is that proponents of same-sex marriage simply ask, where is the evidence that allowing gays to marry is somehow going to harm other marriages? Well, Mr. Chair, quite frankly, I don't know what the answer to that is, because I don't have the evidence myself. We've heard some evidence here, but societies don't move in a matter of three months or six months or a year or two years; societies move in decades.

Mr. Chair, I don't know whether you're married or not, and I don't think whether gays are married or not would affect your marriage, if you are married. I probably think it wouldn't. If you're married, you're married. Your marriage, and your probably being over 40 years of age—

● (1925)

The Chair: Careful, careful.

Mr. Vic Toews: —it's probably not going to be affected.

But the issue is the long-term impact of these kinds of changes. And to say, oh, there's no evidence that this is going to change society—I'm not even going to use the word “harm”, because, again, I don't know—there seems to be some kind of onus here upon those who support a definition of marriage that has been in existence for thousands and thousands of years to justify why it should not be changed. The onus has been on those who believe in a certain institution that has been around for thousands of years. And if you can't prove, in the context of a legal challenge, that damage or harm will come about as a result—as though harm or damage here can be measured in the same way that you can measure harm or damage in a motor vehicle accident or in a criminal case.... We're dealing with societal matters, and it will take decades and hundreds of years for society to feel the impact.

And what I find so amazing is that I've been accused of slowing down this process. Imagine this. This institution has gone on for thousands of years, and we've got to be in such a hurry to change it in the course of the summer because, well, time's a-wasting. That's the attitude.

Well, you know, I think this bill has done Canadians a great disservice. This process, which has been a sham from beginning to end, has done a great disservice to the credibility of Parliament. It's done a great disservice to the respect that people should have for government—and they should respect government, but if we don't give them reason to respect government, why should they respect government?

So I'm faced with an amendment like this—

The Chair: It's not an amendment. It's a subamendment.

Mr. Vic Toews: A subamendment like this—and with the amendment, because I imagine we will vote on and speak about the amendment as well. But I'm faced with this subamendment that in fact doesn't address the issue. Everyone around this table knows it doesn't address the issue. But do you know what we're going to do? We're just going to push it off into a bill, send it out into society, and, quite frankly, most of us will be retired by the time these consequences are felt.

So I'm going to support Mr. Brown's subamendment. I'm very concerned that this kind of a weak amendment is the best that we can do. Certainly the Prime Minister has broken his undertaking to the people of Canada, but this is the best we can do in this kind of situation.

I didn't want to take up too much time, so I will end at this point. I just want to endorse this particular subamendment.

Thank you.

● (1930)

The Chair: Thank you, Mr. Toews.

[*Translation*]

Ms. Boivin, you asked to speak.

Ms. Françoise Boivin: Yes. I'd like to respond to certain statements I've heard a number of times in this committee. I'll be brief. We need more to discuss the subamendment as such and to try to categorize or characterize the process I believed in — I regret saying it to my colleague — when I sat down here. No one will ever be able to say that I took part in a sham process or something like that, to use your words.

I'm sorry. I listened attentively to all the people who came here. I believe that all those around the table, whether or not they voted for Bill C-38 on first and second reading, realized the same thing: there are fears, subjective fears in certain respects, perhaps, in my view. Notwithstanding that fact, there are fears. Government members — and I'm mainly going to speak for myself — are prepared to try to allay those fears. That's the exercise we're all prepared and committed to do this evening. I believe it's important to get that on the record of this committee.

I won't let anyone say that I'm taking part in a sham committee, when I'm here to try to ensure that a bill that I consider extremely fair in terms of equality won't cause other inequalities. We're looking for a way to draft the text that will faithfully reflect what we're trying to do, that is to say to enable Bishop Henry to speak out in a manner consistent with his beliefs without any risk of being accused of anything. However, it must be ensured that the text that we compose and that we incorporate in an act won't cause any other problems by promoting homophobia, for example. That's what has to be checked.

Personally, I won't allow anyone to attack my government or the people on this committee by accusing them of taking part in a pointless, sham process that is inconsiderate of the witnesses and so on. In my view, many things that have been said here have been amplified. We've heard people claim that people have been dismissed because of their beliefs. That's false. I heard no witnesses say they had been dismissed. People have withdrawn from their positions and instituted court proceedings, but that's all. That doesn't mean that that's nothing, that we're laughing about it, that we don't care about it or that we don't want to protect people or allay their fears. We shouldn't go so far as to reject this bill. Even though people say that marriage has been around for millennia — and I have a great deal of respect for marriage as such — not so long ago, many aspects of marriage were nevertheless entirely unfair for other classes of people, including women. I don't think that, because we're improving certain situations, we should make others worse.

I believe we all want to find the amendment that will make it possible for the people you want, and that we want to protect, to feel truly protected. However, we won't do as Ms. Hitch said, that is to say add text. As you know, some lawyers cause more problems than they solve.

I'm still prepared to analyze Ms. Brown's subamendment seriously, but I'm not convinced it will enable us to achieve the goal we all seek, that is to say to protect people. I have reservations, and I'd be inclined to ask what you think about that. We have experts. I'm a lawyer in labour relations, but not in this type of law. Will all this enable us to achieve our purposes, that is to say to ensure that Bishop Henry can say in public that, for him, marriage is a union between one man and one woman, to the exclusion of all others, without running the risk of being hit on the head or called by someone from Revenue Canada? My sole wish is to have “the” text. I'd like someone to create it with a magic wand so that we can achieve our objectives this evening before midnight.

● (1935)

[*English*]

The Chair: Mrs. Hitch, do you want to address this?

Ms. Lisa Hitch: Thank you.

In answer to the question, the subamendment does address many of the legal policy considerations I put out in the first place. There are two remaining ones. One is that removing the word “solely” from the original amendment opens the provision to a broader effect than is perhaps intended.

Again, just take one example within the charitable registration field. I apologize to my colleagues from Revenue Canada and Finance for continually choosing that example, but it has been discussed quite thoroughly before this committee and by many witnesses. The problem is that there are multiple purposes available for a charitable organization. This opens the door to any charitable organization simply adding that they are also now partially trying to promote their belief or religious practice specifically related to the definition of marriage as one man and one woman. The multiple purposes were to be addressed by the word "solely". So that's one concern.

The other concern is the original concern that there's still a lack of balancing factors internal to this provision by the lack of any reference to either the particular limits that would be of concern, such as hate speech, both criminally and civilly, or the general balancing that happens under section 1.

The Chair: Thank you.

Mr. Macklin is next, and then Mr. Moore.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): In the interest of going forward, I will pass.

The Chair: Fine.

Mr. Moore.

Mr. Rob Moore: I've heard you raise that point twice, and to anybody who's paying attention to what's going on, we've heard witnesses and we've put forward amendments based on the testimony we've heard. One of those amendments was because there's concern about religious freedoms.

I think the intent here is good. The intent is to address a legitimate concern, based on the evidence we've heard, that someone is advocating, speaking, or acting on their religious belief that the traditional definition of marriage is the one they believe in—one man and one woman to the exclusion of all others. We've raised that, and I think it's a legitimate protection to put in this bill, in light of the fact it is recognized that clause 3 of the current bill doesn't actually extend anything beyond the realities of the charter and case law.

What concerns me—and I'm not being critical of your analysis of the situation—is we have people here from the Department of Justice whose first response, when we raise the idea of belief in the traditional definition of marriage and not being subject to any sanction, is that this could somehow bring into play hate speech. Some people, because of their religious beliefs, advocate that marriage is the union of one man and one woman, and depending on what poll you look at, a minimum of half of Canadians believe in that definition of marriage. When you do your legal or charter-based analysis, your first response is that this could somehow involve hate speech. I have a problem with that. We're not trying to override any type of criminal sanction of what hate speech is.

You mentioned charities, but we want to take out the word "solely". I can see a judge or a Canadian human rights tribunal saying this person is advocating the traditional definition of marriage, and we think 90% of it is based on religious belief, but 10% of it is probably just what they think on the issue. Therefore, because it was not based solely on religious belief—and this would involve putting their particular religion on trial because it's not solely based on that religious belief, and how they would determine that I have no idea—this person would be guilty of a human rights offence. I have a problem with that. That's why I'm not in favour of having the word "solely" in there. It should be a little broader.

You keep returning to "as recognized under the charter", or "take into account the balance that the charter has". I read the reference case, and we know that. The court even said at some point there could be a collision between the rights of same-sex couples and freedom of religion. What we're trying to do here is address Canadians' concerns that by believing in the traditional definition of marriage based on their religious beliefs, or otherwise, and speaking on that, as some have, they would not be subject to any sanction by the federal government.

The response we get, instead of saying this one might protect them from a complaint under the Human Rights Act, or might protect them from having their charitable status revoked, is we wouldn't want to give people too much freedom because then they'll run afoul of hate speech. I suggest that would be the exception and not the rule, and those laws would still apply.

I'd like your response to that. How do you feel this could be opening up some door that I don't believe it opens? We're just trying to provide protections for Canadians' beliefs, and excuse them for believing that, since this is the definition of marriage that existed before Canada came into being, and our government has seen fit to decide to change that. Even the language used in this debate that we're somehow including—and I'd like your comment on this too—other people into the definition of marriage.... Correct me if I'm wrong, but this bill is really legally changing what the word "marriage" means in Canada. There is a legal definition of marriage, and this bill changes that.

● (1940)

It's not that we still have marriage but now we're just letting a few more people in. It's actually, for Canada and our place on the international stage and for all Canadians, that what the word "marriage" means in our country is different from what it meant before, and it's different from what it probably means in the rest of the world.

Could you comment on why your first reaction was to say that somehow it relates to hate speech? And am I right that marriage in law, the definition, is being changed? This isn't just about including more people in some grand institution that can accommodate new people without changing, in fact, what that institution is.

The Chair: Mrs. Hitch.

Ms. Lisa Hitch: Thank you for providing me with an opportunity to clarify what I must have very poorly stated. I will address two of your questions and then turn to my colleague to answer your question on the use of the word "solely" a little more clearly.

Let me start by saying that of course there's no implication that the 50% of Canadians who believe that the traditional definition of marriage is still the definition of marriage are engaging in hate speech, and I apologize for any implication in that regard. What I meant was the opposite, which is that generally, when the Department of Justice lawyers are asked to look at draft language, and we're asked to identify legal policy concerns, what people are asking us is whether the wording is broader than the intent. So will the wording, when it's applied and interpreted by the courts, accidently capture intents that are not a part of the original purpose. And that's what I had intended to suggest I was doing. It was to say that in this particular instance, without any limitation that's internal to the provision, there is a risk that it can be abused, not by the people who have a bona fide religious view that the traditional definition of marriage should be defended, but by those who seek to use the clause for other purposes. That's the concern we have with, we'll say, the loss of the word "solely" and the loss of any internal limitation.

On your second question, on the definition of marriage, I believe that is quite widely misunderstood, both in the general part of Canada and within the legal community, because it's a very obscure area of the law, of course. The definition of marriage, properly looked at, is that in order for a valid legal marriage to exist, it must meet the requirements of both provincial or territorial law and federal law, because of course jurisdiction over marriage is divided in the Canadian Constitution. That means that all of the requirements of provincial law around licencing, registration, and all of those solemnization requirements must be met as part of the definition of marriage. And therefore also, within federal jurisdiction, all eight branches of legal capacity must be met. What this does, like earlier federal bills to change aspects of marriage, is change one aspect of legal capacity of the eight branches. So in that regard, yes, it alters the definition of marriage, but no more so than any previous federal legislation.

● (1945)

The Chair: Mr. MacCallum.

Mr. Raymond MacCallum: I was wondering if I could ask you to simply restate, after Ms. Hitch's answer, what your question was in relation to the use of the word "solely".

Ms. Lisa Hitch: That leaving it in in some way says that if you have personal views beyond religious views, you won't be protected with the word "solely" in there, because the courts would say—

Mr. Rob Moore: My point on "solely" was that people have beliefs in life that are not totally based on religious beliefs. Or maybe they have a belief that is totally based on my religious belief, or you say acts.... Then you're hauled before some tribunal or a judge, and they say, "Well, that was 90% based on your religious beliefs, but 10% of it was based on the fact that you're just a mean person, or the fact that you're in violation of the law". So you're not safe. Your beliefs have to be "solely" based on your religious beliefs, your action. There's probably some atheist out there who may want to speak to their belief that marriage is the union of one man and one woman. In my understanding, this would provide absolutely no protection for them.

The provinces have jurisdiction over the solemnization of marriage and who can conduct a marriage. But the definition of marriage was set out in the common law. The federal government has said they have jurisdiction over it under section 91 of our Constitution. I would suggest, with respect, that any change made before this time vis-à-vis the legal definition of marriage is nowhere near as significant as this one. This is turning the word "marriage" on its head.

I know that the provinces have jurisdiction over solemnization, but when it comes to the word "marriage", some jurisprudence suggests that it is not only beyond the scope of the courts to change what the word "marriage" means; it is also beyond the scope or jurisdiction of the Parliament of Canada.

It's pretty clear in law, and in the world, and inter-jurisdictionally, regardless of religion, that there is a commonly known definition of marriage. It's also clear that it's not something that can include new people without fundamentally changing what it means. That's what this bill does. It changes. It's not about allowing someone in. I know why the debate has been framed that way—to make people sound mean who don't want to allow someone else into the institution. In fact, the problem people have with it, those who favour the traditional definition of marriage, is that you're changing in law what marriage means. That applies across the country.

To clarify, Mr. MacCallum, that's what I meant about "solely". It's too narrowing. It's forcing a judge to determine that 100% of this individual's speech or actions are based on his religious views. This is too high a threshold to offer the necessary protections.

On the point that we have to use charter language, the problem there is that you would not be extending any protections beyond where we are today with the current jurisprudence on the charter. We have a charter. We have years of jurisprudence. There are some protections. There's been a balancing. If we tie our statement strictly to the charter, then we might as well leave it out. That's my take on the language you proposed.

● (1950)

The Chair: Mr. MacCallum, believe it or not, this was on "solely".

