

The Marriage Dialogue

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ABSTRACT

Using the contemporary example of same-sex marriage, the author uses his first-hand experience as a Member of Parliament to examine the “dialogue” theory of *Charter of Rights and Freedoms* politics and decision-making role of legislators. The dialogue between courts, legislatures and Canadians is robust and having a significant impact on public policy in Canada. However, many of those in the legislature are either unaware or uninterested in this changing fact of Canadian policy making. This is particularly troubling given the power MPs have when voting in the House of Commons on an issue of equality rights in the House of Commons in a free vote – as was the case in the issue at the centre of this thesis, the issue of same-sex marriage.

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DEDICATION

This thesis is dedicated to the greatest man I have ever known, my father, James B. Moore. Without his endless love and tireless support, I would be nowhere. I love you dad.

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1.1 – CHAPTER ONE: INTRODUCTION

When a Canadian is elected to serve as a Member of Parliament, and within that mandate of service is presented with the responsibility to vote on an issue of rights, and in the exercise of that vote is allowed to vote freely – which is to say without official coercion or restraint from his/her Parliamentary leadership – how does that Member of Parliament arrive at his/her voting position? What influences, pressures and responsibilities is a Member of Parliament faced with when given the responsibility to vote in the Parliament of Canada, particularly within the context of the “dialogue” that has emerged between courts, legislatures and Canadians? In my second term as a Member of Parliament I tackled those questions when I voted in Parliament on legislation to redefine marriage in Canada.

Basing my findings on my personal experience as a Member of Parliament, as well as available academic literature, it is clear to me that the dynamic of a dialogue between courts, legislatures and Canadians is robust and is having a significant impact on public policy in Canada, as demonstrated here in the case of same-sex marriage law. Further, that given my experience as a member of the Canadian legislature through the course of this particular dialogue, Members of Parliament have varying degrees of depth of understanding of this dialogue and widely differing views on their role within this dialogue when voting on matters in the Parliament of Canada.

1.2 – OBJECTIVES AND CONTRIBUTION OF THESIS

The objective of this thesis is to contribute to the ongoing and expanding academic examination of the effects of the *Charter of Rights and Freedoms* on Canadian democracy. Specifically, I will begin by discussing the “dialogue” that has developed, and continues to evolve, between Canada’s courts, legislatures and Canadians on policy issues. From there, I will examine the issue of same-sex marriage and the example it provides of policy development through this new “dialogue” in the *Charter* era of Canada. This thesis will trace the advancement of the issue of same-sex marriage through the courts, and then through the Parliament of Canada and its adoption into law. Along the way I will discuss the lessons to be drawn about this approach to policy making. There have been very few issues since the adoption of the *Charter* that have offered as useful and clear an example of the new policy dynamics that exist in Canada. It is worthy of this examination.

What makes this thesis of unique value is the accounting of my personal role as an actor in this process and describing my personal experience in dealing with a rights-based, *Charter* issue as a member of the Parliament of Canada. As an actor in this policy development, I will add to the study of government, representation, and political science in the examination of the behaviour of a Member of Parliament in the exercise of his responsibility of voting in Parliament on a rights-based issue. I will discuss the pressures, considerations, obligations, and dynamics that were at play as the issue of same-sex marriage was considered in Parliament. In my studies around this issue, I have found no first-hand accounts by a Member of Parliament explaining his or her decision making process relating to a free vote in Parliament

on a rights issue. This makes the contribution of this thesis unique and worthy of academic consideration in the context of *Charter* politics and the evolving role of an elected representative in Canada's legislature. Indeed, in the era of frequent propositions on correcting the 'democratic deficit' through more free votes in Parliament and the growth a dialogue between the courts and Parliament on Charter rights, it is a mistake to not research the considerations that MPs make on free votes.

The study has two major findings that nuance the conclusions of academic literature on free votes in Canada and dialogue theory. First, in contrast to literature which stresses the importance of the position of an MP's party in determining their free vote, myriad factors affect the decisions of MPs on free votes. In particular, personal beliefs and local political considerations were found to be important determinants. Second, dialogue theory assumes awareness on the part MPs of the active role that they play in a dialogue between courts and the legislature on rights-based issues. The primary factor in my decision to support Bill C-38 (the bill to legalize same-sex marriage in Canada) was my personal commitment to legal equality within the restrictions of recent court decisions and the constitutional division of federal-provincial powers. However, I found in my personal experience in considering this issue, that within Canada's legislature, understanding of the "dialogue" that exists was seldom understood, never discussed, and underlines an important aspect of dialogue theory that warrants examination.

1.3 – ORGANIZATION AND METHODOLOGY

This thesis will begin with a look at the *Charter of Rights and Freedoms* and how it has been used not just to enumerate and articulate the rights of citizens to be guarded against the state and whatever contemporary political majorities may pursue, but also as an instrument for the advancement of policy goals. In this evolved use of the *Charter* I will examine section 15 of the *Charter* – the equality provisions, and juxtapose them with section 33 of the *Charter* – the notwithstanding clause, and how this has led to new political approaches in the development of policy in Canada. The recent developments of judicial review, active courts, spurred citizen engagement, and the changing role of legislators will be examined to establish the framework into which the issue of same-sex marriage will be studied.

This thesis will describe the “dialogue” that has emerged between Canada’s courts and legislatures, a “dialogue” that led directly to Bill C-38, *The Civil Marriage Act*. From there, I will continue discussing the legislation, how it was debated in Parliament, and how I approached my “free vote” on the legislation as a representative. In doing so, I will discuss my personal background, the local pressures, political pressures, and, ultimately, my voting decision on same-sex marriage. This paper is a first-person account of *Charter* politics in action, as seen from the perspective of a legislator and representative.

Academically, the most appropriate methodology to use for this thesis is the participant observation approach. In using the participant observation research methodology, which is broadly used in anthropological studies, sociology and communications disciplines, I will draw on my personal account of events as they

unfolded. Typically, participant observation is used to examine an issue from an intimate perspective. In achieving this, the research often involves collective discussions, analysis of personal documentation, formal and informal interviews, and direct observation.¹ The strengths of this approach are clear in the circumstance of this particular thesis given that the principle goal of this paper is to provide a personal account of a policy issue and its development, consequences and lessons.

Participant observation is the approach best suited for this type of accounting of my unique perspective in examining the issue of this “dialogue” not only between the courts and the legislature, but also within the legislative component itself. In simple terms, "participant observation means what it says. It is distinguished by active participation as a means of observing the setting or individuals under study. The observer's personal involvement in the research setting is always a central means to understanding it, rather than using a research instrument the participant observer becomes one."²

The greatest weaknesses of participant observation in qualitative research are concerns about the dependability or credibility of the source or sources. This weakness can be addressed by corroboration of data, multiple interviews, and auditable data usage. In the case of this paper, the traditional weaknesses of the methodology are not of concern because the author *is* the source of the experiences discussed and examined.

¹ K.M. DeWalt & C.B. Wayland “Participant Observation.” In H.R. Bernard (Ed.) *Handbook of Methods in*

² C.L. Fry, *New Methods for Old Research* (Boston: Bergin and Garvey, 1986) p.2.

2.1 – CHAPTER TWO: COURTS, LEGISLATURES & RIGHTS

In this chapter I will discuss how Canadian democracy has undergone significant transformation since the *Charter of Rights and Freedoms* came to force. The powers enumerated and inferred in the *Charter* have not only codified and expanded the rights of Canadians, but also created new political dynamics in ways not anticipated. In particular, the *Charter* has ushered in a new era of democracy, where courts and legislatures, both of which have a mandate to serve the public interest, are forced to “dialogue” in ways that challenge Canada’s democratic limits. Nowhere has this “dialogue” been demonstrated more clearly than in the recent case of same-sex marriage.

