

“A Civil Argument About Dignity, Beliefs and Marriage”
Being a Brief for an Appearance Before the
Special Legislative Committee of the House of Commons
on Bill C-38, *The Civil Marriage Act*
(Final Version)

Iain T. Benson
Barrister & Solicitor
Executive Director
Centre for Cultural Renewal
Ottawa*

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Introduction: [Note: Amendment Recommendations follow at pp. 7-10]

I would like to thank the Committee for giving me the invitation to address a few words to you today.

I have had the benefit of reading some of the many submissions put before you to date and do not intend to repeat what others have said. You have had many eloquent and important arguments put before you. I hope you have and take time to properly consider them.

The issues before you must not be rushed for the sake of a political time-table when the effects of your work will influence generations of Canadians. Now is a good time to slow down and provide some sober thought before matters go to the higher chamber. Things have moved at a rather breathless pace over the last few years.

The conditions for a more just and inclusive society cannot be obtained by unjust and exclusive means. The difficult task of balancing competing interests and beliefs must be carefully attended to.

Those who have, as the saying goes, left the closet, and now demand public acceptance and social recognition are perceived by many as seeking to drive those who will not accept their conduct, into the closet they have left relatively recently.

This is not a recipe for civic peace or multicultural harmony in a pluralistic society - - the kind of society Canada envisions itself as being.

* www.culturalrenewal.ca The Centre is an independent, non-partisan, non-denominational think-tank dedicated to explaining the importance of religions to culture and culture to religions.

The Central Problem about the Marriage Debate: Irreconcilable Views:

The central problem with the debate about marriage is that the fundamental starting assumptions of “both sides” are essentially irreconcilable. Since both are legally valid positions to advance under the freedoms of expression, belief, conscience and religion - - all constitutionally recognized, the State should seek to maintain the public space for the discussion to the greatest extent possible. Giving one side of the debate the status of a new constitutional norm does not do this. The prior status of marriage was recognized but not created by the law. Heterosexual marriage does not depend upon law for social recognition. Same- sex marriage depends entirely upon law in its attempt to gain social recognition. Thus, same-sex marriage depends upon force for acceptance but, as shall be argued below, justice properly understood and applied, denies such a use of law.

Marriage as Natural Fact or Social Construct:

Marriage, on one view, is a *natural fact*, that unites men and women and is sanctified by love. Something that everyone historically *recognized* and for many reflective of Divine revelation or, for others, observable by natural reason alone. To the people who hold this view the idea that two men could be married to each other or two women married to each other makes about as much sense, and is as ontologically impossible as two men trying to become sisters or two women trying to become brothers.

On the other view, marriage is a *social construct*, something not given in nature but something chosen and defined by humans. Something chosen by will and sanctified by love; something that everyone should recognize. To the people who hold this view, those who do not agree with them are narrow bigots akin to those who were racists in a prior era.

The Role of the State and Law in Each View:

To those who view marriage as a natural fact uniting male and female the binding force of this reality is nature itself. It does not depend upon the State but upon nature and the law’s primary function is recognition rather than definition. This is why most countries have not had Statutes defining marriage. It was the common law that was challenged in the recent court decisions.

To those who hold the opposite view, that two men can marry, or two women, it is essential to get access to the categories of acceptance by way of law and the State. Positive acts of redefinition are required using all means to hand.

Thus both the state in its politics and law are yanked this way and that by two forces that do not agree, cannot agree on fundamentals. Is the base nature or will? Is it Divinely ordained as part of creation or a product of human will and choosing, as plastic as

“gender” against the fixities of “sex”? Gender as something chosen, sex as something natural.

Even if a Constitution is changed, a legislative over-ride is pronounced (s.33) or court decisions favour (for a time) this side or that while “interpreting the Constitution”, the debate in the long-run will continue and, ultimately, the search for the principles of a workable *modus vivendi* must be found.¹ The proposed Bill avoids such a principled search and offends on every principle.

History and the Accommodation of Conflicting Views:

Debates with irreconcilable starting points are things that countries have had to deal with before. For centuries there were disagreements about whether rulers were divinely ordained or given their authority by will of the people. There were debates about whether the Pope was divinely ordained, a law maker who must be respected, or a usurper who must be overthrown.