Mr. Raymond MacCallum: The concern with not using the word "solely" has to do with cases where a penalty or an obligation is sought in relation to the exercise of a religious practice. But it's not simply the exercise of a religious practice; there are other things going on. Take charitable status. You're exercising a religious practice or espousing a religious belief, and you do so beyond the 10% limit to your ability as a charitable organization, in terms of what's justifiable to retain charitable status. Without the word "solely", this provision would provide some protection to say, "Well, you may be purporting to take my charitable status away because I exceeded the 10% rule, but I exceeded the 10% rule in relation to my exercise of religious practices or beliefs".

With the protection worded so broadly, it provides an excuse that isn't simply, "Oh, no, we're not taking it away because of your religious practices or beliefs; we're taking it away because you exceeded the 10% rule." You would come back and say, "But I exceeded the 10% rule in relation to my exercise of religious practices or beliefs", whereas, if the word "solely" is in there, it's clear that you can't take away your charitable status "solely" because you happen to espouse a belief on the basis of the traditional definition of marriage.

Ms. Lisa Hitch: Could I just take one second to answer the question on the definition of marriage?

The Chair: Certainly.

Ms. Lisa Hitch: I'd direct you to tab 18 in your book, which is the court of appeal decision from Ontario. In the very opening paragraphs, the court cites what has been for 136 years—or all of Canada's history—the basis of the common-law definition of marriage in Canada. It is based, I think, as everyone here has heard many times, on the British case, the 1866 case of Hyde v. Hyde and Woodmansee, which is actually a case dealing with polygamy. But this has been the basis of the definition of marriage in Canada. All federal legislation in the area has sought to modify this definition in one way or another. The original definition, then, was, "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

So you can see, I believe, just looking at these words that a number of issues have changed in Canada since the 1866 formulation of the definition. Of course, the reference to Christendom has changed in terms of Canada's recognition of the plurality of religious beliefs now present in Canada. But certainly the words "for life" have changed with the introduction of divorce legislation in the 1960s. There have been a number of other changes, mostly specific to the prohibited degrees of consanguinity.

The Chair: Thank you.

Mr. Siksay.

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

I just want it to be on record that I also don't share Mr. Toews' assessment of the work of this committee. I find some of the words he used, particularly the word "sham", quite offensive. I also don't share his dark fantasies about the decline of the western world if we go ahead with the ability of gay and lesbian couples to marry in Canada.

With regard to the subamendment—

Mr. Vic Toews: I have a point of order.

The Chair: Excuse me, Mr. Siksay.

On a point of order, Mr. Toews.

Mr. Vic Toews: I'd like to have Mr. Siksay point out where I talked about the decline of western civilization. In fact, my words were that I don't know what the evidence is in that respect.

The Chair: Thank you.

Mr. Siksay.

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

I just want to say that I'm still concerned about the reservations that have been expressed by Ms. Hitch and Mr. MacCallum about the breadth of this amendment. I'm concerned that it offers specific protections to people who are concerned about a particular definition of marriage and not another definition of marriage. So I think it favours one group of Canadians over another, and I find that unacceptable.

I, for one, do not share any lack of confidence in the charter protections that we have available for the freedom of religion in Canada, and I think that this subamendment is unnecessary, given the strength and rigour of those protections that are already available.

Thank you, Mr. Chair.

● (1955)

[*Translation*]

The Chair: Thank you.

Mr. Marceau, did you ask to speak?

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

I'd like to ask Ms. Hitch or Mr. MacCallum a question.

I'd like you to give us your professional opinion. Is this amendment superfluous? Are the fears expressed by certain persons or groups baseless in view of existing protections, in particular those contained in section 2 of the Canadian Charter of Rights and Freedoms? Can you give us a yes or a no?

[*English*]

Ms. Lisa Hitch: I believe perhaps the best way to answer that, in my professional opinion, is to refer back to the words of the Minister of Justice, who said that in his legal view the charter already protects religious freedom fully, and that the entire point of the government taking the time to go to the Supreme Court of Canada on the reference was to confirm that legal view.

[*Translation*]

The Chair: Is that fine with you?

Mr. Richard Marceau: Yes.

The Chair: That's good.

[*English*]

Mr. Toews.

Mr. Vic Toews: I have just a couple of points here.

With respect to the issue of “solely”, what I find very difficult to understand is that when you talk about, for example, the child pornography context, and the defences placed in that provision by the Supreme Court of Canada in respect of artistic merit, no one suggested that you had to say your defence was based solely on artistic merit. In fact, in that case, the courts said as long as there was some artistic merit—it didn't matter if it was only a portion—it was justified.

So I find it amazing that in this country we have no concern about limiting the free speech of child pornographers and child predators, and yet we somehow want to restrict the free speech of people of religion and say they sort of have to be put into a box. It has to be solely as a matter of religion. But for child predators and child pornographers, it doesn't have to be solely, as long as it's a little bit in there.

The second point I'd like you to address is the definition of marriage. Now, from what I heard Ms. Hitch saying, there is a shared jurisdiction over marriage. But I cannot see a province being able to solemnize a polygamous union, because they are guided by the definition of marriage established under the constitutional jurisdiction of the courts, first of all, in incorporating the British definition, and now the exercise of section 91, powers over marriage and divorce.

I'm wondering if Ms. Hitch could point out where in the Constitution or in any document it says that provinces have the power to change the definition of marriage, much less define marriage.

Those are the two points.

Ms. Lisa Hitch: On your first question, Mr. Toews, I would ask if you could possibly do me the favour of reformulating your question, because I wasn't sure where the legal question was. Certainly if it's a political question—

Mr. Vic Toews: No.

Ms. Lisa Hitch: —about why the decision was to put “solely” here but not there, I don't believe I can answer that.

Mr. Vic Toews: Let me reformulate it, then. Why is it that the drafters of the Criminal Code didn't think it was necessary to put in “solely” when dealing with artistic merit in the context of discussing whether something was child pornography, and yet now the drafters are coming up before us and saying “Oh, we have to say that it's solely in respect of religious discussion or expression”?

I mean, I would have thought that it is necessarily presumed that expression of practice and beliefs is lawful expression and beliefs, and that we shouldn't be suddenly assuming, as my colleague pointed out, that we are allowing illegal hate literature to be expressed. I find it quite astounding, because there's a double standard here.

● (2000)

Ms. Lisa Hitch: I will begin by apologizing, then, and state that I am not an expert on the Criminal Code, and neither am I qualified as a drafter, so I don't believe I can answer your question about the child pornography provision.

With regard to my comments here, I was asked for my legal policy analysis of the wording that was proposed. In terms of the wording that's proposed here, I don't believe there's any assumption that the behaviour will necessarily be unlawful. I'm saying that the wording doesn't specify that the religious belief or expression, or the practice of that religious belief, is within the law. And that's my original point, that there's no internal limit within the provision as currently stated.

On your second point, the definition of marriage is, as I said earlier, an element or a combination of both the requirements set out under provincial or territorial law, under section 92 of the Constitution, regarding solemnization, and those requirements of federal law, concerning capacity, under section 91 of the Constitution. The definition of marriage reads all of those requirements together in order to get to what constitutes a valid legal marriage under Canadian law.

The Chair: Thank you.

Mr. Brown, please.

Mr. Gord Brown: Thank you, Mr. Chair.

Since the beginning of this process well over a month and a half ago, we've seen many witnesses. One of my biggest concerns throughout this whole process has been the protection of religious freedom and the ability to speak, or free speech.

I have a question for Ms. Hitch. She said that we've heard from the minister in terms of the charter's protection of religion, but I'm not reassured by that, especially in light of the recent Kempling ruling in B.C. Maybe she could explain to us how we can rely on the charter and the words of the minister, when a ruling just a couple of days ago was actually the complete opposite. That ruling in fact reinforces to me why we need some sort of protection in this legislation, and brings me back to the fact that in my view this legislation has not been thought through that thoroughly, in that all of these other issues are now coming to the fore. Yet we're rushed; it's eight o'clock now, and we have to have this dealt with by midnight.

So if I can throw that question to Ms. Hitch, I'd appreciate an answer. Thank you very much.

The Chair: Ms. Hitch.

Ms. Lisa Hitch: I will defer to my colleague.

The Chair: Mr. MacCallum.

Mr. Raymond MacCallum: Everything that you're conveying, of course, is a concern and a legal concern. The minister never intended, I'm sure, to dismiss those concerns.

With respect to the Kempling case, which has been referred to a couple of times here, I'm not sure much rides on it, but just in terms of some of the factual background, it's important to note that it was actually a freedom of expression case and not freedom of religion. For procedural reasons, Mr. Kempling had failed to make the freedom of religion claim in time, and tried to raise it on appeal, and wasn't allowed to. So technically, it doesn't constitute a precedent where freedom of religion was being balanced with any other competing right.

Second, what the court of appeal found determinative was the fact that Mr. Kempling was a teacher and a counsellor in a public school, and that he made his statements publicly, making reference to his role in the public school system. So there's some suggestion in that court decision that had he expressed his views simply as a member of the public or as a member of a particular political party, there may have been a different conclusion in terms of the balancing. I'm not here to suggest what that might have been one way or the other, but only that those interests are balanced in a contextual way by the court, depending on all of these factors. One that was clearly motivating for the court in the Kempling case was the best interests of the children, who are students in the school where Mr. Kempling was teaching.

Mr. Gord Brown: I'll wind up on that, then.

What we've really got here is that if we pass this legislation as is, we are going to have years of court cases or challenges on this very issue. It's not clear what's going to happen. That's why, even if we were to pass this amendment, we would still have it open to do that.

Thank you.

● (2005)

The Chair: You want a recorded vote? Certainly.

(Submendment negatived: nays 8; yeas 4) [See *Minutes of Proceedings*]

(Amendment negatived: nays 8; yeas 4) [See *Minutes of Proceedings*]

The Chair: Yes, Mr. Macklin. I presume you're speaking on a point of order, sir.

Hon. Paul Harold Macklin: I am speaking on a point of order, yes.

I would like to ask this committee to consider an amendment, which I am prepared to bring forward, dealing with the same substance we have just discussed, but I would need unanimous consent in order to bring that forward.

The Chair: In essence, you're asking for unanimous consent to let you table the wording of an amendment.

Hon. Paul Harold Macklin: That's correct.

The Chair: Does Mr. Macklin have unanimous consent to table an amendment?

Hon. Paul Harold Macklin: Let me read the amendment that I would propose to table. It would read:

> For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage between persons of the same sex based on that guaranteed freedom.

The Chair: Does the honourable member have unanimous consent to table this?

Mr. Vic Toews: I'm not sure of the impact of this amendment.

The Chair: We're not in debate now. We're strictly on the unanimous consent for the member to table so that we can then go into a debate.

[*Translation*]

Mr. Réal Ménard: Pardon me, Mr. Chairman. Can you reread it? Something escaped me.

The Chair: Yes.

[*English*]

Would you read the wording again, please, Mr. Macklin?

Hon. Paul Harold Macklin: I'd be more than happy to do so.

> For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage between persons of the same sex based on that guaranteed freedom.

The Chair: On a point of order, Mr. Moore.

Mr. Rob Moore: On a point of order, I would just ask for greater clarification. What is this supposed to do?

The Chair: We are not in debate now. We are strictly on the unanimous consent for the member to table.

Mr. Rob Moore: Well, I'd like to know what the member—

The Chair: If you let him table it, then you could be in debate and you could question him. If you don't let him table the amendment, it will stop here.

Mr. Vic Toews: There's a point of order here. The problem here is, in the first part, he talks about freedom of conscience and religion. In the second, he talks about their expression of their beliefs based on that—

● (2010)

The Chair: Mr. Toews, I apologize—

Mr. Vic Toews: —so which freedom is he talking about?

The Chair: Mr. Toews, I apologize. We are not at debate stage now. We are requesting, yes or no, unanimous consent for the member to table this amendment.

Mr. Vic Toews: I'm just wondering if we could have a brief suspension.

The Chair: How brief?

Mr. Vic Toews: Five minutes.

The Chair: The meeting is suspended for five minutes.

● (2010)

(Pause)

● (2017)

The Chair: Let's resume.

I had agreed to five minutes; it's now six.

We've listened to the wording of an amendment that Mr. Macklin is asking for unanimous consent to table. Mr. Toews requested a five-minute suspension to decide if he wants to give the unanimous consent.

Mr. Vic Toews: I'm prepared to give my consent, but I can't speak for my colleagues.

The Chair: Of course not. We didn't think that at all.

I'm going to ask again, does Mr. Macklin have unanimous consent to table the wording for this amendment?

Some hon. members: Agreed.

The Chair: Mr. Macklin.

Hon. Paul Harold Macklin: Thank you very much.

I would be very pleased to move new clause 3.1, which is the amendment that I have placed before this committee.

The Chair: Does everybody have the wording, or do you need me to read the wording again?

I'll read it again, and in the meantime we'll also make copies of this. It reads as follows:

> For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or their expression of their beliefs in respect of marriage between persons of the same sex based on that guaranteed freedom.

[*Translation*]

Mr. Ménard, do you want to hear it in French? Is that all right?

● (2020)

[*English*]

Hon. Paul Harold Macklin: I have a point of clarification.

The Chair: Yes, sir.

Hon. Paul Harold Macklin: Just before the word “expression”, rather than use the word “their”, could we use “the”?

Thank you.

The Chair: Done.

[*Translation*]

Ms. Françoise Boivin: Can you read it in French?

The Chair: Yes, certainly.

> 3.1 Il est entendu que nul ne peut être privé des avantages qu'offrent les lois fédérales ni se voir imposer des obligations ou des sanctions au titre de ces lois pour la seule raison qu'il exerce, à l'égard du mariage entre personnes de même sexe, la liberté de conscience et de religion garantie par la *Charte canadienne des droits et libertés*, ou qu'il exprime, sur la base de cette liberté, ses convictions à l'égard du mariage entre personnes de même sexe.

I can't guarantee the translation. It was originally provided to us in English, with a translation that hasn't been checked.

Ms. Françoise Boivin: I prefer it in French.

The Chair: You prefer it in French?

I thought I detected some minor differences in French?

Ms. Françoise Boivin: You too, Mr. Chairman.

The Chair: It's not entirely a word-for-word translation, Ms. Boivin, and I believe you noticed that.

Ms. Françoise Boivin: Absolutely.