The issue of same sex marriage is part of the dramatic changes in social and legal attitudes towards homosexuality over the past several decades in Canada and most Western democracies. Until recently, homosexuals frequently were subjected to ridicule, harassment, discrimination and abuse; and participation in homosexual acts, in fact, was a crime. Riding the tide of the civil rights movement in the 1960s, this situation began to change. In 1969, Parliament amended the *Criminal Code* to abolish homosexual acts as offences.³ In arguing for the decriminalization of consensual homosexual acts between adults, Pierre Trudeau, then the Justice Minister and later the Prime Minister, declared that “[t]he State has no place in the

³ *Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 7; this abolished the offence of “sodomy”, so that it was no longer a crime for consenting adults to engage in anal intercourse in private. For a fuller discussion of this change in the criminal law, see Donald G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery, 1996) p.108-114.

nation's bedrooms."⁴ Starting in 1977, provincial legislatures began to enact human rights legislation that establishes that society considers unequal treatment of certain groups to be unacceptable by setting out a list of characteristics against which discrimination is prohibited. These characteristics have traditionally included race, colour, national or ethnic origin, religion or creed, age, sex, family and/or marital status, and mental or physical disability.

Prior to the 1980s, however, there were few legal rights or provisions that could be invoked by gays and lesbians. The legal – and political – situation in Canada changed considerably with the coming into effect of the equality rights provision in section 15 of the *Canadian Charter of Rights and Freedoms* in 1985. Post-*Charter*, there have been a series of court cases that have expanded the rights of homosexuals and have forced federal and provincial legislatures to respond, resulting at times in a tug-of-war of influence and leadership. The relationship between courts and legislatures is complex and challenging in a constitutional democracy, particularly when the *Charter* is so relatively new to our system of governance. But, it is this tug-o-war between courts and legislatures and the “dialogue” that has emerged as a consequence that is the central element in the issue of same-sex marriage and the advancement of homosexual rights in general.

The *Charter* has ushered in a new era of democracy, where courts and legislatures, both of which have a mandate to serve the public interest, are forced to “dialogue” in ways that both challenge and expand Canada's democratic limits. In considering this “dialogue”, one must consider the impact of the *Charter* on the

⁴ John Robert Colombo, *John Robert Colombo's Famous Lasting Words: Great Canadian Quotations* (Toronto: Douglas & McIntyre, 2000) p.424.

dynamic between the courts and legislatures in Canada.

2.2 – COURTS AND LEGISLATURES IN POST CHARTER CANADA

In 1985, with the full coming to force of the *Charter*, Canada's political culture and power dynamic was forever changed. The Federal Government, cabinets, Prime Ministers and Premiers, federal and provincial legislatures, government departments and agencies, all levels of government, had to wrestle with a shift in power sharing and public policy. Individual Canadians also had to reconsider their rights, roles, and, in many circumstances, opportunities for engagement in the new world of *Charter* politics and policy making. By thinking of the *Charter* as not just a shield to protect established rights, but also a sword to have perceived or desired rights officially recognized, many Canadians viewed the *Charter* as a possible tool to be used to advance values that may not be acceptable to contemporary political majorities.

Richard Sigurdson describes it in these terms, “the constitutional guarantees in the *Charter* have altered the way Canadians view their relationship with government and the way they argue for change.”⁵ Janet Hiebert goes further by outlining the manner in which “rights claiming” – which is to say judicial review – has become a strategy that has found considerable and surprising success. According to Hiebert “the use of rights claiming in legal challenges to legislation has become a significant element of reform strategies since the adoption of the Canadian

⁵ Richard Sigurdson, “Left- and Right-Wing *Charter*phobia in Canada: a Critique of the Critics,” *International Journal of Canadian Studies* 7-8 (Spring-Fall 1993), p.113.

Charter of Rights and Freedoms."⁶

This development is, not surprisingly, not without its critics. Knopff and Morton, have argued that this new era of *Charter* policy seeking is leading to a tyranny of the minority at a steep expense – namely, the destruction of representative democracy. They have advanced their thesis that there has been the development of a ‘court party’ that is an omni-powerful movement that can force social change by plowing through public opinion, Parliamentary consent, or executive engagement. According to Knopff and Morton: “Today the new court party’s undemocratic vehicle is the judiciary... which includes not only “citizen” interest groups... but also important elements within state bureaucracies, law schools, the broader intellectual community, and the media.”⁷ Robert Martin agrees with this cynicism by complaining that “Parliamentary government was the democratic heart of our political system,” and that “to subvert *Parliamentary* government in Canada is, then, to subvert democracy.”⁸

This tug-o-war between courts and legislatures is the central element in the issue of same-sex marriage and the advancement of homosexual rights in general. The relationship between courts and legislatures is complex and challenging in a constitutional democracy, particularly when the *Charter* is so relatively new to our system of governance. This balance between the courts and the legislatures in a *Charter* context is referred to in literature as a “dialogue” and was introduced in Canada as a concept by Peter Hogg and Allison Bushell. However the concept pre-

⁶ Janet Hiebert, *Charter Conflicts: What is Parliament’s Role?* (McGill-Queen’s, 2002), p.163.

⁷ Rainer Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson Canada 1992), p.79.

⁸ Robert Martin, “The *Charter* and the Crisis in Canada.” In *After Meech Lake: Lessons for the Future*. Ed. David E. Smith, Peter MacKinnon and John C. Courtney. (Saskatoon: Fifth House 1991), p.123

dates them and was first offered by Alexander Bickel in 1970 in the examination of judicial review in practice and theory.⁹

The “dialogue” theory suggests that courts and legislatures exist to serve the public but often have conflicting perceptions about the exercise of that role. Adding another layer of complexity, is the conflicting public understanding and sympathy for each institution and their obligations in defending Canada’s interests. The question of who represents the public interest – the courts or legislatures – is a chronic tension in our system of government. This tension and conflict about public interest and the role of the judiciary is not new or unique to Canada. In the United States this is a frequent subject of debate, however there is a central difference between our two countries. The U.S. Constitution contains no limits on the power of judicial review while Canada’s Constitution does. In Canada, section 1 of the *Charter*, the reasonable limitation exemption, and section 33, the notwithstanding clause, afford legislatures opportunities to challenge judicial review in the name of the public interest. By contrast, the U.S. Constitution has no comparable clauses.

Courts in Canada have assumed a central role in our system of governance; that of protectors of constitutional rights with the power of judicial review, tempered by the legislature with specific powers. The *Charter* has made the role of Canada’s courts in lawmaking more explicit, more pronounced, and more controversial in the consideration of the constitutional rights of Canadians. It also allows for legislatures, and not the courts, when section 33 is invoked, to define the limits of, and content of, a right – and to have the final word. Section 33 was an

⁹ Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970).

effort at compromise between those voices who favoured full judicial supremacy and those who backed the defense of Parliamentary sovereignty and supremacy. As Paul Weiler explains, the section 33 override leads to “a compromise, between the British version of full-fledged Parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters.”¹⁰

The exercise of section 33 was not meant to be routine or without due care and consideration of the social, legal and political consequences of doing so. There is a burden on legislatures and the executive to make a clear and convincing case as to why they chose to interfere with what would otherwise be deemed established rights by the courts.

Manitoba’s Attorney General during the First Ministers’ Conference, G.W.J. Mercier, felt that the inclusion of s. 33 should result in the bolstering of *Parliamentary* supremacy in the eyes of Canadians via the *Charter*. He stated:

The rights of Canadians will be protected, not only by the constitution but *more importantly* by a continuation of the basic political right our people have always enjoyed – the right to use the authority of Parliament and the elected legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy.¹¹

The inclusion of a notwithstanding clause was not done without consideration for the sensitivity of its invocation. Roy McMurtry, who participated n

¹⁰ Paul C. Weiler, “Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?” *Dalhousie Review* (1980) Issue 205, p.232.

¹¹ Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, Novem 5th, 1981. p.115

the First Ministers' Conference that adopted the *Charter*, as Attorney General of Ontario, has written:

The fact that the clause does provide a form of balancing mechanism between the legislators and the courts in the unlikely event of a decision of the courts that is clearly contrary to the public interest. On the other hand, political accountability is the best safeguard against any improper use of the "override clause" by any *Parliament* in the future.¹²

Former Alberta Premier Peter Lougheed, who was also part of the drafting of the constitution, noted one of the principle reasons for inclusion of section 33 was to make certain that legislators took into full consideration the rights of their constituents. He said:

The purpose of the override is to provide an opportunity for the responsible and accountable public discussion of rights issues, and this might be undermined if legislators are free to use the override without open discussion and deliberation of the specifics of its use.¹³

2.3 – JUDICIAL REVIEW, CITIZEN ENGAGEMENT, LEGISLATURES AND SAME-SEX MARRIAGE

Equipped with the *Charter* and a growing sense that the Canadian public was prepared to accept that it was wrong to overtly discriminate against individuals on

¹² Roy McMurtry, "The Search for a Constitutional Accord – A Personal Memoir," (1982) p.65.

