Canada's Same-Sex Marriage Law

The Case for Review

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Introduction

Later this fall (2006), in accordance with a promise made early in the last federal general election, the new Government of Canada under Conservative Prime Minister Stephen Harper will introduce a Motion in the House of Commons asking Members of Parliament whether C-38 (officially the *Civil Marriage Act* of 2005), and the same-sex marriage policy it embodies, should be reviewed.

The purpose of this paper is to make a *prima facie* case only for holding such a review by identifying, and briefly discussing a number of issues in support thereof.

Reviewing Legislation – A Matter of Good Government Practice

On July 20, 2005 Bill C-38, officially (and euphemistically) known as the *Civil Marriage Act*, received Royal Assent in Canada thereby formally redefining marriage to include same-sex couples. Later this fall (2006) the new government will introduce a Motion asking Members of Parliament whether or not this law, and the policy that it embodies, should be reviewed and possibly amended.

There are a number of compelling reasons why such a review should take place.

To begin with, reviewing policy and/or legislation within a reasonable amount of time after its implementation is, quite simply, good government practice, irrespective of the issue in question. The purpose of such reviews is to study the impact and effectiveness that new laws and/or policies are having in "the real world", and to recommend changes where necessary to either improve their effectiveness, or to mitigate their negative impact

Such reviews are hardly exceptional. For instance, the federal government is currently conducting a comprehensive review of Canada's *Anti-terrorism Act* to evaluate its effect on the rights of Canadians, a key concern raised by many prior to its becoming law.

This *Anti-terrorism Act* review was legislatively mandated – meaning that the *Act* itself required that such a review take place within a prescribed period of time after its implementation. Laws and policies are regularly reviewed without such legislative mandates though. For example, the federal government is now reviewing its policy toward the marketing of wheat by Canadian farmers, including all laws and regulations governing that activity. There is no legal requirement for the government to be doing so. The sole purpose of this initiative is to identify and study problems which have arisen in the years since the policy was adopted, and to ascertain what changes must be made to address those problems.

It is a fundamental responsibility of any government to undertake such studies, particularly when there is evidence that the law in question is causing great harm or conflict, which is the case with C-38. No citizen should ever have to lobby for it, nor should any constituency or special interest group be able to suppress it, and any MP who votes against such a review would, in essence, be voting to abdicate one of his or her most solemn responsibilities as a Parliamentarian.

Inadequate Study – No Free Vote

The second reason why Members of Parliament should vote in favour of reviewing C-38 is that the process whereby the law redefining marriage was enacted last year was fundamentally and irredeemably flawed.

Before a large scale construction project can begin, the law and common sense require that formal assessments be performed to determine the impact the project will have on the environment. These in depth assessments can sometimes take years to complete, but we insist on their performance anyway because, when it comes to the environment, we have learned to exercise great care and caution. Similar assessments should be performed before implementing laws and policies that affect social structure. After all, is the health and sustainability of society any less important than the trees and the atmosphere? Assessing the impact of social policy before implementation is also good government practice.

There are those who are saying that the issue of redefining marriage received such a full and fair hearing prior to its adoption last year. This is false.

Hearings into Bill C-38 were organized as a last minute concession to members of the federal Liberal Caucus who were on the verge of rebelling against their leadership's single-minded drive to enact same-sex marriage. These Hearings lasted only a couple of weeks and were limited to only a few hours a day. Expert witnesses were often given little more than a day's notice to prepare their testimony, and when they did testify, they were forced to limit their presentations to a mere five minutes. Even then, witnesses were permitted to testify only on the subject of pending legislation – not on marriage and the family in general. This is like saying to environmental groups that they must limit their testimony to the technical specifications of a new roadway and ignore the impact the road will have on the overall environment.

In short, no serious effort was made to study the legal and social implications of redefining marriage prior to its passage.

