

THE CASE AGAINST “SAME-SEX MARRIAGE”

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1. ESTABLISHING CONTEXT

I want, first, to outline briefly the context in which my comments on same-sex marriage are grounded, because in this debate context is definitely not neutral and is not the same for everyone. As this committee has heard, many people who oppose extending the definition of marriage to include same-sex couples do so on religious grounds or because of moral objections to homosexuality. They are not the bases of my arguments. Rather, my arguments against same-sex marriage are secularly based and, to the extent that they involve morals and values, these are grounded in ethics not religion. To summarize:

- ❖ I oppose discrimination on basis of sexual orientation, whether against homosexuals or heterosexuals.
- ❖ I believe that civil partnerships open to both opposite-sex and same-sex couples should be legally recognized and that the partners, whether opposite-sex or same-sex, are entitled to the same benefits and protection of the law.
- ❖ But I do not believe that we should change the definition of marriage to include same-sex couples. My reasons go to the nature of marriage as the societal institution that represents, symbolizes and protects the inherently reproductive human relationship. I believe that society needs such an institution.

2. MARRIAGE AS CULTURE

Marriage is, and has been for millennia, the institution that forms and upholds for society, the cultural and social values and symbols related to procreation. That is, it establishes the values that govern the transmission of human life to the next generation and the nurturing of that life in the basic societal unit, the family. Through marriage our society marks out the relationship of two people who will together transmit human life to the next generation and nurture and protect that life. By institutionalizing the relationship that has the inherent capacity to transmit life — that between a man and a woman — marriage symbolizes and engenders respect for the transmission of human life. (What such respect now requires has become an unprecedented issue in light of recent advances in reprogenetic technology. I discuss that shortly.)

To change the definition of marriage to include same-sex couples would destroy its capacity to function in the ways outlined above, because it could no longer represent the inherently procreative relationship of opposite-sex pair-bonding. It would be to change the essence and nature of marriage as the principal societal institution establishing the norms that govern procreation. Marriage involves public recognition of the spouses' relationship and commitment to each other. But that recognition is for the purpose of institutionalizing the procreative relationship in order to govern the transmission of human life and to protect and promote the well-being of the family that results. It is not a recognition of the relationship just for its own sake or for the sake of the partners to the marriage, as it would necessarily become were marriage to be extended to include same-sex couples.

Reproduction is the fundamental occurrence on which, ultimately, the future of human life depends. That is the primary reason why marriage is important to society. In our highly individualistic societies, we tend to look only at its importance to individuals. That is necessary,

but not sufficient in deciding on the future of marriage.

People advocating same-sex marriage argue that we should accept that the primary purpose of marriage is to give social and public recognition to an intimate relationship between two people, and, therefore, to exclude same-sex couples is discrimination. They are correct if the primary purpose of marriage is to protect an intimate pair-bond. But they are not correct if its primary purpose is to protect the inherently procreative relationship of opposite-sex pair-bonding or to protect an intimate relationship for the purposes of its procreative potential. When marriage is limited to opposite-sex couples, there is no need to choose between these purposes, because they are compatible with each other and promote the same goal. The same is not true if marriage is extended to include same-sex couples. That would necessarily eliminate marriage's role in symbolizing and protecting the procreative relationship. We now need the procreative symbolism of marriage more than in past, because of new technoscience possibilities for transmitting life, if we believe that, ethically, there should be limits on the use of these technologies.

Culture is what marks us as human; it is what distinguishes us and allows us to distinguish ourselves from other animals and, in the future, from intelligent machines. In the past, we used religion as an important forum and force in the foundation of culture - we did so by finding shared values through religion. That is not possible in a secular society; one result is that it makes it more difficult to find consensus on values.

To form a society, we must create a societal-cultural paradigm — the collection of values, principles, attitudes, beliefs, and myths, the “shared story” through which we find values and meaning in life, as both individuals and society. In establishing a societal-cultural paradigm all human societies have focused on the two great events of every human life: birth and death. Marriage is a central part of the culture — values, attitudes, beliefs — that surrounds birth. We require a culture related to birth in a secular society, at least as much as in a religious one, and must establish it through secular means. That is one reason why the legal recognition of marriage is important.