¹³ Peter Lougheed, "Why A Notwithstanding Clause?" (1998) 6 Points of View 1, p.16.

the basis of their sexual orientation, the movement towards legal change for gays and lesbians gained steam in the late 1980s and 1990s. By the late 1980s, there was growing social acceptance of homosexuality, which resulted in more gay and lesbian partners openly cohabiting, especially in urban areas. The demand for legal recognition of same-sex relationships increased, and Canadian courts started to give limited recognition to these relationships for family law purposes. In 1986, for example, a British Columbia court held that a same-sex partner could make a claim to property acquired during a domestic relationship in the same way as an opposite-sex unmarried partner could.¹⁴

Despite a growing consensus that overt discrimination against gays and lesbians would not be tolerated in Canadian society, homosexuals continued to face prejudice as well as acts of violence perpetrated against them because of their sexual orientation. In the early 1990s, legislatures and courts were still largely unwilling to accord familial rights or spousal status to same-sex partners. In 1993, an Ontario court dismissed a *Charter* challenge by a same-sex couple that argued that their constitutional rights had been violated when they were refused a marriage license.¹⁵

The court ruled that since the common law definition of “marriage” was a union of “one man and one woman,” it was not discriminatory to preclude same-sex partners from marrying each other. One of the “principal purposes of the institution of marriage,” the court observed, was the procreation and care of children, which

¹⁴ *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

¹⁵ *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Div. Ct.).

cannot be “achieved in a homosexual union,” concluding, “this reality that is recognized in the limitation of marriage to persons of the opposite sex.”¹⁶

In the mid 1990s judicial attitudes began to change, though initially not in cases claiming full “marital” rights. In one 1997 Ontario case, for example, the court accepted that under provincial child support laws, which had been enacted to impose support obligations on step parents, the lesbian partner of a child’s biological mother could have “parental” support rights and obligations as she had “demonstrated a settled intention” to treat the child as part of her family.¹⁷

What these two court cases demonstrated is that while the *Charter* explicitly enumerates the rights that Canadians have and are to be safeguarded by the courts, there is no guarantee as to what courts may rule. Interpretation is still open in the judicial process, just as much, one might argue, as there is interpretation and flexibility in the Parliamentary system.

While the *Canadian Charter of Rights and Freedoms* does not explicitly prohibit discrimination on the basis of sexual orientation, s. 15 of the *Charter* does provide that “[e]very individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination.” Section 15 enumerates certain prohibited grounds of discrimination, such race, religion, sex, age and mental or physical disability. In its 1995 decision in *Egan v. Canada*, the Supreme Court of Canada considered a constitutionally based claim by long-term same-sex partners to “spousal” benefits under the old age pension legislation, which provided benefits to both long term opposite-sex cohabitants and married “spouses.”

¹⁶ *Ibid.* at 666.

¹⁷ *Buist v. Greaves*, [1997] O.J. No. 2646 (Gen. Div.).

¹⁸ Although a majority of the Court did not accept the particular claim, the entire Court agreed that sexual orientation is a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs,”¹⁹ and that accordingly “sexual orientation” should be treated as “analogous” to the “enumerated” prohibited grounds in s. 15. Since *Egan*, sexual orientation has been accepted as a prohibited ground for discrimination under the *Charter*.

According to Janet Hiebert his acceptance that s. 15 should be interpreted this broadly, and that “analogous” grounds, i.e., personal characteristics other than those listed, may also form the basis for discrimination against a group or individual was met with surprise and praise by the gay and lesbian movement. Hiebert notes “Lesbian and gay activists did not initially see the *Charter* as a likely tool for their liberation.”²⁰ This was due to the assumption that even though the *Charter* was to prevail in the end, there was great skepticism about the arbitrariness of possible rulings, as has been the case in the United States. But progress has been steady for those seeking equal protection by expansion of the interpretation of s. 15 of the *Charter*.

In 1999 the Supreme Court of Canada held that provincial family law legislation which permits partners in long-term opposite-sex relationships to seek “spousal” support at the end of their relationship violated s. 15 of the *Charter*, discriminating against homosexuals by not affording them “spousal” status. Justice

¹⁸ [1995] 2 S.C.R. 513.

¹⁹ *Ibid.* at para. 5, La Forest J., writing for the full Court on this issue.

²⁰ Hiebert, p.164.

Cory, writing for a majority of the Court in *M. v. H.*²¹ emphasized the social importance of recognizing same-sex relationships:

The exclusion of same-sex partners from the benefits of [spousal support law] . . . promotes the view that . . . individuals in same-sex relationships . . . are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances . . . *[T]he human dignity of individuals in same-sex relationships is violated by the impugned legislation.*²²

In *M. v. H.* the Supreme Court was careful to observe that it was only ruling that it was discriminatory to deny same-sex conjugal partners the rights enjoyed by unmarried opposite-sex conjugal partners, and the Court was not directly comparing same-sex partners to married opposite-sex couples. However, the Court's analysis and rhetoric clearly suggested that the Court would be sympathetic to a future argument that the failure to allow same-sex partners to marry is an affront to their *Charter* rights. The Court recognized in *M. v. H.* that "there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships," and thus these relationships will less frequently result in economic dependency and claims to spousal support.²³ Nevertheless, the Court said: same-sex couples will

²¹ [1999] 2 S.C.R. 3.

²² *Ibid.* at paras. 73-74 [emphasis added].

²³ *Ibid.* at para. 110, per Iacobucci J.

often form long, lasting, loving and intimate relationships. . . . While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many . . . “conjugal” characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is “conjugal.”²⁴

In response to *M. v H.* the federal and provincial governments enacted legislation to give same-sex partners the same legal recognition as opposite-sex non-marital partners, based on a period of “conjugal cohabitation”²⁵ (e.g. generally 1 to 3 years depending on the jurisdiction). Nova Scotia, Manitoba and Quebec went further by also enacting a registered domestic partnership law, allowing unmarried conjugal partners, whether of the same or opposite-sex, to register and thereby gain some significant rights and obligations of married spouses, to the extent permitted by provincial law (i.e. for such purposes as marital property, support and succession).²⁶

It must be noted that this is the “dialogue” described by Hogg and Bushell. *M.v H.* forced legislatures to react to court rulings and recognize legal protections for gay and lesbian Canadians. But the legislatures did not all react in unison, and indeed implemented different policies in practice that still sought to satisfy the judicial standard of equal treatment.

²⁴ *Ibid.* at paras. 58-59, per Cory J.

²⁵ See e.g. *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

²⁶ See Bill 75, *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, 1st Sess., 58th Leg., Nova Scotia, 2000 (Third Reading, 30 November 2000). See also *The Common-Law Partners’ Property and Related Amendments Act*, S.M. 2002, c. 48, s. 23, creating a registration scheme under the *Vital Statistics Act*; *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6.

Canada has a complex division of jurisdiction over family law and marriage. Under s. 91(26) of the *Constitution Act, 1867*. The federal Parliament has exclusive jurisdiction over “marriage and divorce,” but under s. 92(12), the “solemnization of marriage” is a matter of provincial and territorial jurisdiction. The federal Parliament has jurisdiction over the law of capacity to marry, which includes the basic definition of “marriage,” and the issue of whether same-sex partners can marry. For most of its history, Canada relied on the common law to define capacity to marry, including such issues as the law of physical capacity to consummate the marriage. The legal definition of marriage in Canada was long based on the 1866 English case of *Hyde v Hyde*, that marriage is “the voluntary union ...of one man and one woman to the exclusion of all others.”²⁷

After *M v H*, gays and lesbian seeking to marry began *Charter*-based challenges to this traditional definition, claiming that it discriminated against them on the basis of sexual orientation. In a number of decisions starting in 2002, lower courts in most jurisdictions in Canada recognized that it is a violation of the *Charter* to deny same-sex partners the right to marry. While each of these decisions applied the federal law governing marital capacity, each decision was only binding in the province or territory of the court that gave it. The first cases were thoroughly litigated, with the federal and provincial governments defending the traditional definition of marriage, but after the 2003 Ontario Court of Appeal judgment in *Halpern v. Canada (Attorney General)*, the federal government announced that it would not appeal that decision to the Supreme Court of Canada, and the later cases

²⁷ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.D. 130 at 133 .

were quickly resolved.²⁸ There were no applications made to the courts in the remaining two provinces, Alberta and Prince Edward Island. Same-sex marriage in those two jurisdictions awaited federal legislation.

