Remarks to the Parliamentary Committee on The Civil Marriage Act (C-38)
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Thank you for the invitation to address you. Like many of my fellow citizens, I wish it were under more propitious circumstances.

Let me begin by presenting to you, on behalf of Professor William Gairdner, who was unable to take up his own invitation due to the haste with which this committee is conducting its business, the *Enshrine Marriage Canada* Declaration on Marriage. (The mission of EMC is to enshrine the phrase "one man and one woman" in the Constitution, making explicit what is already implicit.) Here it is:

Article 1
Marriage and the family are universal
All human beings are born of a mother and begotten by a father. This is a universal biological reality and the common experience of all people. The state supports the institution of marriage because it promotes and protects the father-mother-child relationship as the only natural means of creating and continuing human life and society.

Article 2
Marriage means one man and one woman
Marriage in Canada has always been defined as "the union of one man and one woman," the chief function of which is to promote the biological unity of sexual opposites as the basis for family formation. Governments may want to support other relationships, but these should not be called "marriage," or confused with it.

Article 3
Marriage is centred on children
Marriage is a child-centred, not an adult-centred, institution. No one has the right to redefine marriage so as intentionally to impose a fatherless or motherless home on a child as a matter of state policy.

Article 4
Marriage rests on four conditions
Marriage is a solid social structure resting on four conditions concerning number, gender, age, and incest. We are permitted to marry only one person at a time. They must be someone of the opposite sex. They must not be below a certain age. They must not be a close blood relative. Those who satisfy all these conditions - each of which safeguards the well-being of children, the family, and society - have a right to marry. The removal of any of them threatens the stability of the whole structure.

Article 5
Marriage is about more than equality
All government policies are intentionally preferential. If we want welfare or veterans' benefits, or child-support, or marital benefits, we have to qualify for them. Such policies are ordinary forms of distributive justice through which, for its own good, the state discriminates in favour of some

people, and some relationships, and not others. So an absence of "equality" is not a good argument against such policies. As same-sex partnerships already receive the same benefits as marriages, however, something else is at issue: an attempt to persuade the public that such partnerships are of the same value to society as marriages. But they can only be made so by denying the unique contribution of marriage as a biologically-unitive, child-centred institution.

Article 6
Marriage is about more than love
The fact that two people say they love each other does not, in itself, justify a right to the benefits conferred by the state on married couples. The only justification for a state interest in the privacy of love flows from the connection between the political fact that the state has a fundamental concern for its own survival and well-being, the biological fact that all human beings require someone of the opposite sex to create life, and the social fact that children have a natural claim to the love and support of their own mothers and fathers. Accordingly, the only kind of private love that is of justifiable public concern is the love that occurs between two people who qualify for marriage according to the four conditions in Article 4.

Article 7
Marriage belongs to the people
Marriage is an institution that has arisen from long-held beliefs and customs of the people that are prior to all states and all courts, and are essential to the very fabric of society. Any attempt by unelected officials of the courts or by any other branch of government to claim ownership of marriage, to alter it without the support of a significant majority of the people, or to diminish the father-mother-child relationship in favour of the state-citizen relation, usurps the natural rights and freedoms of the people and constitutes a serious breach of the public trust.

It is appropriate that this Declaration be offered as a preamble to my remarks, just as Bill C-38 offers its preamble: no less than ten *Whereas* clauses to justify its one substantive clause, the substitution of "two persons" for "one man and one woman" in the definition of marriage. These ten *Whereas* clauses betray the bad conscience of Bill C-38. I refer to them as the ten lepers, since only one of them cannot be faulted.

To put it another way, and herewith my executive summary: ***If the "Whereas" clauses fail – and they do fail – the substantive clause, no. 2, is left naked and ashamed, and all that follows from it, beginning with the consequential amendments, constitutes a travesty of justice. It is the duty of this committee to point that out to the House.***

I will take these clauses in order, saying sometimes more and sometimes less, in the time allotted: ten minutes to dispose of the ten lepers, for I fear we shall not be able to send them away healed.