One argument in favour of same-sex marriage is that the culture of marriage has changed over the years and that recognizing same-sex marriage is just another change. A common example given is the change in the status of the woman partner, in that marriage is now seen as a union of equals. But that change goes to a collateral feature of marriage, not its essential nature or essence as recognizing same-sex marriage would. In short, these two changes are not analogous; rather, they are fundamentally different in kind.

Advocates of same-sex marriage also argue that restricting marriage to opposite-sex couples based on society's need for an institution that symbolizes the inherently procreative relationship between a man and a woman, means that opposite-sex couples who cannot or do not want to have children should be excluded from marriage, or, more extremely, that only a man and a woman who produce a child should be allowed to marry.

Marriage between opposite-sex partners symbolizes, however, the reproductive potential that exists, at a general level, between a man and a woman. Even if a particular man and woman cannot or do not want to have a child, their getting married does not damage this general symbolism. The reproductive potential of opposite-sex couples is assumed at a

general level and is not investigated in individual cases. To do otherwise would be a serious and unjustifiable breach of privacy. It is also sometimes argued that the absence of a reproductive potential is obvious “on the face of the record” when a woman well past the age of child-bearing enters a marriage and yet we recognize such marriages. But again these marriages do not damage the reproductive symbolism of marriage in the way that same-sex marriages would. Indeed, they continue this symbolism at the grandparent level and, therefore, across the generations.

Marriage’s role in upholding respect for the transmission of human life — which is the first event in procreation — is of unusual importance at present. We are facing unprecedented challenges to that respect because of new technoscience that opens up unprecedented modes of transmission of life. That is another reason why marriage should remain limited to opposite-sex couples. Without it, we would have no institution that establishes a social-sexual ecology of human reproduction and symbolizes respect for the transmission of human life through sexual reproduction, as compared, for example, through asexual replication (cloning).

Recognizing that a fundamental purpose of marriage is to engender respect for the transmission of human life provides a corollary insight: Excluding same-sex couples from marriage is not related to those people’s homosexual orientation, or to them as individuals, or to the worth of their relationships. Rather, the exclusion of their relationship is related to the fact that it is not inherently procreative, and, therefore, if it is encompassed within marriage, marriage cannot institutionalize and symbolize respect for the transmission of life. To recognize same-sex marriage (which is to be distinguished from same-sex partnerships that do not raise this problem) would unavoidably change and eliminate this function of marriage.

The alternative view is that new reproductive technoscience means that same-sex couples will be able to reproduce as a couple, so they should be included in marriage as the institution that institutionalizes, recognizes and protects procreative relationships. I discuss this argument in the next section.

The inherently procreative relationship institutionalized in marriage is fundamental to society and requires recognition as such. Marriage carries important norms and values, “memes” (long standing units of deep cultural information passed on from generation to generation) related to reproduction. Marriage makes present in the present, the deep collective human memory concerning the norms and values surrounding reproduction. Extending marriage to include same-sex couples (or de-legislating marriage, which I discuss shortly) would seriously harm all of these societal level functions of the institution of marriage.

3. REPRODUCTIVE DECISION-MAKING

❖ *Intense individualism...*

Our societies manifest “intense individualism” — including “intense moral individualism” (Frances Fukuyama), “...my preferences are my moral values”. As a result, decision making about “life” (reproduction) and “death” is seen as purely private. Pursuant to this view, those decisions are regarded as no one else’s business and certainly not the state’s, especially to interfere with through law. This view would favour the state getting out of the “marriage busi-

ness”, one of the options on your committee’s agenda.

But, as Samuel Johnson said, marriage involves a third party beyond the man and the woman — “Society [and] if it be considered as a vow — God”. In short, marriage is not just a matter of private decision-making, it is also of concern to society. That becomes most apparent when a marriage breaks down and ends up in the divorce courts.

If society has a valid interest in marriage, as I believe it does, it must remain involved in marriage through the law.

❖ ***Adult-centred reproductive decision-making...***

Our societies have also adopted adult-centred as compared with child-centred reproductive decision-making. Child-centred means, among other requirements, that we should work from a presumption that, if at all possible, children have a valid claim to be raised by their own biological parents. We must consider the ethics of intentionally creating a situation that is otherwise: It requires justification.

There is an ethical difference between individuals choosing to create such a situation and society authorizing or facilitating it. While society would have ethical obligations not to interfere with the freedom of individuals in relation to reproduction (subject to restrictions on the use of reproductive technologies, discussed below), it also has obligations not to facilitate the creation of situations that are not in the “best interests” of children. In short, the compliance of society in helping to create non-traditional families in which children will be raised is not an ethically neutral act.