The Ontario Court of Appeal decision in *Halpern* is the most frequently cited judgment in Canada on the constitutional right of same-sex partners to marry. On the importance of giving same-sex partners the right to marry, the Court of Appeal wrote:

Marriage is . . . one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.²⁹

The Court of Appeal emphasized the importance of the "choice" that opposite-sex partners have when deciding whether to get married or only have the more limited rights and obligations, which the law in Canada affords unmarried cohabitants, based on a period of cohabitation. The Court of Appeal observed:

[M]arried couples have instant access to all benefits and obligations . . .

²⁸ [2003] O.J. No. 2268 (C.A.). The highest appeal court in each Canadian province is called the Court of Appeal.

²⁹ *Halpern, ibid.* at paras. 5-8. The decision was a unanimous ruling by McMurtry C.J.O., MacPherson and Gillese J.J.A.

Same-sex couples are denied access because they are prohibited from marrying, and same-sex couples are excluded from a fundamental societal institution-marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. . . . Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.³⁰

In the course of these decisions, the courts had to consider what has been the strongest secular concern about same-sex marriage: that it may endanger the family and society. One commentator, for example, argued that there is “danger in taking the country down the path marked out by the court . . . [which] would undermine an institution so essential to the well-being of Canadians.”³¹ In rejecting this type of argument in *Halpern*, the Ontario Court of Appeal wrote:

We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry.

Moreover, an increasing percentage of children are being born to and raised

³⁰ *Ibid.* at paras. 104-107.

³¹ Douglas Allen et al., “Don’t kiss off marriage,” *The Globe and Mail* (18 June 2003). This statement was signed by a number of Canadian religious leaders, academics and lawyers. For a fuller critique of Canada’s recognition of same-sex marriage, see Daniel Cere & Douglas Farrow, *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment* (McGill-Queen’s Press, 2004); and Monte Stewart, “Judicial Redefinition of Marriage,” 21 *Can. J. Fam.L.* 11 (2004). For a Canadian advocacy group that defends the traditional definition of marriage, see www.defendmarriage.ca (accessed August 20, 2005).

by same-sex couples.³²

While the widespread legal and social recognition given to opposite-sex cohabitants in Canada may have contributed to the fall in the marriage rate, recognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children. Further, as acknowledged in *Halpern*, it is becoming more common for same-sex couples in Canada to have the care of children, conceived to one partner by artificial insemination, adopted by the couple or born to one partner prior to entering the same-sex relationship; recognizing the relationship of these same-sex partners will promote the welfare of these children.

There is now a substantial body of social science literature concerning the impact on children of being raised by two homosexual partners (usually lesbians) as custodial parents, and the studies reveal no significant differences between children raised by same-sex couples and opposite-sex couples in emotional or cognitive developmental outcomes or in terms of mental health.³³ As early as the mid 1970s, Canadian courts began to accept that lesbian mothers could be awarded custody after separation from heterosexual fathers. In 1976, one judge remarked that “the manner in which one fulfills one’s sexual needs does not relate to the abilities of being a good parent.”³⁴

³² *Halpern*, [2003] O.J. No. 2268, at para. 123.

³³ For a detailed study of spousal behavior and parenting by homosexuals, see Dr. Anne-Marie Amberto, "Same-Sex Couples and Same-Sex Parent Families: Relationships, Parenting, and Issues of Marriage" (Ottawa: Vanier Institute, 2005). See also J. Stacey and T. Biblarz, "How Does Sexual Orientation of Parents Matter?" 66 *Am. Soc. Rev.* 159 (2001); and Stephen Newman, "The Use and Abuse of Social Science in the Same-Sex Marriage Debate," 49 *N.Y. L. Sch. Rev.* 537 (2004).

³⁴ *K. v. K.*, [1976] 2 W.W.R. 462 at 465 (Alta. Prov. Ct.). See also *Bubis v. Jones* (2000), 6 R.F.L. (5th) 83 at 90 (Ont. Sup. Ct.), where Quinn J. stated, “[h]eterosexual parenting is not better than lesbian parenting—

What is perhaps most worthy of note about this discussion, is that it took place due to the courts' consideration of these issues. Due to political pressures, anxieties, and avoidance of electoral risks, many issues – particularly issues surrounding minority rights – often would never have been thrust into the public realm were it not for the engagement of these issues by courts. In turn, legislatures often were forced to respond to judicial actions, but absent the judicial involvement, it is easy to see how issues such as the advancement of equal rights for gays and lesbians would have been delayed much longer than they were. This “dialogue” between courts and legislatures has served the interests of many issues that were previously avoided by legislatures and has served to stir controversies and debates that many in elected office have historically hoped to avoid. Time and again, in multiple jurisdictions, this was shown to be the case with same-sex marriage specifically, and gay and lesbian rights in general.

2.4 – “DIALOGUING” ON SAME-SEX MARRIAGE

Through these developments, there developed intense pressure for Parliament to become involved in dealing with these evolving issues. Social and religious conservatives were demanding action to protect the traditional definition of marriage, while gay and lesbian advocates along with their liberal religious and civil liberties supporters were advocating that the government abandon any appeals and enact legislation to permit same-sex marriage everywhere in the country.

In 2001, the federal government had responded to *M. v. H.* with the

just different.”

Modernization of Benefits and Obligations Act, which amended 68 federal statutes to recognize as “common-law partners . . . *two persons* who are cohabiting in a conjugal relationship” for at least one year.³⁵ This extended to homosexual partners the same rights and obligations as were already afforded to unmarried opposite-sex partners for purposes such as federal income tax law and federal pension plan eligibility. At that time, however, the government also felt political pressure to reaffirm its commitment to the traditional definition of marriage. Thus, the federal statute specified that “for greater certainty, the amendments . . . do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.”³⁶

In reaction to this growing pressure, and recognizing where the law was headed due to judicial review, in November 2002, the federal Department of Justice released a paper entitled *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*. The document was intended to engage *Parliament*, and by extension the public through the Commons Standing Committee on Justice and Human Rights, around the question of how federal policy and legislation might address the same-sex marriage issue. Martin Cauchon, the then Minister of Justice, asked the Justice Committee to study the question of whether, in the context of Canada’s constitutional framework and the traditional definition of marriage, Parliament should take steps to recognize same-sex unions, and if so, how. Cauchon presented Parliamentarians, and the public, with three options for future action on marriage:

³⁵ S.C. 2000, c. 12 s. 2(3) [emphasis added].

³⁶ *Ibid.* s. 1.1.

- Option 1: Maintain marriage an opposite-sex institution.
- Option 2: Enact a federal statute creating a new registry that would be deemed equivalent to marriage for the purposes of federal laws and programs.
- Option 3: Change the definition of marriage to also include same-sex couples.³⁷

From January 30, 2003, until March 25, 2003, through 14 committee meetings, Members of Parliament heard from a broad range of witnesses on their views on marriage, law, and where Canada's *Parliament* ought to head. 45 groups as diverse as the Lesbian Mothers Association of Quebec, REAL Women of Canada, the Coalition of Canadian Liberal Rabbis for Same-Sex Marriage, the Canadian Bar Association, the Canadian Conference of Catholic Bishops, the Ontario Human Rights Commission, academics and individuals appeared before the committee to advise Parliament of their view on the three options presented by the Justice Minister.