The Chair: We're going to discuss the English version, and then we'll ensure that the French version corresponds to the English. All right?

Ms. Françoise Boivin: All right.

[*English*]

Mr. Vic Toews: Again, this is not a clause I have any particular fondness for. I want to perhaps explain why I'm very concerned about this, and how this is overly restricted, and how this provision simply does not provide any substantive protections.

What we see is essentially two parts to this amendment. The first is the fact that

> ...no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights

What in fact has to happen in this particular context is this. A person has to bring their expression under the context of the rights guaranteed under the charter. Mr. Kempling, who expressed his political views that were of course based on his religious faith as well, found that the B.C. Court of Appeal said that's no protection, and it upheld his suspension.

This doesn't provide freedom of conscience and religion. It only provides it in respect of what the Canadian Charter of Rights and Freedoms guarantees. So what we have tried to provide here is a minimalist type of protection. If, for example, you're inside your church, you can basically, I think, say anything that you want, but again, you can't express anything in public about this. As Mr. Kempling found out, the courts did not see the extension of his rights into the public sphere.

The second problem with this amendment is the second part. It says:

> ...the expression of their beliefs in respect of marriage between persons of the same sex based on that guaranteed freedom.

What I'm concerned about is what guaranteed freedom? There are two freedoms specifically mentioned here: freedom of conscience and freedom of religion. Those are two separate guaranteed freedoms. The third freedom that is at least implicit in this document is freedom of expression. Does the second part of this amendment then say “the expression of their beliefs in respect of marriage between persons of the same sex based on” the guarantee of freedom of expression? Is that what this amendment is trying to say, or is it in respect of the guaranteed freedom of expression of conscience, or the guaranteed freedom of expression of religion?

This is a terrible drafting job by somebody, because it is so vague. It talks about three different freedoms in this amendment, and then says “based on that guaranteed freedom”. On which guaranteed freedom—freedom of conscience, freedom of religion, or freedom of expression?

My colleague Mr. Szabo says that it's that guaranteed freedom of the charter. Of the whole charter? No, that's not what it says. It's very specific—“that guaranteed freedom”. What the charter itself says is the Charter of Rights and Freedoms. The point is that we are going to be voting to pass something that is internally inconsistent. That is what this amendment is.

So how do you resolve this? Perhaps we can ask the people from the justice department to explain what they think this means, because I don't....

● (2025)

The Chair: Did we give you a copy of the wording?

Ms. Lisa Hitch: We do have a copy of the wording, yes, thank you very much.

I take it that you're asking again for a legal opinion on the impact of this particular clause and on whether it gives anything beyond what already exists.

Mr. Vic Toews: No. I know it doesn't give anything beyond what already exists. This is simply a reiteration of what the charter does, because it says "based on that guaranteed freedom", or "of the freedom of conscience and religion guaranteed under the Charter of Rights and Freedoms". So it doesn't give anything more than the charter already gives. This is a very hollow provision. It gives absolutely nothing to people like Mr. Kempling if they were in the federal jurisdiction.

My concern is that not only does this give nothing in terms of any substantive guarantee beyond what the charter already provides, but it is internally inconsistent. In the last phrase, "based on that guaranteed freedom", what freedom are we talking about? The courts have recognized that freedom of conscience is a separate freedom from freedom of religion. Freedom of expression, which is not put in here, is another freedom. So when we're talking about "that guaranteed freedom", what freedom are we talking about?

Ms. Lisa Hitch: All right. I will begin, then, perhaps by going back to a comment of my colleague's earlier, which is that of course the Kempling case was not about the freedom-of-religion guarantee. That wasn't before the court. The second thing I would state is that there is no reference here to freedom of expression.

Mr. Vic Toews: Well, the word "expression"—

Ms. Lisa Hitch: The word "expression" is used with regard to the guaranteed freedom of conscience and religion. So of course there's a right to express that guaranteed fundamental freedom of conscience and religion. So the expression is still limited to the same freedom. That, I think, perhaps answers your question.

In terms of the reference back to that guaranteed freedom in this particular wording, it would be to the paragraph 2(a) guarantee of freedom of conscience and religion. Since the guarantee within the context of paragraph 2(a) is the phrase "freedom of conscience and religion", it would refer back to both or either, depending on factual context.

Mr. Vic Toews: So under this provision, freedom of expression is not guaranteed.

Ms. Lisa Hitch: The provision doesn't refer to freedom of expression. This provision is referring only to freedom of conscience and religion and the right to express that freedom of conscience and religion and to exercise that freedom of conscience and religion. If there were a desire to make a specific reference to any other charter provisions, it would have to be added to the language.

Mr. Vic Toews: Okay. If this provision were not there, what would we lose in the bill?

● (2030)

Ms. Lisa Hitch: I believe, again, the best way to give a legal opinion on that would be to refer back to the comments of the Minister of Justice that the effect of this provision or a provision such as this, which has been asked for by some of the witnesses, would be to provide a tangible expression of the existing charter protections the minister has been referring to. So this provision could give them something to point to when there is a complaint lodged against them or when there is a proceeding begun against them that would be more concrete.

Mr. Vic Toews: Now, this is real news to me. This is a tangible expression of these charter rights and freedoms. I thought the tangible expression of the Charter of Rights and Freedoms was in the charter. What I'm asking is, what substantive rights does this grant beyond what the charter already grants people in Canada?

Ms. Lisa Hitch: I believe that I can only reiterate my earlier statement, which is that it is the position of the minister that this kind of clause—

Mr. Vic Toews: No, no. That might be a political—

Ms. Lisa Hitch: —is what witnesses have been asking for as a tangible reflection of existing charter protections.

Mr. Vic Toews: You're a lawyer. The person sitting beside you is a lawyer. What I'm asking for is a legal opinion from you in respect of what substantive guarantees this provides beyond what the charter already provides us. The charter, generally speaking, gives a 50% guarantee. Let's think in the abstract. Does this take it to 51%, 52%, 100%? What does this substantively do?

Ms. Lisa Hitch: If people are looking for a further protection in order to answer some of their concerns and to provide reassurance, this provides them with one other element to raise in any litigation that might be brought against them. It's stronger than anything within the preamble because it's within the bill, but it is an additional, tangible reflection of existing charter protections.

Mr. Vic Toews: So you're saying that if I repeat a charter freedom in a bill, it enhances the rights that are granted to me in the charter already?

Ms. Lisa Hitch: I'm saying that if you reaffirm a charter principle, it gives you an additional source, a statute considered by the Parliament and passed by the Parliament after due consideration, which is something that can be used as an additional argument in litigation.

Mr. Vic Toews: You're saying that if this provision wasn't in the act, I couldn't then raise the charter because it isn't spelled out in the act? Is that what you're saying?

Ms. Lisa Hitch: Under no circumstances is that what I'm saying; I'm sorry if that was the way it came across.

Certainly the charter and the Constitution guarantee rights to all Canadians; those rights exist. Again, I will reiterate that what I'm saying is that this is a tangible reflection of existing charter protection, not that this displaces charter protection that already exists.

Mr. Vic Toews: But what you said earlier is that this gives further charter protection. In what sense does this give further protection beyond what is already guaranteed in the charter? That's what I'm trying to figure out. How does this provide in a substantive way anyone with any further guarantees or rights beyond simply being able to say, you know, I don't have to go back to the back of Martin's Criminal Code and look at the Charter of Rights and Freedoms, because it says right in here I have those charter rights and freedoms?

Why do we have to reiterate in a statute simply the fact that we have charter rights and freedoms? What I'm asking is, do you have an answer as to what substantively this gives us in terms of furthering or expanding charter rights and freedoms?

I've drafted a lot of legislation, I've litigated a lot of constitutional cases, and this is remarkable, that I'm hearing we can somehow guarantee an enhancement of charter protections simply by putting it into a statute. What a wonderful way to amend a Constitution. Even though we have a level of charter protection, we can now say let's put it inside the statute and that will give us more.

What I can't figure out, what I'm trying to get my head around, is what more does it give? It gives us an ease of reference. I know now I can just pick up this marriage bill and it says right there that my rights, in terms of freedom of conscience and religion guaranteed under the Charter of Rights and Freedoms, are protected as long as I act in accordance with that.

But isn't that what the charter, as the supreme law of this country, already does? Every single federal, provincial, and municipal statue, bylaw, and regulation is already impressed by the Charter of Rights in that it must be read in accordance with the Charter of Rights and Freedoms. That's implicit. It doesn't need to be explicit. How does making it explicit in this case enhance what is already implicit? That's the question.

Ms. Lisa Hitch: Again, I can only reiterate that this is structured as an interpretation clause that would indicate the intent and will of Parliament in passing the statue as to how it should be interpreted in accordance with the charter guarantees. What this does is provide, for those people who are concerned that there may not be sufficient protection in the charter, a tangible reflection of their charter protections to give them something to point to when they may be subject to suit or to complaint.

Mr. Vic Toews: So what you're saying is that for those who are concerned that the charter does not give them sufficient protection—that's basically what you said—this will give them more protection.

● (2035)

The Chair: Mr. Toews, let's try to be brief and to the point, and we'll give an opportunity to Mrs. Hitch—

Mr. Vic Toews: That's better than listening to me speak.

I want to find out why, Mr. Chair, this provision in any way substantively enhances guarantees that are already provided by the Charter of Rights and Freedoms. In what substantive way does this enhance guarantees other than by saying to someone who doesn't understand that you can read the act together with the Charter of Rights and Freedoms, even though they're two separate documents...? One is a constitutional document and one is a statute, and you say, well, it says right here my charter rights are guaranteed. Or you could go pay fifty bucks to a lawyer and he'll tell you the same thing.

The Chair: Let's give an opportunity to Mrs. Hitch to answer, and then you can decide if you accept it or not.

Mrs. Hitch.

Ms. Lisa Hitch: I'm not sure I can add anything to what I've already said.

The Chair: Thank you.

Mr. Moore.

Mr. Rob Moore: After all the witnesses we heard and the testimony that was provided, it's discouraging that this is what we've come up with here. Number one, it shouldn't be in there at all, perhaps, but it more rightly would have been in a preamble, because from what I've heard you say, this doesn't change the state of the law at all.

My thought on it is that this is something Canadians are going to read, and the average Canadian is not a constitutional expert. He's going to read this and say, oh, there you go; my rights are protected. From the evidence I'm hearing today, this is simply a restatement of existing charter rights.

Hon. Don Boudria: It will bring more certainty.

Mr. Rob Moore: Saying something for greater certainty doesn't make it a greater protection. It's just restating the obvious. After all the testimony we've heard, what I'm hearing today is that this provision doesn't actually do anything. It doesn't legally do anything.

I understand that it might provide some political cover for someone to go up to a constituent and say, look, I am able to vote for this bill now because, look here, you can read it right here; all your rights are protected. But the reality is that this same constituent who's hauled before a tribunal or in front of a judge is offered no more protection by this provision being in the bill than they would be if we simply left it out.

What I'd like to ask Ms. Hitch is—because there was a lot going back and forth—is there any greater protection? Why should we, why would we include a provision like this, and does it offer any substantive greater protection than what is already afforded under our Charter of Rights and Freedoms?

Supplemental to that, if your answer is simply that the charter is there and this is restating charter protections, then in drafting legislation, wouldn't you more rightly put something like this in a preamble, for example?

● (2040)

The Chair: Mrs. Hitch.

Ms. Lisa Hitch: Thank you.

In response to your first question, I'm afraid I can only reiterate what I've reiterated so many times, and I will beg the indulgence of the committee unless you wish to hear me say it again.

On your second question, it's difficult for me to answer whether it's more appropriate in the preamble or in the bill. It has been moved here as part of the bill.

Mr. Rob Moore: In the law, is a provision in a preamble of any legal weight?

Ms. Lisa Hitch: Things that are in the preamble are used by the court for interpretation of the rest of the statute. You can judge the importance of that by looking at the reference decision of the Supreme Court, which referred to preambular clauses in coming to the answers they did to the questions posed by the Governor in Council. So yes, the preambles are used.

Mr. Rob Moore: I would suggest, then, that this is of even less effect than if it had been in the preamble.

Hon. Don Boudria: It's greater than in the preamble.

Mr. Rob Moore: No, less. If it had been in the preamble, it might have been used for some guidance, but it's in the body of the act, and it's just a restatement of what the law is.

Ms. Lisa Hitch: Generally speaking, an interpretation clause has slightly more weight than a preamble clause, so it would have more weight in the bill than in the preamble.

Mr. Rob Moore: More weight to do what? I'm reading this as someone who's been brought before a court or a tribunal. What does it tell me that is not already in law?

Ms. Lisa Hitch: It's an interpretation clause for the use of the court in interpreting the application of the bill. It represents an expression of the intent and will of Parliament in passing the bill—how they wish it to be interpreted and applied.

Mr. Rob Moore: I guess it's reminiscent of the interpretative clause we included in 2000, which defined marriage as a union between one man and one woman. Some members of this committee voted in favour of it. The court gave little regard to that interpretative clause. In fact, it was essentially ignored. I would suggest that this too will be ignored, that it's of no legal weight.

The other concern I have is why we're limiting it to "solely by reason of their exercise". The wording mentions "in respect of marriage between persons of the same sex". What about someone who's not critical of same-sex marriage? What about someone who's just advocating the traditional definition of marriage? Nothing to do with same-sex marriage—they're simply speaking in favour of traditional marriage. Does this contemplate that person? To me, it contemplates the person who's being critical of the definition of marriage as "any two persons". It says, "in respect of marriage between persons of the same sex". What about someone who is exercising their beliefs in respect of marriage between persons of the opposite sex?

Ms. Lisa Hitch: Logically, the one branch of legal capacity that has to do with the earlier ban on marriage where there's identity of gender only has a black and a white. Either you're opposite sex and you're marrying, or you're same sex and you're marrying. So logically, if you exercise of your freedom of conscience and religion in respect of marriage between persons of the same sex, you're either talking about a vision of marriage that encompasses same-sex couples, or a vision of marriage that does not. So the wording should allow protection for both viewpoints.

● (2045)

Mr. Rob Moore: What I'm hearing is that this is being provided as some sort of placebo to help people digest this bill. Everyday Canadians who are not constitutional lawyers, who do not have the benefit of watching this hearing, will not know that this does not afford them any greater freedom than they would have had if it was not in the bill.