One common response to the position I outline above, by those advocating same-sex marriage and families, is to point out the deficiencies of marriage. The issue is not, however, whether all or most opposite-sex couples attain the ideals of marriage in relation to fulfilling the needs of the children they produce. Neither is the issue whether marriage is a perfect institution — it is not. It is, rather, whether we should work from a basic presumption that children need a mother and a father, preferably their own biological parents. I believe they do. The issue is, also, whether society would be worse off without the aspirational ideals established by traditional marriage. I believe it would be.

❖ ***Reprogenetic technologies...***

The combination of adult-centred decision-making and intense individualism, together with reproductive technology can result in a claim of rights to “absolute reproductive freedom” (eg. See John Robertson, University of Texas).

In this respect the judgement of Blair, RSJ, in *Halpern et al v. Canada* (Ontario Divisional Court) merits consideration. He addresses the argument that the same-sex partners could not reproduce with each other and, therefore, that extending the definition of marriage to include same-sex couples was not justified. He rejected that argument on the grounds that same-sex couples could use reproductive technology to have children (pp33-34).

It is relevant to note, first, that in doing so, the judge recognizes that a fundamental feature of marriage is related to procreation. And, second, to the extent that the judge’s ruling implies that people have a right to “absolute reproductive freedom”, it would mean that there would

be duties not to interfere with access to reproductive technologies to make reproduction possible or, for instance, with two men married to each other, having access to a surrogate mother. There would, also, probably be a duty to provide access to the means for “collaborative non-coital reproduction” (procreation through the use of reproductive technologies). After all, if exclusion of same-sex couples from marriage is found to be discrimination by way of comparison with opposite-sex couples, not providing same-sex couples with the means for procreation — that is, excluding them from procreating with each other — when procreation is possible between opposite-sex couples, is a related discrimination. Indeed, the Nova Scotia Court of Appeal has held that failing to provide an infertile couple with access to reproductive technology was discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*, although justified, in that particular case, under Section 1 of the *Charter* (*Cameron v Nova Scotia Attorney General*).

These technologies open up a wide range of possibilities for having children. Does a duty of non-interference with their use mean, for example, that creating a child by cloning, or from two ova, two sperm, or multiple genetic parents is ethically acceptable? Could homosexual couples argue that it is discrimination to prohibit them from creating children between them by using reprogenetic technologies in whatever way they saw fit? It merits noting that Bill C-13, the *Assisted Human Reproduction Act*, as recently amended, would support this argument:

Principles sec. 2...

(e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;

New reprogenetic technoscience confronts us with questions no other humans have had to address, because in the past the only mode of transmission of human life was sexual reproduction *in vivo*: What is required for respect for mode of transmission of human life to the next generation? And what is required for respect for the children who would result from the use of reprogenetic technologies?

4. MUTUAL RESPECT

The reason for excluding same-sex couples from marriage matters: If the reason for denying same-sex marriage is that we have no respect for homosexuals and their relationships, or want to give the message that homosexuality is wrong, then, the exclusion of same-sex couples from marriage is not ethically acceptable from the perspective of respect for homosexuals and their relationships. It is also discrimination.

On the other hand, if the reason is to keep the very nature, essence and substance of marriage intact, and that essence is to protect the inherently procreative relationship, then excluding same-sex couples from marriage is ethically acceptable from the perspective of respect for them and their relationships. And such a refusal is not discrimination.

Respect for others' religious beliefs in a multi-cultural society can raise complex issues. Some people object to same-sex marriage on the basis of their religious beliefs. These beliefs are often profound and the people who hold them see a complex interplay in mar-

riage between its voluntary formation, religious sanction, social legitimation and natural origin. Even if we do not agree with these beliefs, indeed even more so if we do not, we need to understand what they are in order to understand the impact on the people who hold them of legally recognizing same-sex marriage.

We must also likewise, take into account the impact on same-sex couples of refusing to recognize their relationships as marriage. We are in a situation of competing sorrows or harms.