However, following almost three months of hearings on this issue, the Committee was in the process of preparing its report to the House when, on June 10, 2003, the Ontario Court of Appeal released its ruling giving immediate effect to same-sex marriage in Ontario. The Committee subsequently adopted a motion to support "the recent Ontario Court of Appeal decision which redefines the common-law definition of 'marriage' as 'the voluntary union for life of two persons, to the exclusion of all others,' while fully respecting freedom of religion, as guaranteed

³⁷ Canada, Department of Justice, *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*. <http://dsp-psd.pwgsc.gc.ca/Collection/J2-189-2002E.pdf>

under the *Charter* of Rights.” In light of these developments, the Committee report was not completed.³⁸

After the 2003 Ontario Court of Appeal decision in *Halpern*, federal politicians had a limited range of options. One was to appeal *Halpern* to the Supreme Court of Canada, but a growing number of court decisions had concluded that the *Charter* requires recognition of same-sex marriage, and the outcome of an appeal seemed a foregone conclusion.³⁹ Further, there was growing pressure within the federal government to not be seen to be taking an “anti-*Charter*” position. Although some politicians favored a “civil union” compromise, the court decisions had explicitly stated that any response which restricted “marriage” to opposite-sex partners and only allowed homosexuals to have a registered domestic partnership would violate s. 15 of the *Charter*; separate treatment of homosexual intimate unions was not equal treatment. Further, as mentioned above, under Canada’s *Constitution Act* s. 92(12), responsibility for the “solemnization of marriage” (e.g. the form of ceremony, the appointment of celebrants, registration) is a provincial responsibility, so the federal Parliament could not create a civil union.

Another option was to use the “Notwithstanding Clause” to preserve the traditional definition of marriage. Under Canada’s Constitution, Parliament may override a *Charter* based right for a five-year period by enacting ordinary legislation that explicitly invokes the “Notwithstanding Clause,” thus permitting Parliament to

³⁸ See 2003 Ontario Court of Appeal decision in *Halpern*
<http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>

³⁹ See e.g. *EGALE v Canada*, [2003] B.C.J. No. 994 (C.A.) rendered a few weeks before *Halpern*.

effectively overriding *Charter*-based court decisions.⁴⁰ If this direction were taken it would have been very controversial for two reasons.

First, it would be the first time that federal Parliament would have invoked s. 33 of that *Charter* in history. Second, it would have broken with the expectations assumed during the adoption of the *Charter* when usage was expected to happen rarely, and in the non-controversial cases, not to thwart large and sweeping social policy changes. This was affirmed by Jean Chretien, Canada's Justice Minister during consideration of the *Charter*, when he said: "What Premiers and the Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures."⁴¹ Invocation of s. 33 would allow Parliament to deny same-sex partners the right to marry, but would certainly not be a "non-controversial circumstance." Even the most conservative politicians and advocates for opposite-sex only marriage were reluctant to advocate using the Notwithstanding Clause. This was predicted by Peter Hogg in 1982 when he noted "the exercise of the power (s. 33) would normally attract such political opposition that it would rarely be invoked."⁴²

So what is a government to do? With limited options before it, after having briefly consulted a Parliamentary Committee, after consideration of the legal avenues to address the judicial mandates, the ball in the 'dialogue' between courts and Parliament, was on the side of Parliament and in the hands of the executive.

⁴⁰ *Charter of Rights*, s. 33. See discussion of Peter Hogg, "So, where do we go from here?" *Globe and Mail*, Dec.15, 2004.

⁴¹ Canada, House of Commons, *Debates*, November 20, 1981, p.13042-13043.

⁴² Peter Hogg, "A Comparison of the Bill of Rights and the *Charter*," *The Canadian Charter of Rights and Freedoms: Commentary*, (Carswell, Toronto, 1982) p.11.

Within a week of the rendering of the Ontario Court of Appeal judgment in *Halpern*, the federal Cabinet announced that it was in principle supportive of same-sex marriage and it would not appeal the lower court decisions requiring recognition of same-sex marriage. And, after thorough consideration, the government chose to move forward with its own legislative initiative in reaction to judicial rulings and drafted Bill C-38, the Civil Marriage Act.

2.5 – SUPREME COURT REFERENCE

In an unstable minority Parliament, the government drafted Bill C-38, and took the extraordinary step of referencing the legislation to the Supreme Court of Canada *before* allowing all Members of Parliament to debate or vote on the legislation. In the “dialogue” between Parliament and the Courts this was a unique approach. Section 53 of the *Supreme Court Act* allows Parliament to make references to the Supreme Court of Canada of this nature. In 1998 the same Liberal administration referred three questions to the Supreme Court of Canada regarding the rules of secession for provinces from Canada, and in the decision the Supreme Court noted that the Court “May also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court’s receipt of jurisdiction to undertake an advisory role.”⁴³

Politically, on a right issue, using the Supreme Court in this way is also a tactical move politically to gather legal momentum for the legislation as it entered Parliament for consideration. This approach of using the Supreme Court at the front

⁴³ Reference, re Secession of Quebec, [1998] 2 S.C.R. 217.
<http://scc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html>

end of a legislative process has been used before in Canada, also in the consideration of some of Canada's most contentious debates including secession, abortion, and the constitution itself.

Justice Minister Irwin Cotler defended the reference by suggesting the reference was to educate Parliamentarians before consideration of the legislation in the House of Commons and Senate. According to Cotler:

The benefit of referring the draft bill to the Court for its advice was not in any way to preclude the Parliamentary process but to clarify for Parliamentarians, before they were asked to make decisions, what is possible within Canada's legal and constitutional framework. The ultimate objective was to ensure that when the bill was debated through the parliamentary process, that debate would be informed and constructive.⁴⁴

The draft bill proposed a definition under which "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." It attempted to address concerns around religious freedom in the solemnization of marriage by affirming that "nothing in this Act affects the freedom of officials of religious groups to refuse to conduct marriage ceremonies that are not in accordance with their religious beliefs."⁴⁵

The government requested that the Court consider whether: (1) the draft bill fell within Parliament's exclusive legislative authority; (2) the bill's extension of the

⁴⁴ Irwin Cotler, "Marriage in Canada – Evolution or Revolution?" *Family Court Review*, Vol. 44, No. 1, January 2006. p.63.

⁴⁵ *Ibid.*

capacity to marry to persons of the same sex was consistent with the *Charter*; and (3) the *Charter*'s freedom of religion guarantee shielded religious officials from being forced to perform same-sex marriages contrary to their religious beliefs. In January 2004, the Minister of Justice, citing the importance of a full and informed debate, added a fourth question to the Supreme Court reference, asking whether the current opposite-sex requirement for civil marriage was consistent with the *Charter*.⁴⁶

The Supreme Court of Canada heard arguments in the Reference on October 6 and 7, 2004, and issued its ruling on Thursday, December 9, 2004.⁴⁷ It found, in part, that the provision in the draft bill authorizing same-sex marriage was within Parliament's exclusive legislative authority over legal capacity for civil marriage under subsection 91(26) of the *Constitution Act, 1867*.⁴⁸ The Court also ruled that the provision authorizing same-sex marriage was consistent with the *Canadian Charter of Rights and Freedoms* and, that in the circumstances giving rise to the draft bill, flowed from it; the religious freedom guarantee in subsection 2(a) of the *Charter* is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.⁴⁹

The Court declined to answer the fourth question concerning whether the opposite-sex requirement for marriage was consistent with the *Charter*. The Court

⁴⁶ *The Supreme Court Decision* (December 9, 2004)

<http://www.cbc.ca/news/background/samesexrights/beforethecourt.html>

⁴⁷ *Reference re: Same-Sex Marriage*, (2004) 3 S.C.R. 698, 2004 SCC 79.

⁴⁸ The Court also found that "[t]he provinces are vested with competence in respect of non-marital same sex relationships, just as they are vested with competence in respect of non-marital opposite-sex relationships (via the power in respect of property and civil rights under s. 92(13)). ... Civil unions are a relationship short of marriage and are, therefore, provincially regulated"; *ibid.*, par. 33.

⁴⁹ *Ibid.*

said this was a decision for Parliament to determine, thus continuing the “dialogue” between the two branches of government in the consideration of the marriage rights of gays and lesbians.