History shows us what accommodations had to be made in order for there to be peace in the State. Certain matters must be left, in a sense, “outside the jurisdiction of the State” because there could simply not ever be agreement about them - - there would only be friction, disagreement, bloodshed.

Another way than taking up arms is to draw a circle around the contested area and leave it in the private realm except for appropriate associational activity. The prime example of this sort of accommodation is with respect to moving religious indoctrination (about which people did not agree) to families and religious bodies or to schools specially set up for just such a purpose and chosen by those with such beliefs. The State could even support such freely chosen (and dogmatic) bodies but it could not force everyone to accept the same beliefs.

Religious dogma and indoctrination compared to sexual dogma and indoctrination:

We may come to see that there could well be a very useful analogy here. Just as there was (and is) disagreement about religious dogma (and fundamentalists come in all shapes and sizes and include atheists and agnostic believers as well as religious believers) so there is now clearly established stark disagreement about what we might call sexual dogmas.

This is central to the marriage debates of the contemporary era. Up until now, reaching an accommodation on marriage as we once did with such things as the teaching of

¹ See the work of English philosopher John Gray *Two Faces of Liberalism* (2001) who contrasts *modus vivendi* liberalism with a kind of liberalism he says threatens genuine liberalism in which the search is for an eventual consensus of views or agreement. It is clear that this latter kind of monistic or illiberal liberalism is behind much of contemporary litigation claims and court decisions. Litigation, with its “winners” and “losers” outcome is hardly the best way to frame the principles of a workable *modus vivendi*.

religious dogma in public education - - by removing it from the contested area, has not been investigated seriously in Canada or anywhere else.

Moving benefits and other questions of duties and obligations out of a marriage model and towards something else such as a reciprocal beneficiaries (Hawaii) or Registered Domestic Partnership (Scandinavian) model has only been hinted at by Law Commissions here and there. No one has taken seriously whether the State should get out of the marriage business (as the saying goes). Some have suggested it but the two main protagonists, those for natural marriage and those for constructed marriage, want the State to stay in marriage and to have its recognition (nature) or redefinition (construction) on their own terms.

Central to ideas of marriage are ideas about the legitimacy of sexual relationships between men and women. Marriage historically provided the framework within which sexual relationships between men and women were regulated both socially and legally. So, too, sexual relationships between those of the same sex.

The change in these laws have, understandably enough, now reached their logical conclusion - - what is the effect of the legal changes on the ideas we have of marriage?

Marriage is About Sexual Conduct Even Though the Difference Between a Person and Conduct is Often Overlooked:

At the root of marriage, even if we have (as the court did in the *Halpern* decision of the Ontario Court of Appeal) tried to strip it of any procreative relevance, is sexual conduct.² Yet sexual conduct acceptance is assumed to be essential to human dignity, a proposition that surely cannot survive scrutiny when compared against our analogy to religious belief.

In short, if you deny my beliefs as a Catholic have you lessened my human dignity? If you deny my heterosexual longings to be real or valid, have you denied my dignity or merely disagreed with me? Is all disagreement to be ratcheted up to the level of dignity rejection? Is all rejection of a form of marriage “bigotry” as some same-sex activists have alleged?³ Rejecting “all gays” or “all blacks” as people is bigotry and if racial, racism, but rejecting particular “conduct” is not the same thing at all.

If I reject the conduct of a black person I am not a racist, if I reject the person of a black man merely because he is black, I am a racist. If I reject the conduct or beliefs of a

² The Court in *Halpern* had to “bleach out” procreative relevance to marriage in order to achieve the end it sought - - for no two men and no two women can ever procreate without assistance from outside the union. But sexual conduct remains key in marriage for the same-sex community because that community defines itself by its sexual orientation. It is about sexual conduct but in a “hidden” or usually unacknowledged way.

³ See: Alex Hutchinson “Gay advocates fight churches’ charity status: *Ottawa Citizen*, Sunday June 12, 2005, A1

particular religious person I am not a bigot if I reject the religious person for being a religious person, I am. If I reject a homosexual person's beliefs or acts, I am not offending dignity, if I reject the homosexual person as a person, I am offending dignity.