We must ask which approach to marriage best accommodates mutual respect. Both sides in this debate must recognize that they can only demand respect from their opponents if they give it; that is, if respect is to be present at all, it will only be so in a context of mutual respect. To the extent that we can avoid transgressing people's religious beliefs, even though we do not agree with them, we should not transgress them out of respect for the people who hold them, not out of respect for those beliefs. The same is true for people who oppose homosexuality on moral grounds, in relation to their having respect for homosexuals, if not for their beliefs. Ethics requires us to take the least invasive, least restrictive alternative, reasonably available and likely to be effective in achieving a justified goal. Maintaining traditional marriage and legally recognizing same-sex partnerships fulfils that ethical requirement.

Note, this same accommodation of respect for beliefs in the formation of public policy, would *not* apply to beliefs, based on religion, about the wrongfulness of homosexuality. While such beliefs may be privately held, they are not acceptable as the basis for public policy decision-making in a secular society, if only because the harm of recognizing such beliefs far outweighs the harm of not doing so. That is the reason why opposing same-sex marriage on the basis that it involves recognizing a homosexual relationship, is not valid, but opposition based on such recognition necessarily destroying the essence of marriage is a valid reason. There is a major difference between not destroying the essence of marriage for people who will enter into that institution and whose religious beliefs mean that recognizing same-sex marriage would destroy it, and recognizing, at any public policy level, the same people's anti-homosexual beliefs. The latter is unacceptable, because it directly denigrates homosexuals, rather than seeking a justified goal (maintaining marriage); and because others' sexual orientation, unlike the recognition of same-sex marriage, in no way directly affects the people who regard homosexuality as morally wrong.

5. ATTRIBUTING HOMOPHOBIA

Being against same-sex marriage is frequently alleged by proponents of same-sex marriage to be proof of homophobia (See "Same-sex hearings rife with 'gay-bashing,' critic says", *Globe and Mail*, 11 March, 2003, A6). A useful comparison can be made with people who take the view that being against infant male circumcision (IMC) is proof of anti-Semitism. (I, personally, have been subject to both sets of allegations in the public square.)

The strategy adopted in both cases is to shame those who are against same-sex marriage or IMC into silence. The choice of language and framing of the issues is carefully crafted to achieve this result. (See William Eskridge, who has articulated important insights in this respect, through his analysis of the techniques used by identity-based social movements to

place courts in the position that they see their only alternatives in reaching a decision as being either to find discrimination or to believe that in not doing so they would be approving of discrimination and themselves engaging in it. In the same vein, see *Halpern et al v. Canada* and arguments considered by the judges.)

This strategy also involves using “*ad hominem*” arguments, that is, derogatorily labelling those who oppose same-sex marriage as homophobic or as religious (which is seen by some as a derogatory label), and claiming, therefore, their arguments against same-sex marriage should not be given any weight. The substance of these arguments, however, is not addressed.

6. USE OF LAW

The use of law can never be neutral, whether we are enacting, changing or repealing it. We use law in post-modern, secular societies, such as Canada, to challenge or uphold our most important societal values. (Whereas, in the past, our moral and values discussions used to take place in religion, now they take place in our legislatures and courts. One way to regard our Parliament, legislatures and highest courts is as the “secular cathedrals” of our society.)

Same-sex marriage cases are already in the Canadian courts and the issue is before this committee. We cannot avoid the decisions of judges and Parliament regarding same-sex marriage affecting the values related to marriage — either to uphold or change them.

One of the options that has been proposed, of Parliament repealing the laws on marriage and abandoning the area of marriage, would not be a neutral act. It would necessarily change the values and symbolism associated with marriage. We legislate about matters associated with our most important societal values, therefore, de-legislating marriage would be to detract from its importance and the values associated with it. Whether or not we agree with all of the provisions in the *Assisted Human Reproduction Bill* (Bill C-13), mentioned previously, its enactment recognizes that there is a need — both practical and symbolic — to legislate in relation to reproduction. It would be paradoxical, if, at the same time, we were to de-legislate marriage.

At the individual level, many young people who see no problems with sexual relationships outside marriage or living together before marriage, get married either before having children or if pregnancy or birth occurs. That fact shows the current importance of the role of marriage with respect to the values governing procreation. We can argue that this reality makes maintaining the institution of marriage and the values and symbolism associated with it, more necessary and more important than in the past, and that requires maintaining marriage as a legal construct.

If marriage were not available as a societal institution, but only as a religious (quasi-private) one, to mark out and mark off the intrinsically procreative relationship from other types of relationship, there would be no societally sanctioned way these people could symbolize for themselves, others close to them, and society that their relationship had changed because they were becoming or had become parents. That would be particularly true for people who were not religious.