In reaction to the reference decision, Osgoode Hall law professor Allen Hutchinson suggested that the government likely did not get the decision that it was actually hoping for. “The Supreme Court has shown how deft it is at appreciating and negotiating the tricky shoals of Canadian constitutional waters,” Hutchinson noted. “It has told Parliament: ‘If you want to dance, face the music.’”⁵⁰ John Ibbitson had a terser and biting interpretation, when he commented on the Court’s refusal to answer the fourth questions: “The judges refused to be used as a scapegoat for a cowardly administration.”⁵¹ What he meant was that the government, and indeed all of Parliament, had to confront the difficult issue and make a decision, and by refusing to answer the final question, the courts were cutting off the ability of the political class to find a short cut out of a tough political debate with each other and with Canadians.

2.6 – Bill C-38 – SUMMARY

Bill C-38 was the culmination of a constitutional drama that was initiated by Parliament, inspired by the Charter, advanced by individuals and groups, and sanctioned by the courts, and that then returned to Parliament for the last stage in the decision- making process. It was a parliamentary initiative to enact the Charter and to make it part of our Constitution. It was Parliament that then vested in the

⁵⁰ Kirk Makin, “Osgoode Professors on Same-Sex Marriage Judgment,” *Globe and Mail*, Dec. 10, 2004.

⁵¹ John Ibbitson, “Here’s the Bottom Line: The System Works,” *Globe and Mail*, Dec. 10, 2004.

courts the authority to protect these fundamental rights and freedoms, including equality rights and religious freedom, on behalf of all Canadians. It was the people of Canada, including minorities, and amongst those minorities gay and lesbian Canadians, who then invoked the Charter and sought rights and remedies from the courts. It was the courts of Canada, in eight provinces and one territory, which held that the opposite-sex requirement for marriage was unconstitutional. It was the government of Canada that, in response to those court decisions, referred proposed legislation to the Supreme Court of Canada for an advisory legal opinion on the impact of the bill on the two fundamental Charter guarantees: equality rights and religious freedom. It was the Supreme Court of Canada that unanimously upheld the constitutionality of the proposed legislation and held that its purpose was consistent with the Charter. Accordingly, the issue then returned to Parliament, where it began.

Bill C-38 consists of a lengthy preamble and 15 clauses, 11 of which represent consequential amendments to 8 federal statutes. The following paragraphs focus on the bill's primary subject matter. Amendments are included.

The 11-paragraph preamble that precedes Bill C-38's substantive provisions will enter the statute book as an integral part of the legislation. In recent years, statutory preambles seem to be employed more frequently as a means of establishing a context and rationale for legislation and of underscoring parliamentary intent in enacting it. Preambles are considered interpretive rather than substantive, and may be relied upon by courts seeking to resolve ambiguity in the statute they introduce.

The preamble to Bill C-38 includes statements of principle and facts, including:

- asserting Parliament's commitment to uphold the Constitution and equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* (par. 1);
- noting the scope of judicial rulings across the country to have legalized same-sex marriage on *Charter* equality grounds, and the reliance of same-sex married couples on those rulings (par. 2-3);
- asserting that only equal access to civil marriage, as distinct from civil union, respects same-sex couples' *Charter* equality rights (par. 4);
- noting that Parliament's constitutional jurisdiction does not extend to creating an institution other than marriage for same-sex couples (par. 5);
- affirming the *Charter's* section 2 freedom of conscience and religion guarantee (par. 6);
- asserting that the bill is without effect on that guarantee, with particular reference to the freedom of members of religious groups to hold their beliefs and that of officials to refuse to perform marriages that conflict with their beliefs (par. 7);
- stating that the public expression of differing views on marriage is compatible with the public interest (new par. 8);
- noting that Parliament's commitment to equality precludes use of the *Charter's* section 33 notwithstanding clause to deny same-sex couples access to civil marriage (par. 9);
- affirming Parliament's responsibility to support the fundamental institution of marriage (par. 10); and

- asserting that in light of Charter values, access to civil marriage for same-sex couples should be legislated (par. 11).

Bill C-38's key provision defines civil marriage as "the lawful union of two persons to the exclusion of all others." The terms of this clause are identical to those considered by the Supreme Court of Canada in the December 2004 Reference decision, and reflect the substance of reformulations of the traditional common-law definition effected in provincial court rulings outlined above.

The legislation also recognized that officials of religious denominations might refuse to perform marriages that are at odds with their religious beliefs. This provision was critical to the passage of the legislation, as the House of Commons Legislative Committee heard from a number of witnesses in their previous hearings on marriage in consideration of Justice Minister Cauchon's white paper, that a primary concern from their perspective was the need for the clear protection of religious freedom, for religious institutions, marriage commissioners, as well as individuals.

The solemnization of marriage and other practical contexts in which the guarantee of freedom of religion is engaged largely fall under provincial jurisdiction, and there was pressure to ensure that the bill could and should enhance the level of protection available in respect of areas of federal jurisdiction. To address this perceived deficiency, the government proposed, and the Committee adopted unanimously, a new provision under which, added the following language to the legislation:

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

The balance of the legislation was largely uncontroversial, merely triggering the consequential amendments necessary in related laws such as the *Modernization of Benefits and Obligations Act*, the *Canada Business Corporations Act* and the *Modernization of Benefits and Obligations Act*.

On February 1st, 2005, two months after the publication of the Supreme Court opinion, Justice Minister Irwin Cotler introduced the long-awaited marriage bill, Bill C-38, in the House of Commons. In a press conference shortly after the bill’s introduction, Cotler referenced the Supreme Court opinion, noting “we have seen a dialogue between Parliament, the courts and the Canadian people, which has made it possible to apply the rights of gays and lesbians as part of the minority rights conferred by the Charter.

The wording of the legislation was clear: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.” The bill amended a total of eight acts, and despite objections from Quebec, which jealously guarded its jurisdiction over the celebration of civil marriages; the bill stated, “officials of

religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.”⁵²

Cotler tried to place the bill in the broader context of human rights, which had been his specialty as a lawyer. “This bill is anchored in the *Charter of Rights and Freedoms* – which is the expression and entrenchment of the rights and freedoms of all Canadians. The bill respects two foundational Charter guarantees - the right to equality – including the protection of minorities against discrimination – and freedom of religion,” said Minister Cotler. “We understand that some Canadians are still struggling with this issue. But Canada is a land built on a tradition of tolerance and respect, rooted in a Charter that protects the equality rights of all Canadians.”⁵³

To justify the approach used in the bill, Cotler completed the circular logic introduced by the Supreme Court, citing the passage from its opinion stating that the bill “points unequivocally to a purpose which, far from violating the Charter, flows from it.” Cotler urged Canadians to follow him on the path towards a redefinition of marriage. “We know that some Canadians still have questions about this topic,” he conceded. “But Canada is founded on a tradition of tolerance and respect; it is rooted in a *Charter* that protects the equality rights of all Canadians.”

To add momentum to his argument that the legislation was both principled based and that the question at hand was clear, Cotler said, “I don’t really foresee how one can put amendments to this.” Conservative Party leader Stephen Harper

⁵² Background, Civil Marriage Act http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31376.html

⁵³ Government of Canada to Introduce Legislation to Extend Civil Marriage to Same-Sex Couples, February 1, 2005. http://www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31374.html

agreed with Cotler's assessment. "The bill is written in a way that will make it difficult to amend," he said in a press release.

2.7 – MY TURN TO ENGAGE THE “DIALOGUE”

As a Member of Parliament in the Official Opposition, watching the development of this whole policy dynamic was quite fascinating. I knew that there would be a point at which I, and my parliamentary colleagues, would be thrust into the spotlight on this issue. Courts had spoken in different jurisdictions, the Supreme Court reference by the Government had set a clear standard for what was to be decided by Parliament, the legislation we were to debate and vote on was clear and simple for all to understand. It was now my turn, our turn, as MPs to engage this issue responsibly as legislators and representatives. This was the next phase in this particular “dialogue.” Other “dialogues” had taken different paths through our governing systems – abortion, capital punishment, and other contentious issues. Same-sex marriage had its own unique pathway: from citizens empowered by the Charter challenging existing law in courts, to lower court decisions, to a parliamentary committee's consideration of Justice Minister Cauchon's white paper, to a cabinet decision to table legislation, to the specifics of Justice Minister Cotler's legislation which found its way into my “in” box in Parliament Hill office, I was now at the centre of the “dialogue” and I had one of the most important votes of my political career to cast in the very near future.