[1] WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

You may be forgiven for supposing the first clause to be the one without fault, and were it found in some other context it might be without fault. But here in C-38 it does great mischief. For it immediately tries to pull the wool over our eyes respecting the purpose of the bill. It implies that C-38, by changing the definition of marriage, will put an end to a section 15 violation, a violation of equality rights.

It is true that several of our provincial courts have construed the matter thus, though the Supreme Court of Canada declined, for its own reasons, to do so. But marriage as we have always understood it (see Article 2 above) violates no one's equality rights.

If marriage is a union for life between a man and a woman, only those who are neither men nor women are in principle excluded from choosing to marry if they wish. There are several restrictions on one's choice of a partner, of course (see Article 4 above), and there is certainly positive discrimination intended to encourage people to marry (see Article 5 above).

C-38 does not deny the necessity of restrictions and it acknowledges in the penultimate clause of its preamble the need for positive discrimination. What it objects to is rather the age-old idea – I believe M. Ménard admitted in these hearings that this idea goes back at least as far as the Flintstones – that marriage is the life-union of a man and a woman.

Well, why not object to it? Why not complain that the ancient Roman jurist, Modestinus, was wrong when he said, "Marriage is the union of a man and a woman, a consortium for the whole of life involving the communication of divine and human rights" (*Dig*. 23.2.1)? Why not argue that Lord Penzance was wrong when in *Hyde* he defined marriage "as the voluntary union for life of one man and one woman, to the exclusion of all others"? It may be a bit Quixotic to do so, but this is meant to be a free country.

Just don't say that the age-old idea of marriage constitutes a violation of section 15, which can only make section 15 look even more ridiculous than Don Quixote. A section 15 violation, as I pointed out in *Divorcing Marriage* (98ff.) and *Le mariage attaqué*, could only arise *after* C-38 passes. That is, once we decide to redefine marriage as a union of any two persons, then and only then does it become discriminatory to say "a marriage is void by reason that the spouses are of the same sex." In other words, we may need a bill to protect equality rights *if* we change the definition of marriage; but we do *not* have to change the definition of marriage to protect equality rights. (Justice Cordy also pointed this out in *Goodridge v. Massachusetts*.)

So you see the fault in the first *Whereas*: It tries to turn an argument about what marriage is or might be, the kind of argument Quixote and Sancho were wont to have, into an argument about whether we really believe in equality rights. It tries to use our

belief in equality rights to force us to abandon a definition that does not violate equality rights. And this is sheer subterfuge. It cheapens and undermines the credibility of equality-rights discourse and of section 15. It does not uphold our Constitution; in the long run it will do it grave harm.

> **[2]** WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

The second *Whereas* falls with the first, and I have already spoken to it. I need only add that the question of equality rights is still before the courts in more than one province, and has not yet been tried by our highest court. It is therefore doubly dishonest at this time to present this bill as an equality rights necessity. But if it's a poll we're after, as the word "majority" suggests, why only poll judges? Why not have a national referendum? Why, for that matter, not have an election?

> **[3]** WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

This clause also may be quickly dispensed with. The Supreme Court pointed out the obvious when it said that we are in a jurisdictional mess over marriage. But it made no serious effort to weigh the relative costs of cleaning up the mess in one way or another. Again, if we're polling, shall we not take into account the 99% of Canadian couples who married on the assumption that marriage is what Modestinus says it is? How do *they* feel about having their marriage redefined after the fact? One of my colleagues at McGill, who is not appearing before this committee, told me that he and his wife would have to consider returning their state marriage licence. Or do you wish to amend this bill with some kind of "grandfather" or "Flintstones" clause?

> **[4]** WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

The fourth *Whereas* has all the faults of the first, with a couple more thrown in for good measure. I do not mean the rejection of civil unions but rather the appeal to dignity, on the one hand, and to "the right of couples" on the other.