But what about homosexuals who bring children into their relationship, shouldn't those adults have access to marriage? This is the most powerful argument, in my view, for recognizing same-sex marriage, but I do not believe it justifies extending marriage to same-sex couples.

First, marriage institutionalizes and symbolizes for society the inherently procreative relationship. It cannot do that if it is changed to include same-sex couples.

Second, the joint reproductive incapacity of a same-sex couple must not be addressed through reproductive technologies. I believe that a child has a right not to be created from the genetic patrimony of two men or two women, or by cloning, or from multiple genetic parents. Therefore, same-sex relationships should not be included within an institution that symbolizes an inherently procreative relationship.

Third, bringing children into a same-sex relationship should not be seen as within the norm, but rather, as an exception to it. Although it is considered a radical view by some people, and often seen as politically incorrect, I believe that a child needs a mother and a father and, if possible and unless there are good reasons to the contrary, preferably its own biological mother and father as its raising parents. (Adopted children's search for their birth parents and current moves to give children born through reproductive technologies, using donated gametes, access to the gamete donors' identity, show a deep human need to know our biological family origins.) Recognizing same-sex marriage would make bringing children into a same-sex relationship part of the norm, rather than the exception.

We should recognize same-sex relationships and legally protect them and any children involved, but not by recognizing the same-sex couples' relationship as marriage.

Finally, within the context of the legal issues related to recognizing same-sex marriage, we must ask what the private international law impact of changing the law would be on all Canadian marriages, not just same-sex ones.

7. SOCIAL EXPERIMENTATION

It is relevant to consider the rules governing experimentation, in deciding whether to redefine marriage to include same-sex couples. The rules governing any experimentation are especially stringent when vulnerable populations — that is, children — and those unable to consent for themselves — that is, children — are involved. The burden of proof is on those wanting to conduct the experiment, to show that it is reasonably safe to do so. In comparison, if we structure the claim to same-sex marriage as a right not to be discriminated against, then the person allegedly discriminating has the burden of proof to show that their actions are justified.

Burdens of proof are not neutral in terms of the outcome of decision-making. In cases of equal doubt as to which decision should be taken, the burden of proof will favour the person who does not carry it, that is, the person with the burden of proof will lose his or her claim. Consequently, how the question of whether to include same-sex couples in marriage is structured, is not neutral with respect to the decision outcome.

8. DISCRIMINATION

Homosexuals are not excluded from marriage, but their intimate pair-bonding relationships are. It is argued that is discrimination on the basis of sexual orientation. If that is correct, we must consider whether the discrimination is justified. I believe it is.

One way the justification can be articulated, is in terms of the doctrine of “double effect”: The primary intent in restricting marriage to opposite sex couples is to maintain marriage as the institution that fulfils society’s need to protect the inherently procreative relationship and its functions for society, and is not to exclude homosexual relationships because they are homosexual. The discrimination involved in the exclusion is a secondary effect which is not desired but unavoidable, and it is justified or excused by the primary purpose which otherwise cannot be realized.

A useful comparison can be made with the discrimination involved in affirmative action. That shows that sometimes discrimination and the harm it involves, can be justified when it is to achieve a greater good that cannot otherwise be achieved.

It is also argued by those advocating same-sex marriage, that excluding same-sex couples from marriage is the same act of discrimination as prohibiting interracial marriage, which has rightly been recognized as a serious breach of human rights. That argument is not correct. Because an interracial marriage between a man and a woman does symbolize the procreative relationship, its prohibition is based on racial discrimination which is wrong. In contrast, not extending the definition of marriage to include same-sex couples, is not based on the sexual orientation of the partners, but the absence of a feature of their relationship which is an essential feature of marriage.

CONCLUSION

In conclusion, society needs marriage to establish cultural meaning, symbolism and moral values around the inherently procreative relationship between a man and a woman, and thereby protect that relationship and the children who result from it. That is more necessary than in the past, when alternatives to sexual reproduction were not available. Redefining marriage to include same-sex couples would affect its cultural meaning and function and, in doing so, damage its ability and, thereby, society’s capacity, to protect the inherently procreative relationship and the children who result from it, whether those children’s’ future sexual orientation proves to be homosexual or heterosexual.