3.1 – CHAPTER THREE: PARLIAMENT AND A FREE VOTE

In this chapter, using a participant observer methodological approach, I will explore the issue of same-sex marriage from my personal experience as an actor in the consideration of Bill C-38. In the second chapter I outlined the evolution of the “dialogue” that has evolved as a result of the *Charter*, and here, I will explore further the subjectivity and dynamics at play within the legislative consideration of a rights issue based on my first-hand experience.

In this thesis, I have thus far traced the issue of same-sex marriage chronologically and objectively. This third chapter marks the beginning of my personal involvement in dealing with the issue as a legislator, and thus begins the participatory observation of this topic. In writing this chapter in the first-person I want readers to gain as effective a perspective as possible into the experiences I had at the time of the debates and public engagement on this topic. I will discuss my first-hand observations and experiences in the House of Commons, in caucus, and as a representative interacting with constituents and pressure groups. I do my best to discuss honestly what I believe are the relevant aspects of my personal biases – familial, political, by background – at the outset of my discussion of the topic so that readers might better understand the lens through which I was considering the issue as an actor in this legislative “dialogue.”

It must be noted that in my preparation for this thesis I found there to be a very limited amount of academic literature on the subject of free votes in our parliamentary system. Queen’s University political scientist C.E.S. Franks, in a short paper in 1997, outlined risks associated with expanding free votes based on what he

considers the rocky experiences on many divisive issues we have had with free votes. He cites the weakening of opposition to a government agenda by allowing free votes within the opposition benches as a risk to accountable government, and that by weakening party control over voting behaviours of MPs, subsequent election campaigns will become increasingly local rather than national in focus, thereby weakening a pan-Canadian conversation on values and choices between parties during an election.⁵⁴

The most impressive and comprehensive book that examines Canada's approaches to dealing with social and moral issues through our parliamentary system is Smith and Tatalovich's *"Cultures at War: Conflicts in Western Democracies"* which was published in 2003. After an extensive literature review, comparisons are made between the U.K, U.S., and Canada given the common origins of our political systems, and Smith and Tatalovich show at length that the varying degrees of legislative collective responsibility and procedural rules in the British and Canadian Parliaments result in less flexible decision-making in Ottawa than in London due to the less frequent use of free votes and the development of a more aggressive structure of Party discipline in Canada.⁵⁵

Similarly, other literature argues the pros and cons of expanding free votes in parliament and what the consequences might be for such a procedural shift. What is clearly missing in Canada's academic literature, however, is any kind of

⁵⁴ C.E.S. Franks, *Free Votes in the House of Commons: A Problematic Reform*, Policy Options (November 1997).

⁵⁵ T. Alexander Smith and Raymond Tatalovich, *Cultures At War: Moral Conflicts in Western Democracies* (Peterborough: Broadview Press, 2003).

comprehensive discussion of the role of Members of Parliament and the pressures and influences that develop in a free vote dynamic. And it is this precise examination that I am attempting to undertake in this chapter – the pressures faced by one of the actors in the “dialogue.” That is to say, the “dialogue” within the legislature, within the larger “dialogue” of the courts, legislatures and Canadians.

3.3 – PARLIAMENT DEBATES C-38

In a rare departure from parliamentary practice, the Prime Minister himself launched the debate on Bill C-38 on February 16th, 2005. This moment was a very important moment in the debate over Bill C-38 as it set the tone for the rest of the parliamentary debate, outlined with clarity the articulate positions of the two governing parties of Canada, and set the tone for the discussions that took place across the country as individual Canadians discussed the subjects in their own spheres of influence when referencing the debate in Ottawa.

Usually, the cabinet minister or MP sponsoring the bill delivers the inaugural speech in a debate. That Prime Minister Martin took the lead demonstrated how important the political stakes of this legislation were. In particular, given that Martin’s own Justice Minister had framed the debate as one of fundamental rights, and given that the Liberal Party had a divided caucus on the subject of same-sex marriage, Martin could not afford to see this legislative effort and defense of minority rights fail.

Prime Minister Martin’s speech outlined solid arguments aimed at convincing recalcitrant MPs into supporting the legislation. “This is an important day,” he

began. “The attention of our nation is focused on this chamber in which John Diefenbaker introduced the Bill of Rights, and in which Pierre Trudeau fought to establish the Charter of Rights and Freedoms. Our deliberations will not be merely about a piece of legislation or sections of legal text. More deeply they will be about the kind of nation we are today and the nation we want to be.”⁵⁶

Early on, Martin acknowledged the significance of the religious fears among some MPs. However, he repeated that no institution – “no church, no synagogue, no mosque, no temple” – would be compelled to marry same-sex couples. At the same time, he urged his colleagues to go beyond their beliefs: “Certainly, many of us in this House, myself included, have strong faith, and we value that faith and its influence on the decisions we makes. But all of us have been elected to serve here as parliamentarians. And, as public legislators, we are responsible for serving all Canadians and protecting the fights of all Canadians.” It was not enough to “embrace freedom and equality in theory,” he said. “We must also embrace them in fact.”

The Prime Minister then explained why the establishment of a system of civil unions for same-sex couples, instead of marriage, would be insufficient. In such a scenario, he said, gays and lesbians “would be equal, but not quite as equal as the rest of Canadians,” adding, “Put simply, we must always remember that ‘separate but equal’ is not equal.” This phrase, echoing a slogan used by gay and lesbian groups, was greeted with applause in the Commons. Martin reminded the House,

⁵⁶ Parliament of Canada Hansard, 38th Parliament, 1st Legislative Committee on Bill C-38, Thursday, May 12, 2005.
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=38&Ses=1&DocId=1640291&File=0#OOB-1131987>

that the federal government does not have constitutional jurisdiction in matters of civil union: “Only the provinces could define such a regime, and they could feign it in ten different ways, and some jurisdictions might not bother to define it at all. There would be uncertainty. There would be confusion.”⁵⁷

In an effort to give the impression that same-sex marriage was inevitable, Martin pointed out that the definition of marriage had already been changed by the courts: “The issue is not whether rights are to be granted. The issue is whether rights have been granted are to be taken away.” Taking aim directly at Stephen Harper, Martin reiterated his position that the only way to prevent a redefinition of marriage would be to invoke the notwithstanding clause in the *Charter of Rights*:

“Some are frank and straightforward and say yes [to the notwithstanding clause]. Others have not been so candid. Despite being confronted with clear facts, despite being confronted with the unanimous opinion of 134 legal scholars, experts in their field, intimately familiar with the constitution, some have chosen to not be forthright with Canadians. They have eschewed the honest approach in favour of the political approach. They have attempted to cajole the public into believing that we can return to the past with a simple snap of the fingers, that we can revert to the traditional definition of marriage without consequence and without overriding the Charter. They are insincere. They are disingenuous. And they are wrong.

⁵⁷ Ibid.

Upping the rhetorical ante, Martin argued that to use the notwithstanding clause would send a message to all of Canada's minorities that they could no longer turn to government "for protection, for security, for the guarantee of their freedoms."

"We would risk becoming a country in which the defence of rights is weighed, calculated and debated based on electoral or other considerations. That would set us back decades as a nation ... Our rights must be eternal, not subject to political whim."

Prime Minister Martin responded to Stephen Harper's controversial statement a few days earlier that same-sex marriage was an attack on ethnic-minority communities, evoking a very different relationship between same-sex marriage and multiculturalism: "When we as a nation protect minority rights, we are protecting our multicultural nature." He also linked same-sex marriage to the establishment of official bilingualism in 1969, noting the vigorous opposition that Pierre Trudeau's government faced at the time:

"Today, we rightly see discrimination based on sexual orientation as arbitrary, inappropriate and unfair. Looking back, we can hardly believe that such rights were ever a matter for debate. It is my hope that we will ultimately see the current debate in a similar light, realizing that nothing has been lost or sacrificed by the majority in extending full rights to the minority."

Saving his strongest arguments for the end of his speech to Parliament, while leaving no rhetorical stone unturned, Prime Minister Martin summarized the

difficult struggle of hundreds of men and women over the years to gain full access to the mainstream of society when he said:

“For gays and lesbians, evolving social attitudes have, over the years, prompted a number of important changes in the law. Recall that, until the late 1960s, the state believed it had the right to peek into our bedrooms. Until 1977, homosexuality was still sufficient grounds for deportation. Until 1992, gay people were prohibited from serving in the military. In many parts of the country, gays and lesbians could not designate their partners as beneficiaries under employee medical and dental benefits, insurance policies or private pensions. Until very recently, people were being fired merely for being gay.”