With all of this testimony, could we not have done something, offered some protection? As Mr. Toews said, there's 50%. Could we have not have brought it to 51% or 52%? We had to say, "There's 50%, and that's all you're getting, and just to make to you feel better, we'll restate it in the bill". There have been some valid concerns raised. We're not pulling this out of the sky; it's not something that might happen 500 years from now. We have people that are being brought before human rights tribunals. My colleagues say no one has lost their job. But there have been marriage commissioners who have been told to resign if they refuse to perform same-sex marriage. That's the evidence.

Mr. Vic Toews: And there's Kempling.

Mr. Rob Moore: You have people like Mr. Kempling. In light of all of this, could we not have given something, 5% or something? We just had to restate the law. That's a serious disappointment. I hope Canadians realize exactly what this is. It's a political blanket for people to shield themselves from their constituents. They can say, "Look, I've done something. I've done something on your behalf to protect your rights". In reality, this is just a shell or a sham. It offers Canadians no protection whatsoever. We've basically heard their testimony and told them, "Look, here's a restatement of the law and we'll let the chips fall where they may". So you can mark me down as disappointed.

The Chair: Thank you.

[*Translation*]

Ms. Boivin, over to you.

Ms. Françoise Boivin: Thank you, Mr. Chairman.

[*English*]

I'm not looking for any political cover or any political blanket, I must say. I will never settle for 5% or 10%, but I want 100%. I truly believe that there's already protection for 100%.

[*Translation*]

However, the witnesses expressed a lot of subjective fears to us. I sympathize with them because I think everything is a matter of interpretation. There are a number of lawyers here, and I'm convinced we would all be able to go to court and argue one side or the other. That's what we want to avoid here.

It's been asked whether there's a text we can incorporate. I understand from Ms. Hitch's testimony, and that's always been my vision, that the Canadian Charter of Rights and Freedoms protects all those individuals who came to meet us and expressed their fears.

My colleague Mr. Toews was very articulate, but he has enough experience... I have experience in labour law. When we negotiated collective agreements, we incorporated clauses — I'm convinced my colleague Richard Marceau can say the same — that were already in the Civil Code or in Quebec's Charter of Human Rights and Freedoms, to reassure people and to provide a guide for interpretation, not to add to an existing right. You can't add to a right that already exists. This can simply assist in interpretation. I believe that's the exercise we've been carrying out for a number of hours now.

I find the comments we've been hearing from the other side for the past few minutes odd. When our Conservative friends introduced amendment CPC-9, their purpose was to provide somewhat shaky protection in the text. We're trying to find the text, and I'd be inclined to suggest a subamendment. I would amend the last two sentences as follows. I've done it in the English only for the moment since I was told we were working on the English text and that we would make sure the French text corresponds to it.

Rather than say,

● (2050)

[*English*]

"or the expression of their beliefs in respect of marriage between persons of the same sex, based on that guaranteed freedom",

[*Translation*]

I would say,

[*English*]

"or the expression of their beliefs in respect of marriage as the union of a man and a woman to the exclusion of all others, based on that guaranteed freedom".

[*Translation*]

I'm not sure I'd keep the final words. The idea would be to clarify the matter, since that's what we've heard from group after group. They're afraid their vision of marriage as such...

Even if I think that's already protected by law, it's worth the trouble to say it again in an instrument. We mustn't delude ourselves. If we think we're going to prevent any possibility of legal action, whether a bill is introduced or not, we're mistaken. Lots of cases are already before the courts. We're not here to ensure there will never be any more trials. That will never happen in the best of all worlds.

It's good that Mr. Toews speaks at length, since that enables us to do a little reading at the same time. I amused myself by reading the Kempling case. It would be good for the members of this committee to look at that case, since it's been extensively cited. As our witnesses said, we should bear in mind that it wasn't a freedom of religion case. I'm going to go further. Mr. Kempling never appeared before his employer's board before he was sanctioned. He didn't defend himself at that stage. So it was a bit difficult for him to advance the freedom of religion argument at the appeal stage.

That being said, it was nevertheless recognized that he had a right to speak and to say certain things. However, it would be good for you to read that individual's remarks. Perhaps we could have a good debate on that one day. Perhaps I'm having fun with my colleague Vic Toews. However, that's not at all what we're trying to do on the civil marriage issue. I don't believe this is the kind of remark we're trying to protect. I don't believe my colleagues have gone that far in their thinking — at least, I hope — because those are quite curious remarks.

I don't want to dwell on the subject, but sometimes it's good to read certain things. I imagine it's being done in good faith. Perhaps you haven't had the opportunity to read the decision. Mr. Kempling may have been an inspiration for you regarding the main thrust, but this is a very interesting decision that shows how freedom of expression in Canada is a right guaranteed by the Supreme Court of Canada. I have a great deal of respect, and I wanted to say so, because the British Columbia Court of Appeal has come in for some hard knocks this evening. I think this is a great decision by the B.C. Court of Appeal. However, don't take my word for it: just read it.

The Chair: Ms. Boivin, am I to understand that you're moving a subamendment?

Ms. Françoise Boivin: That's correct.

The Chair: All right.

[*English*]

We now have a subamendment.

Mr. Vic Toews: I don't know if—

The Chair: I have other speakers on the list.

Mr. Vic Toews: Yes, this is just a point of order. I'm not going to —

The Chair: Oh, on a point of order.

Mr. Vic Toews: I'm just wondering whether Ms. Boivin is suggesting that I read the Kempling decision into the record.

Some hon. members: Oh, oh!

The Chair: We're not going to get into that debate, Mr. Toews.

Mr. Boudria, Mr. Brown, and then Ms. Neville.

Monsieur Boudria.

[*Translation*]

Hon. Don Boudria: Thank you, Mr. Chairman.

The Chair: You have before you the text of new clause 3.1,

[*English*]

"For greater certainty...". When we get to "their beliefs in respect of marriage", scratch out "between persons of the same sex", and replace it with "as the union of a man and a woman to the exclusion of all others, based on that guaranteed freedom".

Ça va?

● (2055)

[*Translation*]

Mr. Réal Ménard: [*Inaudible*] ...the definition of clause 3.

The Chair: Mr. Boudria.

Hon. Don Boudria: Thank you, Mr. Chairman.

[*English*]

I want to speak on the amendment as amended. It's not amended yet, because the subamendment hasn't carried, but I will speak on the subamendment.

I perhaps want to start by asking our witnesses if they could give us the department's opinion on what the subamendment, as presently drafted, does, and if the parameters they identified as being appropriate in the original proposition, that is to say, the amendment, are equivalent under the subamendment.

Mr. Raymond MacCallum: Yes.

Hon. Don Boudria: In other words, the department can live with the subamendment? Okay.

I want to get back, then, to the entire proposition, assuming that the subamendment does carry and that we're dealing with the main motion. I'm one of the not so numerous people around this table who's not a lawyer; most people here are. But I had always thought that when interpreting laws, the ranking worked roughly like this: that a preambular section had a lower threshold; that a declaratory section, or one with greater certainty, had a somewhat higher threshold; and of course that the regular kinds of clauses were higher yet.

Is that roughly the ranking, or are the preambular sections stronger than a greater certainty section, as I heard one of my colleagues across the table state? What is that ranking? Which interpretation is correct, in a general way?

Ms. Lisa Hitch: I believe the way you just stated it is the case. We would have worded it slightly differently, but that's the essence of it.

Hon. Don Boudria: All right. Then stating something for greater certainty is stronger, generally speaking, than something strictly in a preamble.

Now, I want to bring to the attention of our colleagues that before we broke for the lunch, or the dinner—whatever that thing was that we had, I didn't eat any of it—we had adopted another clause, specifically starting with the same words, “For greater certainty...”. There was no argument at that point as to whether or not the use of that kind of language was appropriate in the legislation. It was seen as being appropriate. There were criticisms of another kind, but not about that particular element of what was there.

Finally, this clause here, as I see it, starts with the same words, “For greater certainty...”. I see it as a reflection of this. We had legal experts appear before us, and I attended, I think, all meetings—perhaps one evening I might have left early, but I heard everything else that was said here—and I saw a number of our legal experts tell us that the protection that was there was quite correct, balanced, and all of these things. Nevertheless, I saw a number of people—religious groups and others—saying that they were not certain that it would protect them.

I see that clause, and its subsequent amendment, as saying it does provide “for greater certainty” with the rest of the proposition. It provides that kind of certainty. Perhaps it does not redefine law—and I think our witnesses have already indicated that before, notwithstanding attempts to make them say something else. It does not redefine, but it does provide—am I not correct in saying—that kind of certainty for those people who are seeking to ascertain that it is there. With this, it is in fact present.

Is that not the purpose of a greater-certainty clause? In other words, it indicates what the intention of the legislator—capital “L” in this case—what the intention of the institution of Parliament was when the legislation was put together to provide the greater certainty that this element is there. Is that not the purpose?

● (2100)

Ms. Lisa Hitch: Yes.

Hon. Don Boudria: Thank you. I have no further questions.

The Chair: Thank you.

Ms. Neville.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you. I don't have a lot to add, Mr. Chair.

Like Mr. Boudria, I am not a lawyer, but it seems to me that in responding with this amendment, we are in fact responding to the many people who came before us who had concerns. I'm of a belief that the bill, as originally drafted, covers the concerns that many of the delegations expressed, but I agree with Mr. Boudria's remarks that it provides a greater certainty in terms of the intent of the legislators to guarantee the freedoms.

With your indulgence, Mr. Chair, I don't intend to read the 17 pages of the Kempling decision, but I would like to read two short paragraphs, which I think are relevant to the discussion we've had here tonight. When it deals with freedom of religion, the judge said, and I quote:

> I do not consider it was open to Mr. Kempling to raise s. 2(a) for the first time on his appeal from the administrative decisions because he did not appear before the Panel at the first hearing and therefore laid no evidentiary basis upon which an infringement of his religious freedom could be assessed.

The judge goes on to say:

> There is no evidence in this case which even identifies Mr. Kempling’s religion or its tenets. Most significantly, there is no evidence that establishes that his ability to practice his religion would in any way be compromised by his being restricted from making discriminating public statements about homosexuals. Shortly put, no evidentiary case of a s. 2(a) infringement has been advanced.

So I think what we are doing here is simply providing some assurance, some expression of intent of those around this table, that we heard what they said, we took it seriously, and we want to assure them that the practice of their religion is guaranteed.

Thank you.

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, I'm going to take advantage of our guests and their legal learning, particularly since at least one of them was trained at Dalhousie University, which impresses me. I'd like to discuss the entire issue of freedom of religion.

In recent weeks, in this debate in committee, there's been a kind of deviation and spill-over that I think requires us to clarify a certain number of things once again. Am I mistaken in saying that, when freedom of religion cases have been put before the Supreme Court, it has adopted a more liberal attitude in trying to protect applicants rather than restrict? From my understanding, freedom of religion was not a jurisdictional matter when decisions were rendered on the wearing of the kirpan, among other things. Of course, that was related to the Ministry of Education, but section 2 of the Canadian Charter of Rights and Freedoms was also argued. In the Amselem case — they wanted to build a succah in a Mont-Royal condo — freedom of religion was also argued, and the Supreme Court adopted an extremely liberal attitude designed to protect rather than restrict freedom of religion.

What I don't understand in what our Conservative friends say is that they don't give any examples. First of all, I entirely agree with Ms. Boivin's comments. None of the witnesses was able to give us an example of reprisals or dismissal, of abuse or violation of their rights as a result of their adopting a position in favour of heterosexist marriage.

I'd like you to help us and show us situations in which people with public responsibilities or members of religious denominations might be the object of reprisals or be concerned because they spoke out on a heterosexist vision of marriage. Our Conservative friends have been concerned about this since the business of this committee began, but they have never cited any actual examples.

I'm prepared to vote in favour of this amendment and of the subamendment, but I'm trying to see how they improve the text of the bill, and I'd like someone to give me examples of people with responsibilities who might be concerned because they spoke out on their heterosexist vision of marriage. Do you have any examples that might help enlighten the committee? I get the impression we're dealing with a great illusion that's based on nothing solid.

I don't want to trouble you. You have a right to human dignity, and you have a right not to be concerned as officials. However, please be assured that you aren't subject to a performance bonus.

● (2105)

[*English*]

Ms. Lisa Hitch: With the indulgence of the committee, we'll just confer for a second before we answer.

[*Translation*]

The Chair: Mr. Ménard.

Mr. Réal Ménard: So let's take a five-minute break, Mr. Chairman. That'll do us a lot of good. We'll go freshen up. Do you agree?

● (2110)

[*English*]

The Chair: Let's resume.

[*Translation*]

Let's resume, please.

Mr. Ménard, you had the floor.

● (2115)

Mr. Réal Ménard: I hadn't finished.

The Chair: You had started asking a question. Could you finish your question so that we can let the witnesses try to answer it?

Mr. Réal Ménard: Yes, I finished my first question, but I'd like to ask two more. I'm ready to listen to them with you, Mr. Chairman.

The Chair: That's perfect.

[*English*]

Mrs. Hitch, do you have an answer for Monsieur Ménard?

Ms. Lisa Hitch: I had a very quick conversation with my colleagues to consult. We are unaware of any current case law, decision tribunal, or court decision that would have raised an issue of religious freedom in the context of the definition of marriage. However, as the witnesses before the committee have pointed out, a few cases are currently before the courts and tribunals in the provincial jurisdiction, not at the federal level.

I suppose that's pretty much all we can say for the moment, except to point to the fact that in the Supreme Court reference decision, the court pointed out that none of the 18 interveners that were before the court could come up with any examples either, including the counsel representing the faith communities. I imagine they had a little more time to think about it than my colleague and I did. But we certainly couldn't guarantee all or any hypothetical circumstances into the future.

[*Translation*]

The Chair: Thank you.

Mr. Ménard, do you want to ask any other questions?

Mr. Réal Ménard: Mr. Chairman, I'd simply like us to note that the witnesses before us — if not them, people in their department — are obviously quite familiar with the cases before the courts.

In the course of the proceedings of this committee, an attempt has been made to make the people listening to us believe that there was a threat to freedom of religion. Now we have an amendment before us which I think would contribute very little in view of the protection already offered.