So with sexual conduct at the base of the disagreement about marriage, it isn't just a claim about "love recognition" (which any two persons can have without sexual conduct) it is about "sexual conduct legitimacy" in the public sphere. This then raises the question about whether what began in the privacy of the bedroom (the State had no place in it so we were famously told by Prime Minister Trudeau when laws against sodomy were repealed) should or even can have public legitimization yet it will be seen that the public/private discussion plays an important role in how we might order our lives together.⁴

Is it the role of law to force acceptance of certain sexual conduct? Let's return to the analogy to religion. Could law legitimately force acceptance of religious principles in a free and democratic society? Religion is important to my being just as sex is. If the answer to the religion question is "no" then it should be so for sexual conduct.

A State ceases to be liberal in the right sense when it attempts to force everyone to (with certain very broad restrictions excepted such as laws to protect minors from pedophiles etc.) to agree to what are validly contested sexual practices: just as the State cannot properly coerce religion, it should not coerce sexual practice acceptance.

Here it is critical to understand that we allow differing views of sexual conduct to co-exist. But when the idea of sexual relationships are hidden within the language of marriage - - as they are, there is a risk that what is really at issue- - differing views of human sexuality, are missed.

The attempt to claim THE public definition of marriage is actually an attempt to gain public recognition through law for certain sexual practices and those who affirm them. This is not a legitimate use of law in a free and democratic society.

The removal of restriction on homosexual and lesbian sexual practices was done on the basis that "the State has no place in the bedrooms of the nation." Most people would agree with this. What people object to is that what goes on in the bedroom is now the focus of public conduct, expression and practice seeking public support and affirmation.

⁴ See, the 1994 Massey Lectures of Jean Bethke Elshtain, *Democracy on Trial* (New York: Basic Books, 1995) at 39 ff. in which Prof. Elshtain notes particularly the relation between a strong private realm and freedom and the danger to the integrity of both when private and public are dissolved by what she calls the "politics of displacement" which is "...when private values, exigencies, and identities come to take precedence in all things, including public involvement as a citizen." (at 40).

The New Sectarianism and Historic Attacks Upon the Family, Religions and Private Property

As sex, sexual orientation, and gender identity discrimination in religious institutions wither away, the need for a religious exemption in the religious private sphere will disappear. Although it is unlikely to appear within my lifetime, I look forward to the day when, for example, the first lesbian Pope issues her apology for the sins of the Roman Catholic Church against LGBT [lesbian, gay, bisexual and transgendered] persons around the world. And I am sure that Bertha Wilson [former Supreme Court of Canada Judge] will welcome that day too.

“Religion vs. Sexual Orientation?: A Clash of Human Rights?” Robert Wintemute Vol. 1, No. 2 Journal of Law and Equality, Fall 2002, 126 – 153 at 153.

In this article, a revised and annotated version of the 2002 Bertha Wilson lecture delivered at the University of Toronto law school, Professor Robert Wintemute analyzes whether religion and sexual orientation collide and how such collisions should be managed by law and public policy. As the concluding paragraph of the essay, above, shows, Wintemute is wedded to the idea of “progress” and the notion that what he calls “the religious private sphere” which he distinguishes from “the religious public sphere” will “wither away.”

It was, of course, one of the doctrines of Karl Marx that the capitalist state and, in fact, the family would “wither away” once the Proletariat revolted against the Bourgeoisie. This was, somewhat later, picked up by feminist scholars who believed in Marx’s associate Friedrich Engels’ theories on the family - - which applied Marxist categories to the relationships between men and women and shared this revolutionary framework. The same revolutionary movement now speaking the language of “equality” continues the same, essentially, religious mission to displace other religious frameworks.