Moreover, when the proposed law was finally put to a vote, that vote was not free. Members of the Liberal Cabinet were forced to ignore their conscience and vote against marriage, or be fired. The Bloq Quebecois and NDP also threatened to punish any of their members who failed to tow the party line. In fact, NDP member Bev Desjarlais was expelled from her party for defying her leader's orders. Only the Conservative Party allowed its members to vote freely, according to their consciences.

Church and State on a Constitutional Collision Course

One of the main concerns raised last year by Canadians of all walks of life was that, if marriage was redefined the way it has been, clergy would be forced to perform same-sex marriages in violation of their religious convictions. In response to this concern, the government proposed provisions in the new law exempting clergy from having to do so. When asked to comment on the validity of these proposed provisions though, the Supreme Court stated that the matter was "*ultra vires* Parliament" which means "outside" of Parliament's jurisdiction.

In other words, according to the Supreme Court, any attempt by the federal government to exempt clergy from performing same-sex marriages would be unconstitutional. Despite this unequivocal position, the government included the invalid clause in the draft bill and persisted in the fiction that it would be sufficient to guaranteeing the rights of clergy. Legal experts were not fooled by this subterfuge, however, and many urged the government to take its time and study the issue properly, rather than rushing a law through that was so obviously legally flawed and that would create as many problems as it resolved.

Some say that, in any event, provisions explicitly protecting people of faith is unnecessary since the *Charter of Rights and Freedoms* already provides adequate protections. In theory this may be so, but it must be remembered that the practical application of these *Charter* rights (like all others) is subject to the interpretation of the Courts – and the Courts have demonstrated time and time again in recent years that they are unwilling to enforce freedom of religion provisions of the *Charter* whenever these provisions come into conflict with sexual practice or preference.

In reality, dozens of so-called marriage commissioners made up of lay (non-ordained) ministers, or ordained clergy who are not formally attached to a congregation, but who have been performing marriages as part of their private pastoral services, have been told that they must agree to solemnize same-sex marriages or forfeit their licenses to perform civil marriages. These individuals are not government employees. They don't perform civil marriages because it's their job – they perform them because the law requires that they do so at the same time that they solemnize a religious marriage. In fact, many of these commissioners are pastors who have retired from regular congregational work but continue to perform marriages for a fee to supplement their modest retirement incomes. Thus far the Courts have refused to uphold these individuals' *Charter* rights *vis-à-vis* religion and conscience.

This is consistent with other Court Rulings on point. For example:

- A Christian printer was fined $5,000.00 by an Ontario Human Rights tribunal for declining – on religious grounds – to print promotional material for a lesbian group. This individual appealed his conviction to the Courts and lost.

- The Courts also refused to come to the defense of a teacher who was disciplined, not for conduct in the classroom, but for writing a letter to the editor of his local newspaper questioning the propriety of same-sex marriage.

- Finally, in a more recent case, an Ontario Court ordered a Roman Catholic high school to allow teenage same-sex couples to attend a prom dance organized by the student council of that school, even though this violated Catholic teaching on the subject.

And this is just the beginning. Thus far, religious teachers in public schools have been able to avoid legal controversy by passively teaching that, right or wrong, homosexual practice is a personal matter between consenting adults. Henceforth they will have to proactively teach that marriage can be between same-sex couples, a requirement that will put them into direct conflict with their conscience. No person of faith who is informed about the recent trends in jurisprudence dealing with religious freedom in Canada can be confident that their rights will be upheld in the future.

More Undesired Legal Consequences

Experts also warned that once the definition of marriage is changed to include same-sex couples, it would only be a matter of time before other so-called alternative relationships, such as polygamy, would have to be embraced as well.

Prior to C-38 becoming law, the government could rely on the argument that marriage was a unique legal bond between one man and one woman to the exclusion of all others that deserved preferential treatment because of its important benefit to society, something the *Charter* explicitly allows. By proposing to expand the definition of marriage to include same-sex couples, however, not only did the government abandon the position that marriage is a unique institution, more importantly, it also conceded (wrongly, in our view) the invalidity of the "benefit to society" justification for preferential treatment. All this simply begged the question – why not include other alternative relationships, such as polygamy?