Ultimately, my comment is not really legal in nature. We've been working since 3:30 p.m., and it's sad to be considering a subamendment which may not be pointless, because it has another scope, but the main amendment focuses on the concerns that the Conservatives and the official opposition have tried to put on the table. Those concerns are not based on any empirical reality, any demonstrable reality that would provide us with any support in terms of cases handled by the law courts.

I sincerely believe that freedom of religion is protected in this bill. No member would want it to be possible for any one of the religious organizations in Canada or Quebec to be forced to celebrate same-sex marriages against their convictions or dogma.

I'll close on that to allow the witnesses to respond. I didn't really abuse my right to speak this evening. Moreover, I don't remember ever doing it.

Let's not forget that, if I had only one reason to be sorry, it would be because of this not always honest attempt to lead us down paths that have no solid foundation. The reason why they can't give us any examples regarding freedom of religion is that this bill does not concern freedom of religion. It concerns civil marriage. We can spend hours and days more looking for concerns over freedom of religion — concerns that are unrelated to what's going on in the law courts — but that's not what we're talking about.

You've been generous enough to enable us to speak out on something that could very easily have been declared...

[*English*]

Mr. Rob Moore: Point of order.

The Chair: On a point of order, Mr. Moore.

Mr. Rob Moore: I hope my colleague's not suggesting that those of us who raise the possibility or infer that this bill could impact on freedom of religion are being dishonest, because I heard him say dishonest people.

The Chair: Mr. Moore, you're not on a point of order. Let Mr. Ménard finish his comments, please.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: I want to reassure Mr. Moore. I'm not questioning his honesty or that of anyone else. I find that his elegantly feminine sensitivity does him credit. We have had no actual examples of people who, based on their religious convictions, may have been concerned that they were promoting heterosexist marriage. We don't have any because there aren't any. I'll finish my comments by saying three things. If we can be proud as parliamentarians, it's because it's good to be on a clear path to recognizing equality among individuals. I believe that those who believe in equality among individuals will vote for this bill.

Second, everyone on this committee and elsewhere respects the spiritual life of people and freedom of religion. That's not what this is about.

Third, we've heard extremely eloquent testimony on the fact that gays and lesbians want to commit to forms of loving relationships that are similar to marriage, and their relationships are no less true. For all these reasons, in the record we leave behind as parliamentarians, the positive, grand, noble and extremely promising things that we can talk about will include Bill C-38, and I hope that all parliamentarians will vote for this bill.

● (2120)

The Chair: Thank you, Mr. Ménard.

[*English*]

Mr. Toews.

Mr. Vic Toews: Thank you.

I know it's always difficult to find examples, but even Mr. Ménard would have to agree that some of the terms he uses are very derogatory. For example, he uses the terms “heterosexism” or “heterosexist marriage”. They are terms that are quite often used in a derogatory way—in the same way that individuals who used to be derogatory about women were accused of being—

[*Translation*]

Mr. Réal Ménard: I have a point of order, Mr. Chairman.

The Chair: A point of order, Mr. Ménard.

Mr. Réal Ménard: Pardon me for interrupting Mr. Toews, but I want to be clearly understood and for it to be clearly established with the Chair that there is nothing pejorative about the term “heterosexist” and that there is nothing unflattering about using it. I hope we'll agree on that.

The Chair: You're making an issue of it, but we understand you.

[*English*]

Go ahead, Mr. Toews.

Mr. Vic Toews: In fact, it is being used in that way. I assume that Mr. Ménard may not have intended it in that way, but it is being used in that way. It's equivalent to when people used to make derogatory terms about women, and they said those people were sexist. In the same way now, heterosexist is being used to describe those individuals who favour the traditional definition of marriage, and that's a derogatory way of referring to those individuals. That's what concerns me.

It's the same as what we heard from the Unitarian Church, which basically said it was similar to being a racist when you talked against or were not in favour of same-sex marriage. That's what the Unitarian Church said here in testimony. It was similar, they said.

I just want to make that point. It's funny how our language changes, and what happens over a very short period of time. I'm sure Mr. Ménard did not mean that. He's a gentleman. He does not engage in that kind of debate, but I just—

Mr. Réal Ménard: I love you even though you are a heterosexual. I appreciate you and love you for that.

The Chair: Whoa, excuse me. You can have conversations after hours if you wish.

Voices: Oh, oh.

The Chair: Thank you.

Mr. Toews, please.

Mr. Vic Toews: Actually, Mr. Chair, if he has anything to say, I prefer him to say it right here on the record.

The Chair: Anyway, let's carry on.

Mr. Vic Toews: I'm sort of following up on what Mr. Boudria was saying. He asked the justice department lawyer to talk about the types and the hierarchy of provisions in bills. If I'm not mistaken, he called the preamble the lowest on the rung, in terms of legal persuasion. The second, on a higher rung, were declaratory provisions. The third and highest were the substantive provisions themselves. I believe the witness said that was not exactly the terms they would use, but that was generally the way it was. I agree with Mr. Boudria that's generally the way it is. I don't know if there are more specific terms we can use.

My question is, where does the Constitution fit into that hierarchy of interpretation?

● (2125)

Ms. Lisa Hitch: Clearly, the Constitution is at the top.

Mr. Vic Toews: It's the highest. Is that right? So if we have this hierarchy of one, two, three, and four, where would we put the Constitution? Would you agree with me that it's not only at the top, it's on the sides and at the bottom? It surrounds the entire statute, doesn't it?

Ms. Lisa Hitch: Yes. The Constitution is the enabling authority for everything. Therefore, if you want to use your analogy, it's the box in which the legislation fits.

Mr. Vic Toews: It's almost like God in a legal sense. It's omnipresent, to use that analogy. It pervades every aspect of our law, does it not?

Ms. Lisa Hitch: It's the box within which all laws must fit.

Mr. Vic Toews: That's right. If there is a law that does not comply with the charter, it's outside that box and it's unconstitutional. Is that right?

Ms. Lisa Hitch: Yes, that's the principle of the proper exercise for delegated authority.

Mr. Vic Toews: Okay. We have these three levels, plus this all-encompassing or all-pervasive kind. Are there any others that we have missed in this hierarchy?

Ms. Lisa Hitch: I believe there is the common law, certainly within most provinces in Canada.

Mr. Vic Toews: Okay. We use the common law as well. Where does that fit in this hierarchy?

Ms. Lisa Hitch: Well, it's difficult to move this analogy any further.

Mr. Vic Toews: The common law surrounds the interpretation, even for statutes, but it's still within that box of the Constitution.

Ms. Lisa Hitch: That would work for expressing it, yes. It's woven into the box, but I don't know how you'd quite do it.

Mr. Vic Toews: All right. I know that it's a rough analogy. Is there anything else that we need to know? Is there any other kind?

We have the common law. We have preambles. It's declaratory and substantive, and there's the charter. Is there anything else?

Mr. Raymond MacCallum: There's international law.

Mr. Vic Toews: Well, okay. International law and equity are things that we might use from time to time.

Is there anything else that we haven't mentioned? Is there anything that you might know of? Is there anything else?

Mr. Richard Marceau: Is she being graded?

Mr. Vic Toews: Pardon me?

Mr. Richard Marceau: Is she being graded?

Mr. Vic Toews: No, I'm only curious about this.

We have all of these. Is there anything else that you can think of?

Ms. Lisa Hitch: I believe that's more or less the content of the bar education course on public law.

Mr. Vic Toews: Good. That corresponds with my understanding, not that I'm any kind of a legal scholar.

Tell me this. Where does clause 3 of the bill fit into that?

Ms. Lisa Hitch: Clause 3 of the bill is, again, a restatement of the Supreme Court of Canada interpretation of the charter protection.

Mr. Vic Toews: What does that mean in the hierarchy?

Ms. Lisa Hitch: It crosses right through the box.

Mr. Vic Toews: It crosses right through the box. It is substantive. It is declaratory. It is preambular. It is constitutional, and it is common law.

Ms. Lisa Hitch: I don't believe that I would characterize it as substantive. It is declaratory and is drafted as such. It is a declaration of what the Constitution says. It is a restatement or a reaffirmation of the Supreme Court's interpretation of the Constitution.

Mr. Vic Toews: It's declaratory. That's precisely what the Supreme Court of Canada said was unconstitutional when that provision was put in front of it last year. It says that it's unconstitutional, whether it's substantive or declaratory.

We're dealing here with an unconstitutional provision, because in your interpretation you stated that it's either declaratory or substantive. We know why it's unconstitutional. It's because it deals with a matter falling within provincial jurisdiction. Whether it's declaratory or substantive, it's unconstitutional. Why is it there?

● (2130)

The Chair: Let me intervene for half a second. Are you not talking about clause 3? Clause 3 has already been accepted, Mr. Toews.

Mr. Vic Toews: No, I understand that. I'm building to a point. Could I have some latitude, please?

The Chair: Well, if you build too much, the clock continues to run, and what's going to happen is you're going to get additional comments from Mr. Ménard. So watch out, please.

Mr. Vic Toews: All right.

But that's my concern here, that we're dealing with an unconstitutional provision. I think everybody around this table realizes it's unconstitutional, because it's either declaratory or substantive. The Supreme Court said that's unconstitutional.

Anyway, I should probably move on to one last point I want to make. We were challenged, I believe, by Mr. Ménard to find an example of dealing with the issue of gay marriage and how that has created any difficulties. As we know, this is a relatively new concept in our law. I don't know if you're familiar with the Saskatchewan human rights case, but in that particular case we had an individual who manufactured a bumper sticker and a little poster. What the poster said...there were two stick men holding hands with that universal red slash through it and then the equivalent sign. It had certain biblical verses. I'm not a biblical scholar, but I think it said Deuteronomy or Romans on that.

The Saskatchewan Human Rights Tribunal found that to be hate literature—an expression of hate toward homosexuals. The courts upheld that decision. This was before we had the concept of gay marriage in our law. I mean, it doesn't take a genius to figure out the jump from that kind of classification as hate literature in that religious context, to simply saying, if you had those two same stick men or stick women holding hands with the red universal slash through them and had the word “marriage” underneath.... It doesn't take any lawyer with any brains to make that argument. That's the reality we're facing when we change these fundamental concepts, that suddenly we now expand the scope of these tribunals to further suppress free speech.

I don't know exactly what the red slash means in that context, but I'm concerned that something like that would be classified as hate literature by a tribunal and by the courts and that the expression did not fall within the guarantees of the charter. That's what concerns me here.

Nothing I see in this particular provision.... Let's say that had happened on the federal level—because we can't legislate in respect of the province, we understand that—for example, in the territories. I assume there must be some kind of human rights tribunal that would administer that at the federal level. But how does this protect against that expression of religious faith? There are people who in fact believe that a marriage between two individuals or any kind of homosexual contact violates provisions of their holy book, whether it's Sikh, whether it's Old Testament, or whether it's New Testament. How does this protect against those kinds of situations? That's what I'm concerned about. How does this bill protect against that?

Mr. Raymond MacCallum: As to the specific question as to how this protects, I believe that's been asked and answered by my colleague, Ms. Hitch.

As to the specifics of the case you recall in Saskatchewan, I'm not sure of all the facts of that case, and not sure, for instance, of the content of the particular paragraphs cited in the Bible and what they may have spoken to.

● (2135)

Mr. Vic Toews: It was about homosexuality, basically.

Mr. Raymond MacCallum: It would be, I think, speculative, in light of not knowing the specific context—appreciating that the balancing of these competing interests is always context-specific—to say with any certainty how that would play out in an analogous federal context, assuming one could be found.

I would note what you said, that this case, of course, arose prior to and outside of the context of same-sex marriage, but deals generally with the issue of gay and lesbian relations, which of course pre-exists this bill.

Mr. Vic Toews: Right. And I guess that is my concern, that here we have, essentially in short form, an individual stating that Deuteronomy and Romans—I don't know what chapter or verse—condemn that kind of behaviour. I would see that as fundamentally religious expression, or at least freedom of expression, that one would think would somehow be protected in the charter, and yet the courts have had no problem in simply dismissing those kinds of concerns.

So if we simply restrict this bill to the very narrow protection offered by the charter in respect of freedom of conscience and freedom of religion, these types of cases, especially when we now change the definition of marriage to make it in fact a legal definition to include homosexuals, or gay or lesbian couples....

I don't even know any more whether the term “homosexual” is derogatory. I know gays and lesbians don't use it, but I don't know whether that is derogatory or....

A voice: No.

Mr. Vic Toews: It's not. Okay.

I don't want to say anything derogatory.

An hon. member: Make yourself comfortable.

Mr. Vic Toews: Well, not that comfortable; I want to go home.

In any event, I'm just concerned that this now would not, given that we change the definition of marriage to make that a legal state of affairs.... We specifically recognize that relationship in law. How much more difficult, then, would it be for someone of a religious background to say, in a public place, “I think homosexuality is morally wrong”, or whatever it says in Deuteronomy or Romans? That's my concern.

This bill enhances the ability to strike out at people of religious faith without increasing any of the protection. This protection simply is non-existent.

Ms. Lisa Hitch: Perhaps all we can say in response is to one more time remind the members of the committee that we are here to answer questions about Bill C-38, which is about civil marriage. Changes to the human rights acts federally and provincially, to add the grounds of sexual orientation, were some time ago, and outside the scope of our appearance here today.

Mr. Vic Toews: I beg to differ with you. What I'm saying is that when we change the definition of marriage in the act, as we are doing here, we are in fact enhancing the legal ability of those who wish to suppress the religious views of those who do not accept homosexual marriage.

Ms. Lisa Hitch: With respect, I cannot understand what your corollary is here. The example you chose was about homosexuality, per se, and the biblical verses against homosexuality. I'm not aware of any biblical verses specifically against same-sex marriage.

I would also point out that, again, this bill will provide uniform coverage in the change to the definition of marriage, but as you are aware, the definition of marriage has already been changed in now nine provinces and territories, with New Brunswick this morning.