In a recent article, following Canadian jurisprudence throughout, but framing itself within a South African context, the author, a leading South African legal academic, referred to as an authority by that country’s Law Reform Commission (see: Discussion Paper #104, Domestic Partnerships, December 2003: ISBN: 0-621-34421-4), like Prof. Wintemute in the top quotation, shows the illiberal direction of main-stream analysis in how he speaks of the need to “attack” the concept of “family” and “marriage”:

If everyone has the right to be different and if we must move away from the idea that heterosexuality forms the normative basis for policy formulation, then the very institutions which valorise a certain manifestation of heterosexuality in our society must be under attack. A prime candidate for re- invention or reconstruction must surely be the institutions of "marriage" and the "family", the very institutions which have been deployed to regulate and police intimate

relations in our society. These institutions have traditionally been associated with the validation and valorisation of certain kinds of heterosexual relationships and have thus contributed to the marginalisation of those whose sexuality do (sic) not conform to the idealised heterosexual norm. If we were to engage with the [South African] Constitutional Court's equality rhetoric around sexual orientation in a serious manner, it would throw into doubt the constitutional tenability of the continued use of these concepts [marriage and family] in their present form or perhaps in any form.⁵

The language of simple “inclusion” into the pre-existing recognized category of male/female marriage is not, therefore, a simple inclusion and the language of “attack” shows that religious believers are right to be concerned with the strategies against them. As De Vos’ article shows, the goal is the “attack” on marriage and the family with a view to replacing them with other conceptions. Legal challenges claim simple exclusion and, like the Civil Marriage Bill a simple inclusion based upon justice but the motivations for a change to marriage (and family) vary and some are extremely illiberal and pose a threat to ordered liberty.⁶

Recommendations for Amendment:

Recommendation #1: The Department of Justice Canada, on a website page devoted to explaining what it calls “Common Misconceptions” on the Civil Marriage Act, states as follows with respect to religious freedom:

Religious groups will retain the full ability to make their own decisions about whether to recognize these legal changes, in the same way that they already have with earlier changes to civil laws on marriage and divorce⁷

If this is so, given the widespread and significant concerns expressed by all manner of religious groups about the possible effects of this law on their organizations, then, taking the Government at its word, there should be no objection to adding the following as both a substantive provision and a preamble addition to Bill C-38.

1. no person will be deprived of any benefit under federal law by reason that they define marriage as being between a man and a woman; and
2. no person will be subject to any burdens under federal law by reason that they define marriage as being between a man and a woman.

⁵ Pierre De Vos “*Same-Sex Sexual Desire and the Re-Imagining of the South African Family*” South African Journal of Human Rights Volume 20 Part 2 (2004) 179 at 187 (underlining added).

⁶ Dr. Daniel Cere of McGill University, Montreal, has done extensive work showing the philosophical roots of social constructivism as it pertains to the strategy to change the meaning of marriage: his affidavit in the marriage cases is instructive: see <<http://www.marriageinstitute.ca/images/affidavit.pdf>>

⁷ http://canada.justice.gc.ca/en/news/fs/2005/doc_31440.html

Recommendation #2: Need to Protect Members of Religious Groups as well as Officials and Other Citizens as Well: Preamble and Section 3 are inconsistent and insufficient:

The Preamble to Bill C-38 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 and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

In Section 3 of the proposed *Act*, however, contrary to the Preamble, contains no mention of members:

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

The Protection of the religious beliefs of *members* of religious groups (and not just their leaders) is no less significant for society and should be included in Section 3. Similarly, other citizens should also be protected since freedom of conscience is a right for all (see next Recommendation).

Recommendation #3: Protect “Conscience” as well as “Religious Beliefs”

The protection of “religious beliefs” should be extended to beliefs based on “conscience” to reflect the conjunctive use in the Charter itself in S. 2(a) “conscience and religion” as well as the recital in the Preamble to the Bill. This alone treats all citizens equally.

Recommendation #4: Charitable Status Protection Amendments

Given expressed concerns by witnesses to your Committee and recent Press coverage⁸, there should be protection for all charities (religious or not) so that the expression of views for or against differing models of marriage should not be grounds for Revenue Canada to remove or fail to grant charitable status. The *Income Tax Act* should reflect this.

Recommendation #5: Consider Why Sexual Relationships are the Marker for Federal Legal Recognition? *Consideration of all the Options: Failure to Consider a Non-conjugal State Model: Necessary to Delete Whereas #4*

⁸ See note #3 above.