The former Justice Minister dismissed these concerns by explaining – curiously – that "polygamy is against the law". It seems to have been lost on him that same-sex marriage was also against the law – until the Courts struck that law down. Why would the Courts refuse to strike down laws against polygamy, especially since the government itself is now taking the position that marriage is not a unique and important social institution? More on this later.

That being said – last December (2005) it was revealed by a journalist that the federal Justice Department had commissioned a report on polygamy and the constitution which confirmed exactly what legal experts had been warning.

Social Impact

Thus far we've discussed procedural and legal reasons why the former government's approach to marriage was problematic and needs to be sorted out. Another area of concern that is not as readily apparent, but is arguably of far greater consequence, is the area of social impact.

There are those who dismiss these concerns by pointing out that "the sky hasn't fallen in" since the new law was passed last year. Of course, this observation is true, but it is also

grossly uninformed. In truth, it often takes years for the impact of bad social policy decisions to be felt.

Consider the tragedy of Davis Inlet.

In the late 1960s the government built a brand new modern village at Davis Inlet in Labrador as a new home for an entire Innu community that was being more or less displaced by various development projects which were disrupting their traditional way of life. Everyone involved in this decision believed that they were doing a wonderful thing for this people.

Two and a half decades later, it was revealed that the Davis Inlet community was in deep crisis. Alcoholism and chemical addiction were epidemic, violence was rampant and suicides, particularly among the youth of the community, had skyrocketed. When all of this came to light 13 years ago it was unanimously acknowledged that, despite the best intentions of governments and other social policy experts in the 60s, they had just – well…they just got things wrong.

Other policies formulated with the best of intentions have proven – over time – to be devastating to the communities they were supposed to be helping.

Take the narrow issue of welfare for single mothers, for example. Reasonably intended to help struggling mothers and their innocent children cope, social policy experts are now virtually unanimous in their observation that generous welfare programs for unwed mothers was the greatest contributor to the explosion of single-mom families in inner cities which, in turn, led to increased in crime and greater poverty, particularly child poverty – ironic, inasmuch as this is precisely the problem that larger and more liberal benefits was intended to eliminate.

In fact, the breakdown of the traditional family is now widely recognized as an important cause of many social ills. How will expanding the definition of marriage to include alternative relationship lifestyles impact these trends? As of yet, there are no clear answers, but clues are beginning to emerge which should cause us concern.

To begin with, studies indicate that the outcomes of children who are raised in intact families with both of their biological parents present are much better than those who are not. In the case of same-sex unions, such a condition is not possible since at least one of the biological parents can never be part of the marriage.

Research also indicates that the marital status of parents has a profound impact on the safety of mothers. Statistics compiled by the U.S. Department of Justice demonstrate that married mothers are half as likely to suffer from violent crime at the hands of their husbands as unmarried mothers are at the hands of their common-law spouses, boyfriends, or domestic partners.

Moreover, the rate of victimization of children seems to vary widely depending on the marital status of the parents. British data on child abuse show that rates of serious abuse of children are lowest in the intact married family with both biological parents, six times higher in the step family, 14 times higher in the single-mother family, 20 times higher in cohabiting, biological parent families, and 33 times higher when the mother is cohabiting with a boyfriend who is not the father of her children.

Same-sex relationships seem to fall into the latter category in both of these subject areas. Why? One reason may be that, for most opposite-sex couples, marriage is largely representative of a commitment, not just to one another, but also to what they perceive to be an objective morality that transcends, and thereby governs, their relationship. This is rejected by same-sex couples who regard marriage as a status symbol, representative of their commitment to one another only, a view that is shared by common-law couples who are committed to one another but forego marrying precisely because they regard it as merely symbolic, and not substantive.

In sum, experience has taught us that when it comes to implementing social policy of any kind, as a general rule we ought to exercise the greatest possible caution and resist the temptation to rush ahead with changes simply because they seem like a good idea. A careful approach is all the more indicated when evidence already exists – as it does in the case of changing the definition of marriage – that calls into question the prevailing opinion that all will be well if only we proceed with the proposed new policy.