● (2140)

Mr. Vic Toews: No, I understand that. My concern is that while we're changing the definition of marriage and enhancing the legal basis of the acceptability of homosexual marriage, we are not, on the other hand, enhancing any of the defences that protect individuals who have a contrary view about what marriage should be. I understand that the Saskatchewan case occurred before the change in definition. But if it can be said that simply saying about a homosexual relationship, any type of relationship, what that bumper sticker signified, then how much more difficult would it be to criticize a homosexual relationship that in fact has the blessing of law? As you say, it's a civil marriage.

Ms. Lisa Hitch: As my colleague pointed out, the problem is that we do not have before us the facts of that specific Saskatchewan case. I can't answer your question, then, because as I believe we all know, without being biblical scholars, there are particular verses in the Bible, specifically Leviticus, that refer to homosexuality, but also to disability and a number of other grounds, in terms of inciting violence. It could very well be that was the concern of the tribunal, that it wasn't simply textual verses from the Bible against homosexuality, but that it actually went over the line and started to incite violence. I'm not sure, and I'm not aware of the specifics.

However, I would say that there's nothing in this bill that legally should make any difference to the protections of freedom of religion. I think the Supreme Court went fairly far in saying some very sweeping statements about the scope of the protection of freedom of religion within the charter and how far it went to protect religious officials and religious groups.

Mr. Vic Toews: Right, so if the Supreme Court of Canada has already said it's a sweeping freedom, why do we need this to restate what the Supreme Court of Canada has already told us?

Anyway, we've been over that. That's the end of my comments.

The Chair: Okay. Well, thank you very much.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, with your permission, I'm going to ask our witnesses a few background questions. I hope to do so as eloquently as the last speaker, but his orientation was somewhat different.

First, is it fair to say that, if the government had not introduced a bill in the House to put an end to the discrimination experienced by same-sex spouses who do not have access to the civil institution of marriage, that would not have been consistent with the Constitution? Our colleague Vic Toews talked about the Constitution and the rule of law. Living in a society where the rule of law takes priority, where section 52 of the Constitution takes precedence over any other consideration, is it right to think that, if the government had not introduced a bill giving same-sex spouses access to civil marriage, that would have been contrary to the Charter and thus to the Constitution? Vic Toews was concerned about the rank it should be granted in our society.

[*English*]

Ms. Lisa Hitch: Again, I will refer to the words of my minister. I believe that my minister and the government are on record as having said that they accept the reasons of the courts as correct in law. There are now binding court decisions across the nation that will address the majority of the Canadian populace that state it was contrary to section 15 not to extend equal access to civil marriage to same-sex couples.

[*Translation*]

Mr. Réal Ménard: Ultimately, your answer is that passing a bill that recognizes the right to marriage for same-sex spouses is definitely not contrary to the state of the law and the Constitution in 2005.

[*English*]

Ms. Lisa Hitch: In the view of the minister and the government, the bill is consistent with the charter.

[*Translation*]

Mr. Réal Ménard: I'd like to hear what you have to say about paragraph 60 of the reference to the Supreme Court of Canada, which I'm going to read to you. It's on page 23 of the French version.

> Returning to the question before us, the Court is of the opinion that, absent unique circumstances with respect to which we will not speculate, the guarantee of religious freedom in s. 2(a) of the Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

Isn't this a clear statement by the Supreme Court on the fair and relevant connection that must be made between recognition of the unions of same-sex spouses and the court's unfailing attachment to freedom of religion?

● (2145)

[*English*]

Mr. Raymond MacCallum: Yes.

[*Translation*]

Mr. Réal Ménard: Let's take a few moments to talk a bit about hate crimes and the connection that must be made with religion.

Even though you're more familiar with Bill C-38 than we are and that's why you're appearing before us, we nevertheless clearly understand that the Criminal Code already contains specific provisions on hate crimes.

[*English*]

Mr. Raymond MacCallum: Yes.

[*Translation*]

Mr. Réal Ménard: Since I sense that you're full of energy and vitality, I'm going to speed up.

Here's my last question, and I believe it's an important one. Aren't the underlying values of the bill before us values of equality and full citizenship? Can we say it would be contrary to the Charter and the definition of discrimination that the lower courts have given not to pass a bill such as the one before us today?

[*English*]

Mr. Raymond MacCallum: As the courts have upheld, it's discriminatory not to extend access to civil marriage to same-sex couples. Your actions in voting for or against aren't technically subject to the charter, but in the words of the Supreme Court, supporting this bill would be supporting an objective that flows from the charter, in particular, section 15.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chairman.

The Chair: Thank you, Mr. Ménard.

Are there any other questions, or comments on the subamendment?

[*English*]

Shall I call the question?

Some hon. members: The question.

The Chair: So let me read as it would be with this subamendment, both in English and in French. It says:

> For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and a woman to the exclusion of all others based on that guaranteed freedom.

[*Translation*]

The French version reads as follows:

> Il est entendu que nul ne peut être privé des avantages qu'offrent les lois fédérales ni se voir imposer des obligations ou des sanctions au titre de ces lois pour la seule raison qu'il exerce, à l'égard du mariage entre personnes de même sexe, la liberté de conscience et de religion garantie par la Charte canadienne des droits et libertés, ou qu'il exprime, sur la base de cette liberté, ses convictions à l'égard du mariage comme étant l'union entre un homme et une femme à l'exclusion de toute autre personne.

Is that all right?

[*English*]

Do you want a recorded division on this?

Mr. Vic Toews: On division.

Hon. Paul Harold Macklin: I have a point of order, Mr. Chairman. If I heard you right, the English amendment didn't necessarily translate into what you read in the French, or at least through the process of interpretation. That is, the subamendment.

The Chair: Originally, I was under that impression. While the discussions were being conducted, we had the French text reviewed by the chief official translator. We are satisfied that this translation, along with the translated text of the subamendment, would be very acceptable, as I have read it.

● (2150)

Hon. Paul Harold Macklin: As long as it's been affirmed that it meets the English text equivalent....

The Chair: Yes, Mr. Macklin.

So we're back to the question.

(Subamendment agreed to on division)

The Chair: Fine. The subamendment is therefore carried on division, so now we need you to vote on the amendment as amended.

Mr. Brian Jean: Is it supposed to be the amendment as amended, as amended, as amended?

The Chair: Not really, because there's only one subamendment on an amendment. I'm getting tired, but not that tired.

Okay, so basically you have to decide if you're going to accept this amendment, which has now been amended. The text is as the text that I have just read. So now you're voting on the amended amendment, the amendment as amended.

(Amendment agreed to on division)

[*Translation*]

Mr. Réal Ménard: I have a point of order, Mr. Chairman.

The Chair: A point of order, Mr. Ménard.

Mr. Réal Ménard: I beg the committee's indulgence. Since time is slipping away and much of our work has focused on the issue of recognition of charitable organizations, could you check to see whether the committee would agree to consider amendments BQ-1 and CPC-15 on charitable organizations immediately?

[*English*]

The Chair: Okay. What Mr. Ménard is asking is unanimous consent to deal now with proposed amendments BQ-1—

[*Translation*]

Mr. Réal Ménard: And CPC-15.

[*English*]

The Chair: —and CPC-15, instead of simply proceeding in the order we have already started. Does Mr. Ménard have unanimous consent?

[*Translation*]

Mr. Ménard, you don't have unanimous consent.

We're on CPC-10.

[*English*]

We are now at CPC-10. Mr. Toews, do you want to move your motion, sir?

Mr. Vic Toews: Yes.

The Chair: We are now on CPC-10, which is at page 10. Do you want to speak on your amendment?

Mr. Vic Toews: No, I understand that this is out of order. I want to challenge the chair.

The Chair: Amendment CPC-10 proposes to establish a fund of $10 million from the consolidated revenue fund. According to Marleau and Montpetit on page 655, and I quote: "An amendment must not offend the financial initiative of the Crown. An amendment is therefore inadmissible if it imposes a charge on the public treasury." This amendment clearly requires a royal recommendation and is thus inadmissible.

Mr. Vic Toews: I challenge the chair and all the other members. What do I have to do now?

The Chair: What you have to do is—

Hon. Paul Harold Macklin: Sustain.

Mr. Vic Toews: We want to have a vote on challenging.

The Chair: The motion is that the chair's ruling be sustained. There's no debate. We'll take the vote on it.

● (2155)

Hon. Don Boudria: Who moves that the chair's ruling be sustained?

The Chair: It's a little bit awkward because Mr. Toews doesn't agree with the decision, but he's going to move that it be sustained.

Hon. Don Boudria: Okay, I'm just wondering.

The Chair: So maybe you should find somebody, one of your friends, maybe Mr. Ménard. He seems to be very close to you tonight. I mean, I'm not saying you're close to him. I said he's close to you. Maybe Mr. Ménard would agree to move the motion that the ruling be sustained.

Mr. Réal Ménard: I agree with the romantic sentence....

The Chair: Who wants to move the motion? Okay, Maître Boivin will move the motion that the chair's ruling be sustained. We're going to go on a recorded vote.

Mr. Vic Toews: I challenge the chair, and a recorded vote. We say no, right? Is that what we're...?

The Chair: You said a while ago you were going to say no.

Mr. Vic Toews: I'm going to be consistent.

The Chair: Okay.

(Motion agreed to: yeas 8; nays 4)

The Chair: The ruling is sustained.

We now move to CPC-11.

Mr. Toews, do you want to proceed with CPC-11, sir?

Mr. Vic Toews: I sure do.

The Chair: Do you want to speak on this, or would you rather hear the ruling?

Mr. Vic Toews: Well, I'll just speak very briefly here. I'm not going to abuse the committee's patience.

The Chair: I didn't say one word. I stayed neutral.

Mr. Vic Toews: I'm not going to abuse the committee's patience again; I will not.

I simply want to state that because of the split jurisdiction in respect of marriage, this act should not apply in those provinces that do not guarantee these specific rights in schools, and the rights of students, and the like—that we simply withhold the application of that province until their laws come into accordance with this protection.

The Chair: Amendment CPC-11 proposes to add the concept of advocacy, as well as the rights of schools, to this bill on same-sex marriage. According to Marleau and Montpetit, page 654:

> An amendment to a bill that was referred to a committee *after* second reading is out of order if it is beyond the scope and principle of the bill.

Bill C-38 is about same-sex marriage. This amendment is about advocacy and the rights of religious schools. Neither concept is in the bill; in consequence, I must declare the amendment inadmissible.

Mr. Vic Toews: I'd like to challenge the chair.

Ms. Anita Neville: I move to sustain the chair's ruling.

The Chair: Your dear friend Mrs. Neville moves the motion that the decision be sustained.

A voice: Recorded vote.

(Motion agreed to: yeas 8; nays 4)

● (2200)

The Chair: So the ruling is sustained.

Okay, we now move to CPC-12.

Mr. Toews, do you want to address this, sir?

Mr. Vic Toews: I certainly want to move the motion. I so move.

The Chair: Do you want to speak on this?

Mr. Vic Toews: I sure do, but if I could just have two minutes, please.

The Chair: Sure. Let's suspend for a few minutes.

● (2201)

(Pause)

● (2207)

The Chair: Let's resume.

Mr. Toews, on amendment CPC-12.

Mr. Vic Toews: Essentially what this does is ask the Minister of Justice to table a report in the House of Commons reviewing the effect of this particular legislation. It's done after, I believe, three years here. I think, given the fundamental nature of this bill, this is a prudent thing to do. Whether or not we'll be able to have any worthwhile statistics in that time, I don't know, but I think it's an exercise worth carrying out.

That's all I have to say on it. I urge the committee to support this very good amendment.

The Chair: Thank you.

Wait a minute. Mr. Jean, I understand, wants to talk on this.

Mr. Brian Jean: Very quickly, we did hear from several witnesses who suggested there might be ramifications for this particular bill. One witness did come forward with a similar proposal to this. I think, quite frankly, on that basis it would be a form of security to ensure that the ramifications of the bill would at least be known, and it could be extended past that period.

So I think it's a very wise proposal.

The Chair: Okay. Are there any other comments?

Let me just make a very technical adjustment on this. Instead of becoming new clause 4.4, it will become new clause 4.1. The ones that were supposed to be clauses 4.1, 4.2, 4.3 have been rejected. So this would become clause 4.1. Okay? That's very technical; it doesn't change anything.

Is this accepted on division?

Some hon. members: No.

The Chair: Oh, I'm sorry. I was just asking. I'm not related to Mr. Jean, but sometimes my ears also play tricks on me.

An hon. member: I want a recorded vote.

(Amendment negatived: nays 8; yeas 4)

(Clauses 5 and 6 agreed to on division)

● (2210)

The Chair: Now we move to amendment CPC-13. Mr. Toews, do you want to move this motion, sir?

Mr. Vic Toews: Yes, I do.

The Chair: Okay. Do you want to speak on this?

Mr. Vic Toews: Well, basically this adds the protection of the Canadian Human Rights Act to ensure that any person by any means can express or communicate their views on the definition of marriage. It enhances those rights under the Canadian Human Rights Act.

The Chair: Okay. Amendment CPC-13 proposes to add a section to the Canadian Human Rights Act concerning the expression of views on the definition of marriage.

According to Marleau and Montpetit, page 654, "For a bill referred to committee *after* second reading, an amendment is inadmissible if it amends a statute that is not before the committee or a section of the parent Act unless it is being specifically amended by a clause of the bill."

On the same page of Marleau and Montpetit, which was 654, it says, "An amendment to a bill that was referred to a committee *after* second reading is out of order if it is beyond the scope and principle of the bill".

Bill C-38 does not amend the Canadian Human Rights Act at all. In consequence, I must declare the amendment inadmissible.

Mr. Vic Toews: Is there a motion? Are you going to sustain?

The Chair: Maître Boivin will move the motion to sustain the decision. There's no debate.

Mr. Vic Toews: And it will be a recorded vote.

The Chair: A recorded vote? Certainly.

(Motion agreed to: yeas 8; nays 4)

The Chair: The ruling is sustained.

(Clause 7 agreed to on division)

(On clause 8)

The Chair: We now move to CPC-14 on page 14 of your package.

Mr. Toews, do you want to move your motion, sir?

Mr. Vic Toews: Yes, sir, I'd like to move this. Very briefly, it just deals with adding protection in the Criminal Code for those people who express their views on the definition of marriage.

Hon. Don Boudria: That's the example, Mr. Toews, you used before. It was out of order in our initial remarks.