(beginning “whereas only equal access...”) and Whereas #5 (beginning Whereas the Supreme Court of Canada) as inaccurate and substitute:

The Parliament of Canada acknowledges that many citizens, in good faith and as a matter of deeply personal conviction, believe that Parliament should uphold the traditional definition of marriage as the union of a man and woman to the exclusion of all others while other citizens believe that the definition should be changed to comply with the court decisions, and recognizes that Parliament has legislative jurisdiction over marriage and must decide the matter.

Recommendation #6: Delete the Word “Civil” from the Existing Title and call the Act the “Marriage Act.”

Calling the Act the “*Civil* Marriage Act” or using the word “civil” in its title, suggests that there is a sharp division between a civil marriage and a religious one. This is fair neither to the State nor to religions. All citizens (religious or not) are full members of the civil society. Keeping marriage as one institution in terms of the society and allowing for clear protection for religious beliefs is a better direction in which to proceed than by creating a frankly “secularistic” split through some notion of a “religion free civil.” Since the term “secular principles” has been held by the Supreme Court of Canada to include “religions” and “religious people” it is inconsistent with the *Chamberlain v. Surrey School District No. 36* [2002] 4 S.C.R. 710 (December 2002) decision to attempt to resurrect a religion free “civil” marriage concept.⁹

Recommendation #7: Do Not Proceed at all with this Bill and Adopt an Alternative Strategy.

This Committee, in the alternative to making amendments, should recommend not passing this Bill at all and the replacement of this proposed law with another sort of regime entirely; one better suited (for reasons set out above) to proper respect for the diversity of beliefs in Canadian society.

Consideration should be given to instituting a regime that uses federal provincial cooperation with respect to relationships (property, dissolution, etc.) not based upon a sexualized marker but one open to “any two persons.” This sort of law alone would “get the State out of marriage” while leaving it to those groups who can teach its meaning according to their traditions. Only this approach provides an even-handed way of respecting and protecting the competing beliefs of all citizens. Believers of all sorts (religious, atheists and agnostics) would look to their own civic associations (church, club, associations) to perform marriages but any two people whether sexually involved or

⁹ On the nature of “secularism” see: Iain T. Benson “Considering Secularism” in D. Farrow, ed. *Recognizing Religion in a Secular Society* (Montreal: McGill-Queen’s Press, 2004) pp. 83 – 98 and, on the meaning of “secular” generally, Iain T. Benson “*Notes Towards a (Re) Definition of the Secular*”, 33 *U.B.C. Law Review* (2000) 519 - 545 . The latter was cited with approval by the Supreme Court of Canada in *Chamberlain* (Dec. 2002) when that court came to accept a religiously *inclusive* conception of the secular.

not, would then register for State benefits. The State, on this model, would not further any particular sexual arrangements in relation to marriage.

Such an approach has not been adequately canvassed in Canada and should be as part of an overall consideration of the importance of marriage and other relationships to Canadian society.¹⁰

Again, the focus is not sexual relationships in such a model, but the actual financial and lived interdependence of those in the relationship. Children may be benefited in terms of who is looking after them whether or not such people are in a sexual relationship.

Such a recognition has the benefits of including those who are not in a sexual relationship at all but who are financially interdependent while not giving State recognition to contested sexual practices that some groups cannot support and ought not to be forced to support by force of law.

THE FOREGOING IS REPECTFULLY SUBMITTED

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¹⁰ In the Address of Prime Minister Paul Martin on Bill C-38 on February 16, 2005 the Honourable Prime Minister gave very little analysis of this point and simply stated that the idea of “getting out of the marriage business altogether” “...was rejected by the major religions themselves when their representatives appeared before the Standing Committee on Justice and Human Rights in 2003.” He does not say which ones or on what side of the issue they were speaking (pro same-sex marriage or not). Opinions, however, change. It is worth noting that a majority of M.P.’s voted that marriage should be reserved to heterosexuals in 1999 and again in 2003. Views change over time and if certain religious officials rejected “the State out of Marriage” in 2003, with all that has happened since then, it is likely many would now favour a “non-sexualized marker” (i.e. non-conjugal) for benefits - - that is, getting the State out of marriage all together if it can be shown that there is no other means of maintaining a traditional conception of marriage. See: <http://pm.gc.ca/eng/news.asp?id=421>