Understanding the "Rights" Argument – And Why it's Wrong

The most effective argument *for* changing the definition of marriage to include same-sex couples was also, regrettably, the most misunderstood – the so-called equality rights argument. Was changing the definition of marriage was ever truly necessary to address the equality rights argument? To answer this question it is necessary to first understand the nature and source of the inequities that existed between opposite and same-sex couples prior to the passage of C-38.

Inequities that existed prior to the passage of C-38 between opposite-sex married, and same-sex couples, or between opposite-sex married couples and all others for that matter, were the result of preferential treatment extended to them (opposite-sex married couples). This preferential treatment had, as its source, the belief that an important benefit to society was derived thereby, a belief that was, and is, in turn, predicated on the unique nature of the married, opposite-sex couple.

As a general rule, in those cases where an individual or group is denied the rights and benefits enjoyed by all others, the appropriate way to address the inequality is to extend those rights and benefits to the individual or group to which they have heretofore been denied. Conversely, in cases where an individual or group enjoys rights and benefits *that differ from everyone else*, i.e. they receive preferential treatment, the correct response is

the opposite – to eliminate that special status altogether, assuming that there is insufficient justification for its retention. This caveat is vital, because, as has been previously pointed out, the *Charter of Rights and Freedoms* expressly permits preferential treatment of individuals and groups if such treatment provides an important benefit to society.

This, then, is the true essence of the rights argument *vis-à-vis* marriage for same-sex couples. It is not a matter of fundamental equality as articulated in the first example cited above, but rather an argument over the right to receive the same preferential treatment, as articulated in the second example. The government implicitly acknowledged that this was so by changing the definition of marriage to include same-sex couples *while continuing to exclude all others*. This is no solution to the equality issues raised by the Courts, however, because although the group receiving preferential treatment has been expanded, *it remains limited* – a point that has not been lost on polygamy advocates.

And so the government is left having to do for opposite-sex *and* same-sex couples together what it refused to do for opposite-sex couples alone, i.e. justify their preferential treatment on the grounds that to do so provides an important benefit to society. It is highly unlikely that this position can be maintained for long in the face of a determined campaign to expand the definition of marriage further, especially if such a campaign were to be based on the very equality rights arguments used to advance the same-sex marriage agenda.

This point is important enough to be repeated: Changing the definition of marriage to include same-sex couples did not address the issue of equality rights as articulated by its advocates. To the contrary, the change exacerbated the problem by limiting the "new" definition at the same time that it denies that there are any meaningful and objective criteria for such limitations. Further litigation is inevitable then as those in other alternative relationships challenge the constitutionality of their being excluded from the definition of marriage – litigation that will be virtually impossible to win given the new *status quo*.

All this leaves the government with two apparent alternatives: either reaffirm the unique and important contribution *opposite*-sex married couples alone make to our society and continue to extend to them *and them alone*, special rights and privileges that strengthen that contribution – in other words return to the *status quo ante* – or decide that married couples in any combination no longer have a unique and important contribution to make to society and eliminate special status for anyone by removing itself (government) from the business of registering and regulating marriages altogether.

Whatever decision the government ultimately makes, however, let it be the product of careful deliberation rather than the byproduct of political maneuvering.

Conclusion

As stated in the introduction, the purpose of this paper has not been to argue for or against same-sex marriage *per se*, but rather to identify and clarify many of the issues which have arisen and continue to arise as a result of changing the definition of marriage. Because our goal has been to make a *prima facie* case for conducting a comprehensive review of current policy, we have refrained from dealing in depth with any single issue, each of which deserves a paper dealing with it alone.

There are many other issues which we did not include in our discussions. Among these is the emerging and important issue of children's rights and how changing the definition of marriage impacts these. Readers should not make any inferences with regard to the importance of any single issue based on where, if at all, it can be found in this document.