What is this "right of couples" anyway? It is not defined here, nor in the legal literature, because it has no solid legal tradition behind it. As for "dignity," did you notice that the word doesn't appear anywhere in the seven articles of the Declaration? I

don't think that was done on purpose; it's just that "dignity" isn't actually a big item in the marriage tradition. All the "dignity" talk that has clustered around marriage at the moment has been imported by those who find it useful in keeping up the equality-rights subterfuge.

The human dignity of homosexuals is not at issue in the definition of marriage. (See *Divorcing Marriage* 101ff.) Apartheid in South Africa or slavery in America, say, was structured in such a way as to benefit whites and do injury to blacks. But marriage, while structured in such a way as to benefit the children produced by a marriage, as every article of the EMC Declaration points out, is not structured in such a way as to do harm to the unmarried. (There are celibate unmarried and non-celibate unmarried; some are homosexual, most are heterosexual. None of them are harmed by the existence of marriage; indeed, all in their way are helped, especially if they are fortunate enough to have been the child of a stable marriage.) The implicit analogy in the fourth *Whereas* to civil rights movements is cynical and scandalous.

> **[5]** WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

The fifth *Whereas* contains the deepest flaw of all. It is bound up with language we have thus far ignored, the language of "marriage for civil purposes." There is nothing wrong with speaking of marriage for civil purposes unless by doing so we mean to imply that civil marriage and religious marriage are not two different ways of effecting the same thing but are in fact two different things altogether, which may safely be isolated from each other. But that is exactly what this bill implies, and it is also the operating assumption of the Supreme Court.

The matter is too large to treat here. I must refer you to Professor DeCoste's devastating analysis of the *Same-Sex Reference* opinion in the new issue of the *Alberta Law Review*. I will only say that the Supreme Court produces this *distinctio et separatio* out of thin air, and in defiance of our history, our Constitution, our 1960 Bill of Rights, and even our *Charter*, whose own preamble links belief in the rule of law to belief in the supremacy of God. (See further *Recognizing Religion in a Secular Society*, chap. 9. Preambles are only heuristic, of course, not legally binding. But preambles tell us who we think we are and where we think we're headed. If they do not matter, why then these ten lepers of C-38?)

The preamble to the *Charter* is mocked, not by the distinction, but by the separation between civil and religious marriage, and by the assumption that the Court is free to declare Parliament free to make marriage a creature of the state and to exercise unlimited power over marriage in the public realm. C-38 is in fact *ultra vires* as respects

either Court or Parliament, and if passed it will mark the end of liberal democracy in Canada.

I draw your attention to Article 7 of the Declaration, and I add: What C-38 is doing is precisely what it claims not to be doing – establishing an institution *other* than marriage. Under C-38 there will be no such thing as civil marriage in Canada.

> **[6]** WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

Here is the leper for whose healing one may at least pray. It is, unfortunately, the leper that is least understood. I offer, as evidence of that, sec. 3 of C-38: "It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs." But this requires us to look at the next *Whereas*.

> **[7]** 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;

This is arguably the most hypocritical clause of the preamble, given the company it keeps. C-38 places the vast majority of religious communities in this country – and this of course means the majority of Canadians – squarely on the side of the bigot. It makes them out to be purveyors of discrimination and, by some accounts, of hatred. What is more, it leaves them no option, if they wish to avoid this slur, but to keep their religious opinions to themselves and to conform their visible pratices to those of the state. C-38 is a formal declaration that the great religious traditions are from now on publicly irrelevant (the fifth *Whereas*) if not actually harmful (the first and the last *Whereas*). C-38 is the beginning of the end of religious freedom in Canada. Barbara Findlay was not mistaken when she insisted, nearly a decade ago, that "the legal struggle for queer rights will one day be a showdown between freedom of religion [and] sexual orientation."

This seventh *Whereas*, taken together with sec. 3, demonstrates how poorly the *Charter* provision for freedom of religion is understood today. Why do we need a guarantee that clergy will not be forced to perform same-sex marriages? History has cast up relatively few tyrannical regimes that required clergy to perform rites contrary to their faith and canons. Stalinist Russia and its ilk forbade clergy to perform certain rites in which they did believe, but did not ordinarily try to compel them to perform rites in which they did not believe. That kind of crime is the preserve of political perverts like Nero or Idi Amin. What has happened in Canada that suddenly we are forced to contemplate such a thing? Freedom of religion indeed! And all of this handed us as

reassurance of the state's beneficence, when the Supreme Court has clearly said that this, at least, is *ultra vires* as regards Parliament.