Mr. Vic Toews: That's right.

The Chair: I have a suspicion that a few people were anxious to give that line, but I congratulate Mr. Boudria for waiting until now.

Amendment CPC-14 proposes to add a section to the Criminal Code concerning the expression of views on the definition of marriage. According to Marleau and Montpetit, still on page 654, same as before:

> For a bill referred to a committee *after* second reading, an amendment is inadmissible if it amends a statute that is not before the committee, or a section of the parent Act, unless it is being specifically amended by a clause of the bill.

On the same page, again, Marleau-Montpetit, 654:

> An amendment to a bill that was referred to a committee *after* second reading is out of order if it is beyond the scope and principle of the bill.

Bill C-38 does not amend the Criminal Code at all. In consequence, I must declare the amendment inadmissible.

● (2215)

Mr. Vic Toews: Well, I don't know if we could sustain that ruling.

The Chair: You doubt that, eh? Well, I assume that Mrs. Neville will move the motion to sustain the decision. Do you want a recorded vote on this, sir? Thank you.

(Motion agreed to: yeas 8; nays 4)

The Chair: The ruling is sustained.

On a point of order, Mr. Toews.

Mr. Vic Toews: Just on a point of order, very briefly.

Mr. Chair, you see, I'd asked for that opinion to be given. When I actually moved the amendment, you were very quick to give that opinion. I'm surprised that when I raised the question you didn't give me that opinion. It would have saved time and trouble. Anyway, that's in the past.

The Chair: We had to keep it clean, clear, and in order.

Mr. Vic Toews: All I'm saying is that it could have been done so much easier and saved the committee two minutes or three minutes.

The Chair: But seeing as you had tabled this, I would have had to do it anyway.

Now, before we take another two minutes or three minutes, let's keep going.

An hon. member: A recorded vote.

The Chair: A recorded vote? Certainly.

(Clause 8 agreed to: yeas 8; nays 4)

(Clause 9 agreed to on division)

(Clauses 10 and 11 agreed to on division)

[*Translation*]

The Chair: We'll move on to amendment BQ-1. Mr. Marceau, do you want to move it?

Mr. Richard Marceau: Mr. Chairman, I thought I understood in informal discussions that you were going to rule this amendment inadmissible. Before deciding whether or not to introduce it, I would like us to come to an understanding. I'd like to talk about the informal, but very friendly discussions I had with my colleague Mr. Macklin. He told me that the government supported the spirit of this amendment, the aim of which is to reassure a number of organizations that fear they will lose their status as charitable organizations if they continue promoting and defending the so-called traditional definition of marriage, that is to say the union of a man and a woman to the exclusion of all others. If I withdraw this amendment at this stage, he told me he would be prepared to work with me, and with other colleagues interested in doing so, at the report stage, on third reading, to amend the bill by including something of that kind.

So my question is for my colleague Mr. Macklin.

[*English*]

The Chair: Did you answer, Mr. Macklin?

Hon. Paul Harold Macklin: The answer was *oui*.

[*Translation*]

The Chair: The answer is yes.

● (2220)

Mr. Richard Marceau: Consequently, Mr. Chairman, I withdraw this amendment for the moment.

The Chair: Mr. Marceau, do you have the unanimous consent of committee members to withdraw your amendment?

Mr. Richard Marceau: If I remember clearly, I don't need unanimous consent, since this amendment belongs to me until I have introduced it.

[*English*]

The Chair: I'm sorry. I unfortunately led you down the garden path. Let me specify. What happened was that I asked Mr. Marceau in French if he wanted to move the motion. Before he moved the motion, he asked a question unofficially of Mr. Macklin. Mr. Macklin gave him an answer, which he accepted, so therefore he did not move it and he pulled it back. He could do it.

I'm sorry. I made a mistake because I thought he had moved the motion. He is allowed to pull it back. Okay?

Mr. Vic Toews: Okay.

This is just on a point of order. Now, he had an opportunity to move it in committee. The member has refused to move it in committee. I just want the record to be very clear on that.

The Chair: The record is clear.

Let's go to CPC-15.

Mr. Toews, do you want to move this motion, sir?

Mr. Vic Toews: Yes, I do.

The Chair: You moved it. Do you want to speak on this motion?

Mr. Vic Toews: It's essentially that the minister may not revoke the registration of a charitable organization solely because the charitable organization has engaged in public debate in respect of the definition of marriage or has advocated in favour of a particular definition of marriage. It relates to the charitable status of these organizations.

The Chair: Amendment CPC-15 proposes to amend section 149.1 of the Income Tax Act, concerning the revocation of the status of a charitable organization.

According to Marleau and Montpetit, page 654, "For a bill referred to a committee *after* second reading, an amendment is inadmissible if it amends a statute that is not before the committee or a section of the parent Act unless it is being specifically amended by a clause of the bill". And on the same page of Marleau and Montpetit, that being 654, it says "An amendment to a bill that was referred to a committee *after* second reading is out of order if it is beyond the scope and principle of the bill".

While Bill C-38 proposes amendments to other sections of the Income Tax Act, it does not amend section 149.1, nor is it concerned with the question of the status of charitable organizations. In consequence, I must declare the amendment inadmissible.

Do you agree with me?

Mr. Vic Toews: No, I don't.

The Chair: Ms. Neville will move the motion that the ruling be sustained.

(Motion agreed to: yeas 8; nays 4)

[*Translation*]

The Chair: The decision is therefore sustained.

[*English*]

We now go to amendment CPC-16 on page 17 of your package.

Mr. Toews, do you want to move this motion?

● (2225)

Mr. Vic Toews: Yes, I would like to move that.

I assume the chair's ruling is the same, and if somebody wants to sustain the chair's ruling, I'll challenge it and we can have a recorded vote.

The Chair: Am I to understand that you're taking shortcuts, sir?

Mr. Vic Toews: Well, I did outline the process.

The Chair: Mr. Macklin moves that the decision be sustained.

Mr. Vic Toews: I challenge it and want a recorded vote.

(Motion agreed to: yeas 8; nays 4)

(Clauses 12 to 15 inclusive agreed to on division)

The Chair: We will now go to amendment CPC-17 on page 18 of your package.

Do you want to move the motion, Mr. Toews?

Mr. Vic Toews: I assume your ruling is the same. I assume someone will move to sustain. I will challenge, and I would like a recorded vote.

The Chair: Mr. Boudria will move it, and a recorded vote it will be.

(Motion agreed to: yeas 8; nays 4)

[*Translation*]

The Chair: The decision is sustained.

[*English*]

We are now going to amendment CPC-18 on page 19 of your package.

Mr. Toews?

Mr. Vic Toews: I assume the ruling is the same and that someone will move to sustain it. I will challenge it, and we'll have a recorded vote.

The Chair: Mr. Savage moves the motion. A recorded vote it will be, sir.

(Motion agreed to: yeas 8; nays 4)

[*Translation*]

The Chair: The decision is sustained.

[*English*]

Shall the short title carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Now we move back to the preamble.

Mr. Vic Toews: How many paragraphs in the preamble do we have here?

The Chair: We have eight, sir.

Mr. Vic Toews: I'm not moving CPC-1.

The Chair: You're pulling it back?

Mr. Vic Toews: Yes.

I'm wondering whether we can vote on the other ones as a block, because it's a preamble and we were told this was on the low rung of statutory interpretation. Right?

Hon. Paul Harold Macklin: I'm not sure if that's grounds for doing that.

Mr. Vic Toews: Well, it's a preamble and it's not declaratory or substantive. So can we do this in one?

The Chair: Let me just check something here.

Let me make a suggestion to you. You've pulled back on one.

● (2230)

Mr. Vic Toews: Yes.

The Chair: Paragraphs two, three, four, five, seven, and eight are of the same nature. Six is a little different in nature but the results are the same. So if we could do two, three, four, five, seven, and eight in one block, and afterwards do six by itself I'd appreciate it.

Does everybody agree on proceeding in this manner?

Mr. Vic Toews: Yes.

The Chair: Okay.

Mr. Vic Toews: So I move that paragraphs two, three, four, five, seven, and eight.... You're ruling this out of order, I assume. Somebody is going to move to sustain.

The Chair: Yes, sir. It will be Mr. Boudria.

Mr. Vic Toews: I challenge and ask for a recorded vote, please.

The Chair: Certainly, sir.

Hon. Don Boudria: Can we not apply the previous vote and record it as such?

Mr. Vic Toews: I'd like a recorded vote, just for greater certainty.

The Chair: It's comforting to hear the names, right?

Mr. Vic Toews: Yes.

(Motion agreed to: yeas 8; nays 4)

[*Translation*]

The Chair: The decisions are therefore sustained.

[*English*]

Should we do it for six now?

Have we done CPC-6 yet?

Mr. Vic Toews: That's the one I'm going to move now.

The Chair: I understand Mr. Marceau has a question before or after we move CPC-6.

[*Translation*]

Mr. Richard Marceau: No, I'm going to let...

[*English*]

The Chair: Okay, sorry.

Mr. Toews.

Mr. Vic Toews: In moving CPC-6, I want to talk very briefly. I know we have an hour and a half, but I don't intend to use that.

The Chair: Thank you very much.

Mr. Vic Toews: This is in the preamble. It basically states: "Whereas it is not against the public interest to hold and publicly express diverse views on marriage".

The reason I put that in is because of the Kempling case. This is what the B.C. Court of Appeal said about an issue like this. I find it to be a horrifying statement from the B.C. Court of Appeal. What they said at paragraphs 76 and 77 is all that I'm going to read out of that decision:

> There is undoubtedly a political element to Mr. Kempling's expression, and portions of his writings form a reasoned discourse, espousing his views as to detrimental aspects of homosexual relationships. Though his views may be unpopular, he was, in his more restrained writings, engaged in a rational debate of political and social issues; such writing is near the core of the s. 2(b) expression. However, not all of his writings were of this nature and as I have said, Mr. Kempling's writings at times clearly crossed the line of reasoned debate into discriminatory rhetoric.
>
> In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b). Accordingly, Mr. Kempling's published writings, taken as a whole, are not deserving of a high level of constitutional protection.

The B.C. Court of Appeal said very clearly that if your expression of political views doesn't fall within the political mainstream, it is not entitled to section 2(b) protection. Quite frankly, that is absolutely astounding. Whether I agree with Mr. Kempling or not, it is a horrifying thing for any politician to realize that if their views are not expressed in the mainstream, they will be subject to the kinds of disciplinary matters that Mr. Kempling was subjected to.

Those are all my comments on that. I don't have anything further, other than I want to move that.

● (2235)

[*Translation*]

The Chair: Before telling you whether or not it's admissible, I'm going to turn the floor over to two people who asked me if they could speak very briefly.

[*English*]

Out of good faith, I would be willing to hear these very brief comments.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Without presuming on your decision, which we know is informed, and in the event it is admissible, I'm going to propose to Mr. Toews a friendly amendment that is not contrary to freedom of expression.

I find the term “public interest” excessive. I'd be prepared to have it provided in the bill that it is not against freedom of expression to hold and publicly express diverse views on marriage. I hope that amendment is admissible.

[*English*]

The Chair: Mr. Jean, do you have a very short comment?

Mr. Brian Jean: I don't think that changes my comment at all.

I think the members here should take very seriously what we've heard from the experts from the justice department. In essence, the preamble is used for legislative interpretation when there are questions. This is my understanding as a litigator for many years. It is used for interpretation for cases where there is some form of uncertainty by judges.

I think this form of interpretation would add more weight to the argument that was proposed by the Conservative Party members and again proposed by the Liberal Party members. I believe that from the base, if it's not ruled totally out of order, even with the amendment that Mr. Ménard has suggested, it would be appropriate, especially given the new change that we have proposed and that has been passed.

The Chair: We're talking about amendment C-6. The amendment proposes to add a provision to the preamble of the bill.

According to Marleau and Montpetit, on page 657:

> In the case of a bill that has been referred to a committee *after* second reading, a substantive amendment to the preamble is admissible only if it is rendered necessary by amendments made to the bill.

Unless the member can identify an amendment to the bill that clearly necessitates this amendment to the preamble, I must declare this amendment inadmissible.

Mr. Brian Jean: A point of order, Mr. Chairman.

The Chair: On a point of order, Mr. Jean.

Mr. Brian Jean: I would argue the opposite. The amendment we've put forward deals specifically with this provision.

The Chair: Any other comments?

Mr. Brian Jean: Also, it's interpretive, not substantial.

Mr. Vic Toews: I'd like to speak to that.

The Chair: Go ahead, sir.

Mr. Vic Toews: First of all, there was a provision that there's an agreement by the Liberals and the Bloc to support a Bloc amendment at report stage. The Bloc had the opportunity to put that motion here. They refused to do so. So there are going to be grave procedural problems with this getting forward. My preamble relates directly to that particular provision.

Mr. Brian Jean: Absolutely.

Mr. Vic Toews: By doing this backroom deal, the Liberals and the Bloc—

An hon. member: It's not a deal.

Mr. Vic Toews: Oh, I'm sorry, I thought you said it was a deal.

Hon. Paul Harold Macklin: We were just talking about a principle that could be brought forward at report stage.

Mr. Vic Toews: And you agreed?

Hon. Paul Harold Macklin: I agreed that in principle—

Mr. Vic Toews: Okay, then we have a deal. So because of this backroom deal made between the Bloc—

Hon. Paul Harold Macklin: No.

An hon. member: That's out of order, Mr. Chairman.

Hon. Paul Harold Macklin: Out of order.

An hon. member: That's terrible.

The Chair: Order, please.

Mr. Vic Toews: A deal, an arrangement, was made.

The Chair: All evening long it's been at your request, and now it's at my request. Give me a minute.

Mr. Vic Toews: Okay.

The Chair: Mr. Toews, is your contention that the new 3.1 clause, which is the only amendment we've done to the bill, relates directly to or necessitates this addition to the preamble? Is that your contention, sir?

● (2240)

Mr. Vic Toews: That's correct. The two are inextricably intertwined.

The Chair: Thank you.

Let's hear other comment on this, Mr. Toews.

We'll start with Madame Boivin, then we'll hear Mr. Boudria.