> **[8]** WHEREAS, in light of those considerations, the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;

About the eighth leper I will saying nothing but this: It has the merit of not adopting the view that *any* use of section 33 is a denial of the *Charter*. That is the view of some MPs, but it is manifestly incoherent and self-contradictory. It is itself a denial of the *Charter*. This clause too might have been healed had it not appealed to the faulty clause that stands at the head of the preamble.

> **[9]** WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

On the ninth, had I twenty minutes rather than ten, I would gladly spend most of my words. Marriage is indeed a fundamental institution in society that the state has a responsibility to support. The *Universal Declaration of Human Rights*, Article 16, declares "the right to marry and to found a family," linking marriage to procreation in the time-honoured way. It states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." But C-38, while it is busy redefining "marriage" and "parent" and "spouse," etc., also in effect redefines "family" to leave procreation right out of the picture.

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

But it does something more than that. It also restructures the law in such a way as to make, not only marriage, but the whole nexus of family relations into a pure legal construct, subject to "political whim" (to borrow an expression from the Prime Minister). That is, it brings them under the control of the state and makes them subject to whatever definitions the state wishes to impose upon them.

When, in the consequential amendments section, C-38 strikes down the language of "natural parent," "blood relationship," and the like, it is striking down the very language that acknowledges the priority of the natural family unit, the unit with which Article 7 above and Article 16 of the *Universal Declaration* are concerned.

The aim of these amendments, in the words of Professor DeCoste, "is to de-naturalize the family by rendering familial relationships, in their entirety, expressions of law. But relationships of that sort – bled as they are of the stuff of social tradition and experience – are no longer family relationships at all. They are rather policy relationships, defined and imposed by the state… It occurs to me [writes DeCoste] that the initiatives being carried forward in this bill are an assault on the traditions of family life and that they risk the disintegration of that way of life, at least to the extent that they lure fathers and mothers, and husbands and wives, into detachment from and forgetfulness about the moral point of family life." ("Courting Leviathan," *ALR 42.4*. Here one might also refer to Professor Gairdner's work on the family, which predicted all of this some years ago.)

Bill C-38 ignores children. A sign of our sterile times, it mentions them only in the fine print. But C-38 does not ignore children in a benign way, like a husband and wife determined to converse in spite of the fact that the kids are tearing about, making a great din. C-38 undermines the very foundations of our children's lives while doggedly pursuing its adults-only conversation. Under the new same-sex marriage regime children will be taught, implicitly and explicitly, that either father doesn't matter or mother doesn't matter. Or rather the father and mother that matter will be the state. To quote DeCoste again: "Its methodology is what one would expect. Social life will be further occupied by the state; and, through the state's coercive power, social relationships will be, not just re-defined at law, but changed root and branch by law."

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> **[10]** AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

The ninth is the most insidious, and it is the reason why I stood on this hill two months ago and insisted before a crowd of many thousands of Canadians that a vote for C-38 was in fact a vote for tyranny. The last *Whereas* merely restates the first, and in so doing repeats for greater certainty the charge that C-38 lays against all who resist it, all who even harbour doubts about it, viz. that they are deficient in the official state values, values that the new Canada – the Canada of the *Charter* revolution, as my erstwhile colleague, the justice minister, likes to say – now exists to uphold and to advance.

For my part, I deny both the deficiency and the dogma, the dogma of this new Canada. And I reject the ungodly haste with which this dogma is being forced upon us in the form of a piece of legislation that hasn't a leg to stand on, though it has ten horns on its

head. Before you wrap up these hearings, on 14 June, I suggest that you pause and reflect on the message of Shavuot, and only then prepare your report to the House.

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* The EMC Declaration on Marriage can be found at www.enshrinemarriage.ca.