[*Translation*]

Ms. Françoise Boivin: I only have one comment to make. I'm not necessarily opposed to CPC-6, but, based on what you said about Marleau and Montpetit — pages 654, 655 and 657 of which I know virtually by heart — I don't think this amendment is necessary. I believe you said it wasn't necessary because of the adoption of new clause 3.1.

In my view, CPC-6 is included in 3.1 and therefore does not meet the criteria of Marleau and Montpetit.

The Chair: Thank you.

Mr. Boudria.

Hon. Don Boudria: That's the same argument, Mr. Chairman. CPC-6 may refer to a similar or closely related issue, but that doesn't mean this amendment is necessary. The criterion is very strict. It has to be "necessary". Furthermore, it's very hard to convince anyone here that it's necessary to make this amendment. I'm convinced it isn't.

The Chair: Are there any other comments?

[*English*]

Mr. Brian Jean: Your quote from page 657 goes on to the top of page 658, and it deals specifically with no preamble. I'm not suggesting that there's no preamble here, because we have quite an extensive one, but I think you could argue that even though there is a preamble, there is nothing that references, particularly, clause 3.1 and the freedom of expression that is set out specifically there.

It goes on to say, "if there's not already been a preamble, one may be presented as long as the proposal is relevant to the bill; in addition, substantive amendments to an existing preamble are admissible." If you look at the previous paragraph that you already quoted, Mr. Chair, and put it in with the second in relation to the substantive changes, I would suggest that there's no question that this is certainly part and parcel of what the legislative process is talking about.

The Chair: When we're looking at Marleau and Montpetit, page 657, the last paragraph, where it talks about the preamble, it's talking about it in the case of a bill that's been referred to a committee after second reading. However, the two last lines of this, which continue on to page 658, say: In the case of a bill that has been referred to a committee *before* second reading, if there is not already a preamble, one may be presented as long as the proposal is relevant to the bill; in addition, substantive amendments to an existing preamble are admissible.

But that's in the case before second reading.

Mr. Brian Jean: That's not how I read it, sir, but I understand your interpretation of it. But it still, in the first part of that paragraph, allows it if it is rendered necessary by amendment, sir. And I would point out that there is absolutely no part of the preamble that deals with freedom of expression, which has been adopted by clause 3.1, not one part of the preamble at this stage.

So on one side the other parties argue that the preamble is necessary, but in this particular case it's not necessary. With respect, sir, it's not logical. There's no reference to freedom.

The Chair: Are there any other comments?

Mr. Boudria, very quickly please.

● (2245)

Hon. Don Boudria: It's not the argument that a preamble is, in a general sense, necessary or not necessary. That's a different debate.

The debate here, and what Mr. Chairman will have to rule on, is whether the changes made to a clause make it necessary to change or alter a preamble. It's a very different threshold, and certainly that has not been demonstrated. It's not even been invoked yet. Other arguments have been used, but not that one, because it's not there.

Mr. Rob Moore: Mr. Chair, may I comment on this point just quickly?

The Chair: Yes, very briefly, Mr. Moore.

Mr. Rob Moore: Okay, then I won't take the time to do it.... If you go through the preamble, every item in the preamble links to one of the first three clauses that we have. Every one of the clauses in the bill, clause 1, clause 2, clause 3...there's a paragraph in the preamble that touches on them. That's the consistency of the bill.

If we add new clause 3.1, then there will be no preamble that speaks to what this change makes in the bill. So for consistency in the bill and in keeping with the other three clauses, this clause should have a portion of the preamble that speaks to it.

The Chair: Okay. I will let it go forward for debate.

Mr. Rob Moore: Thank you, Mr. Chair.

The Chair: Mr. Toews, we're on debate now.

Mr. Vic Toews: Very briefly, I don't want to unnecessarily prolong this debate. My comments were in the context of the B.C. Court of Appeal, where basically the B.C. Court of Appeal said, because these views that Mr. Kempling had expressed were, if I could say, on the fringes of.... It says here: "Though his views may be unpopular, he was...engaged in a rational debate of political and social issues..." And yet the judge would have us believe that because the individual did not express political discourse that is somehow in keeping with the mainstream values of Canadians, this expression was not worthy of protection.

What this preambular phrase does.... It is not against the public interest to hold and publicly express diverse views on marriage. I may not agree, for example, with polygamous marriage. I certainly would not argue that a person who does agree with polygamous marriage should somehow be restrained from expressing that view, and I know we have that debate among some cultural circles in this country. I've seen it on the front page of our newspapers. We know the situation in Bountiful, British Columbia, where people argue in respect of a different definition of "marriage". I don't agree with it. In fact, it's contrary to the Criminal Code, in my opinion. Yet I think they're still entitled to publicly express diverse views on marriage.

The other point I would like to make is if we didn't guarantee this kind of ability to express diverse views on marriage, where would this entire same-sex marriage debate be, if we had come out and said we can't express that kind of thing? So now it seems that because there is a particular view being advanced in this bill, we should somehow shut out all other views of what marriage should be. I think this is not an issue of what we believe as individuals but what we believe as politicians, as people who believe in democracy, who believe that the marketplace of ideas should not be stifled by legislative provisions that attempt to force the public to accept views of marriage that they may or may not agree with.

So I think this is an important symbolic statement, in many ways. I understand the preamble is interpretive more than anything, but I think it's important to give some of the people reassurance, for greater certainty, about the concerns they have about their right to express different views on marriage. In the same way that the government said that their amendment "for greater certainty"—that freedom of conscience and religion is protected and the expression of their beliefs in respect of marriage between persons of the same sex based on that—

● (2250)

The Chair: Excuse me just a second.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Pardon me for interrupting you. I thought I understood that you considered the amendment inadmissible. I want to appeal from your decision, and I think we should move on to the vote.

The Chair: One moment, please. I didn't tell you it wasn't admissible.

Mr. Richard Marceau: Then what's your decision?

The Chair: We had decided that the amendment could be questioned and, furthermore, that it might be admissible only if it constituted a necessity.

Mr. Réal Ménard: So, in the current state of affairs, it's inadmissible.

The Chair: One moment.

After hearing the comments of Mr. Ménard, Mr. Jean and others, I said I was prepared to put the amendment to a debate. We're now in the debating period, and Mr. Toews has the floor.

Mr. Richard Marceau: So it's admissible?

The Chair: I allowed it to be subject to debate, and that suggested that I considered it admissible.

Mr. Réal Ménard: Would Mr. Toews accept an amendment that might lead us to vote as soon as possible? It could state that it is not against freedom of expression to hold diverse views on marriage. If you rule the amendment inadmissible, I believe that should be put to a vote as soon as possible. I think the mover is prepared to agree that this is a friendly amendment. Instead of referring here to the public interest, which has nothing to do with this, reference should be made to freedom of expression instead. I'm be prepared to give you my opinion.

The Chair: One moment, Mr. Ménard.

Mr. Réal Ménard: I don't want to rush you.

The Chair: I was just going to suggest that you not try to do that. Mr. Toews has the floor, and we're going to let him continue.

Mr. Réal Ménard: Invite him subtly to wrap it up, Mr. Chairman.

The Chair: I believe he's understood your remarks, and, as you said earlier, I believe he's old enough to make his own decision.

Mr. Réal Ménard: Mr. Chairman, I'd say you're a "gerontocrat", but nevertheless engaging.

[*English*]

The Chair: Merci, monsieur.

Mr. Toews, please.

Mr. Vic Toews: I will be brief.

Basically, this gives many of the witnesses that we had here some further reassurance that their views in respect of marriage will not be the subject of tribunal hearings, or at least that when they're in front of tribunals, they have an additional defence to rely on by pointing to this preambular amendment.

So I would urge the committee to accept this and to vote in favour of it.

● (2255)

[*Translation*]

The Chair: Mr. Ménard.

Mr. Réal Ménard: Could you check to see whether the committee agrees to carry my friendly amendment? If everyone agrees, we could call the vote.

The Chair: Earlier you referred to an eventuality. The subamendment hasn't yet been introduced.

Mr. Réal Ménard: I'm going to read you my subamendment right now.

The Chair: Please, go ahead.

Mr. Réal Ménard: The amendment would read as follows:

> WHEREAS it is not against freedom of expression to hold and publicly express diverse views on marriage;

The words "public interest" are replaced by "freedom of expression".

The Chair: So it would read as follows:

> WHEREAS it is not against freedom of expression to hold and publicly express diverse views on marriage;

Mr. Réal Ménard: It seems to me that's completely reasonable.

[*English*]

Mr. Vic Toews: It's just a friendly amendment, because it's not against freedom of expression. What it should in fact say technically is that it is consistent with freedom of expression, which would be the appropriate way of expressing that.

I think it does exactly what Mr. Ménard is trying to do. If that is what he's trying to do, I would accept that as a friendly amendment and proceed.

[*Translation*]

The Chair: Mr. Boudria.

Hon. Don Boudria: Mr. Chairman, with your permission, before even determining whether the department considers whether this subamendment is within the spirit of the bill, I must say that there's something more fundamental here: "liberté d'expression" and "freedom of speech" are two different concepts. This isn't an amendment; this concerns another subject. Is this subamendment admissible?

Mr. Réal Ménard: You can't substitute yourself for the Chair because you're the dean.

Hon. Don Boudria: No. I'm putting the following argument before the Chair.

Mr. Réal Ménard: Yes.

Hon. Don Boudria: I'm free to argue that the subamendment is inadmissible. Of course, the Chairman will decide. That's all.

The Chair: Mr. Ménard, our advisors tell me this adds a concept that goes beyond the intent of the bill. Without it being a suggestion from Mr. Boudria, I must tell you that your subamendment is not admissible.

Mr. Réal Ménard: Mr. Chairman, I'm going to have to invite you to free yourself of your legislative advisors. I think these are two concepts and that it's admissible. I'm going to have to appeal from your decision.

The Chair: I see no problem in that.

Mr. Réal Ménard: Don't take it personally.

The Chair: Absolutely not. But someone will ask that the decision be sustained.

Mr. Réal Ménard: The brownnoser on your left will no doubt...

The Chair: Mr. Boudria. I didn't hear that remark, but I presume that...

Mr. Réal Ménard: Our friendly colleague will no doubt...

● (2300)

The Chair: I presume it was highly respectful.

Mr. Réal Ménard: The member for Glengarry—Prescott—Russell.

Hon. Don Boudria: No doubt.

Mr. Réal Ménard: The nice member for Glengarry—Prescott—Russell.

The Chair: Watch out. I'm from his riding.

Mr. Réal Ménard: Everyone knows that, Mr. Chairman.

The Chair: Perfect. Remember it.

Hon. Don Boudria: And I'm from his.

The Chair: Yes. So it's moved by Mr. Boudria.

[*English*]

I assume that you want a recorded vote on this, sir.

Mr. Vic Toews: Yes.

The Chair: This is to sustain the chair's decision that it's out of order.

(Motion agreed to: yeas 7 ; nays 5)

The Chair: The ruling of the chair is sustained.

Mr. Brian Jean: We still have the amendment itself.

[*Translation*]

The Chair: Unfortunately, Mr. Ménard, the decision is sustained.

Mr. Réal Ménard: I respect that, Mr. Chairman.

[*English*]

The Chair: Okay, so we are back on amendment CPC-6, as is.

Hon. Paul Harold Macklin: Call for the question.

The Chair: Do you want a recorded vote on this, sir?

Mr. Vic Toews: I would have thought we would unanimously pass that.

An hon. member: Why would you be against that?

So what are you doing with this? Are you ruling it out of order?

The Chair: No, I didn't rule it out of order. I allowed you to proceed to debate.

Mr. Vic Toews: That's fine.

The Chair: You've debated. Now you're at the vote.

Mr. Vic Toews: Let's vote.

The Chair: Exactly what I've been saying.

How do you want to vote, sir?

Mr. Vic Toews: I want to support that amendment.

The Chair: Okay. And you want to be recorded as having supported it.

Mr. Vic Toews: Absolutely.

The Chair: So therefore you want a recorded vote. Thank you very much.

[*Translation*]

Mr. Richard Marceau: We're coming back to the original wording of amendment CPC-6, which you ruled admissible.

The Chair: Your amendment isn't there. Your subamendment accepted.

● (2305)

[*English*]

Okay, we will now have the vote.

We have six yeas and six nays, a tie vote.

As we are in the legislative process, it will go to the House and there is another opportunity for changes. Therefore, I will vote yes.

(Amendment agreed to: yeas 7; nays 6) [See *Minutes of Proceedings*]

The Chair: Amendment CPC-6 has been carried.

Shall the preamble as amended carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the bill, as amended, carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the chair report the bill, as amended, to the House?

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill, as amended, for the use of the House at report stage?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Okay. Before we all go home, give me thirty seconds to thank every participant in this committee for the entire cooperation, collaboration, and help that I have had.

I want to offer a special thanks to all of the staff, especially the clerks, Mr. Pagé , Mrs. Garbig, and Mrs. Baldwin. I want to offer a second very special thanks to our research staff. During the hearings you did not ask very many questions of the research staff, but their work had been done, and they were absolutely very helpful to me.

I want to thank all the staff who helped us during all these different hearings: the interpreters, the officials from the different departments, and broadcasting, of course. Thank you ever so much.

I want to thank all of your staff, all of the members' staff, all of the whips' different staffs, all of them. It's been a very pleasant experience for me, and I'm sure that there are some friendships—be careful now, Mr. Ménard—

Mr. Réal Ménard: You're not my type of man, but....

The Chair: Some friendships have been created at this committee, and I'm sure they're for a lifetime. So thank you, merci beaucoup.

Hon. Paul Harold Macklin: Mr. Chair, on behalf of the committee, we express our feelings to you for your equanimity. It's been wonderful to work with you.

The Chair: Thank you.

Mr. Vic Toews: I'll add to that. I think you handled a very difficult topic in an exemplary fashion. Should the present Speaker of the House ever decide to retire, you may want to consider a future there. You've done an excellent job on a difficult bill. You handled yourself in an even-handed manner and I've got nothing but praise for the job you did.

Some hon. members: Hear, hear!

The Chair: Thank you. I appreciate it. Merci.

Bonne soirée. I'm sure that tomorrow morning at 10 o'clock you will all be present in the House for the tabling of the report.

We're adjourned.

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