Martin had to justify his own rejection of same-sex marriage five and a half years earlier, when he voted in favour of a Reform Party motion to protect the traditional, heterosexual-only definition of marriage:

“My misgivings about extending the right of civil marriage to same-sex couples were a function of my faith and my perspective on the world around us, but much has changed since that day. We have heard from courts across the country, including the Supreme Court. We have come to the realization that instituting civil unions, adopting a separate but equal approach, would violate the equality provisions of the Charter. We have confirmed that extending the right of civil marriage to gays and lesbians will not in any way infringe on religious freedoms.”

As recently as a year and a half prior to the introduction of C-38, Martin had still been skeptical about the need to legalize same-sex marriage, but he had come to see this change as an important step in Canada's collective life:

“There are times when we as parliamentarians can feel the gaze of history upon us. They felt it in the days of Pearson [when they entrenched official bilingualism] and they felt it in the days of Trudeau [when they enshrined the Charter of Rights]. We, the 308 men and women elected to represent one of the most inclusive, just and respectful countries on the face of this earth, feel it today.”

In sum, for Prime Minister Martin, same-sex marriage had come to represent progress that could not be held back: “If we do not step forward, then we will step back. If we do not protect a right, then we deny it. Together as a nation, together as Canadians, let us step forward.”

This aggressive pursuit of same-sex marriage, and defining it as a rights issue, was a marked departure from the approach taken by Martin's predecessor. In his memoir, Prime Minister Chretien explained his less aggressive approach to same-sex marriage. “This wasn't an issue I chose to play up,” he wrote. “It is complicated, emotional, divisive, and maybe not as important as all the sound and the fury suggested, given how few gay couples actually bothered to tie the knot. For me, it was a problem best handled by the slow and steady evolution of society.”⁵⁸

⁵⁸ Jean Chretien, *My Years as Prime Minister* (Toronto: Random House of Canada, 2007) p.390.

The Liberals in the chamber gave Prime Minister Martin an enthusiastic and proud standing ovation – none more so than Mario Silva, a young gay Member of Parliament from the downtown Toronto riding of Davenport, who took the occasion of Prime Minister Martin’s speech to sit next to his leader in the seat actually reserved for the Finance Minister. Even NDP and Bloc Québécois Members of Parliament joined in the applause, while all Conservative MPs in the chamber remained seated and silent, allowing the yea side of the debate their moment of pride in their expression of principle.

As an observer from my seat in the House of Commons, a couple of things struck about this scene. First, it was very emotional to see the impact and importance that this issue had on many Members of Parliament. Whether it was Mario Silva, or openly gay NDP MP Bill Siksay championing this change in law and what it meant to their sense of social acceptance and recognition in Canadian law; or more socially conservative MPs who spoke about their firmly held views that this legislation posed unintended threats to the institutional stability of marriage and even families, there was a clear sense that this debate had consequence and a level of engagement rarely seen in Parliament. Second, it also struck me throughout the debate how seriously Members of Parliament took this issue. While words were tough, principles were deeply held, and expression often quite strident, the mood in the chamber was respectful and tense. People listened to the articulation of views they may or may not be agreeing with, while understanding that both sides represented views shared by a great many Canadians who were of honest and sincere intent.

In his address to Bill C-38, Stephen Harper gave the longest and most detailed speech of the day. You could feel the passion of someone who believed with sincerity and conviction in the arguments he was presenting to Canadians. “My position ... is not derived from personal prejudice or political tactics, as some Liberal MPs would have us believe,” he said, assuring those listening that his only motivation was the defence of “time-tested values.”

He moved quickly in his speech to criticize Paul Martin for using nationalist arguments to sell the redefinition of marriage and appeared deeply insulted by this tactic: “The greater tragedy is the greater message in his speech, that if we do not accept his particular views on this legislation, then we are not truly Canadian. That is something that this party will never accept.”

Mr. Harper then used a familiar rhetorical approach as Martin by noting the Supreme Court’s refusal to say whether the traditional definition of marriage was constitutional. He cited the court’s judgment in the *Egan* case, in 1995, when Justice Gerard La Forest wrote, “marriage is by nature heterosexual.”⁵⁹ This statement “remains the only commentary on the fundamental definition of marriage in any Supreme Court decision,” Harper said. “On this side (of the House), we do not believe that merely on the basis of lower court decisions, upheld only because the government refused to appeal them, a fundamental social institution must be abolished or irretrievably altered.” He went so far as to accuse the prime minister of wanting to legalize same-sex marriage out of a “blind, ideological interpretation of the Charter.”

⁵⁹ [1995] 2 S.C.R. 513.

Harper gave a detailed exposition of the danger that he believed recognition of same-sex marriage represented for religious authorities. “What churches, temples, synagogues and mosques fear today is not immediately the future threat of forced solemnization, but dozens of other threats to religious freedom, some of which have already begun to arrive and some of which will arrive more quickly in the wake of this bill.” He quoted an article by Catholic priest, Raymond de Souza that appeared in *First Things* a journal published by The Institute on Religion and Public Life:

“That is the worst-case scenario of state expansion. But state expansion will likely pass other milestones on its way there, eroding religious liberty on questions related to marriage. First it will be churches forced to rent out their halls and basements for a same-sex couple’s wedding reception. Then it will be religious schools not being allowed to fire a teacher in a same-sex marriage. Then it will be a hierarchical church not being allowed to discipline an errant priest or minister who performs a civilly legal but canonically illicit same-sex marriage.”

Then, Mr. Harper said: “This (legislation) may only be the beginning of a chilling effect on religious freedom for those groups and individuals who continue not to believe in same-sex marriage.”

Harper used his speech to lay out supporting arguments for his theory that it was not necessary to use the notwithstanding clause to stop same-sex marriage:

“There are several precedents of Parliament passing statues without using the

notwithstanding clause to reverse decisions made by the courts including the Supreme Court under common law and the courts have accepted these exercises of parliamentary sovereignty.” He noted that judges typically showed greater deference to laws passed by Parliament than to common-law jurisprudence. The court judgments on same-sex marriage represented a modification of the common-law definition of 1866. Mr. Harper’s argument was a gamble that if Parliament itself passed a law restricting marriage to heterosexuals, the courts would be less inclined to overturn it.

As an example, Harper mentioned Bill C-72, which Parliament passed in 1995 to reverse the Supreme Court’s *Daviault* decision allowing extreme intoxication as a criminal defense. He also noted that in 1996 Parliament passed Bill C-46, reversing the Supreme Court’s decision in *O’Connor*, which allowed the accused to have access to medical records of the victims in sexual assault cases. In a subsequent decision on this matter, the Supreme Court justices wrote:

“It does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament’s law is unconstitutional. Parliament may build on the Court’s decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court’s rulings, so the Court must respect Parliament’s [decision] ... to insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy.”⁶⁰

⁶⁰ Ibid.

“We have every reason to believe,” Harper continued in his speech, “that the Supreme Court, if it were eventually asked to rule on a new statutory definition of marriage combined with full and equal recognition of legal rights and benefits for same-sex couples, might well choose to act in a much more deferential manner toward the Canadian Parliament than lower courts showed toward ancient, British-made, common-law definitions.”⁶¹

Mr. Harper then outlined why he felt opening marriage to gays and lesbians did not constitute a fundamental right. The government’s attempt to present it as such was an “erroneous opinion and a totally specious argument,” Harper said. He went further:

“The Prime Minister cannot through grand rhetoric turn his political decision to change the definition of marriage into a basic human right, because it is not. It is simply a political judgment. It is a valid political option if one wants to argue for it; it is a mistaken one in my view, but it is only a political judgment. Same-sex marriage is not a human right. This is not my personal opinion. It is not the opinion of some legal adviser. This reality has already been recognized by such international bodies as the United Nations Commission on Human Rights.”

In 2002, the UN Human Rights Committee rejected a complaint in which it was asked to rule that New Zealand was in violation of the International Covenant

⁶¹ Mr. Harper did fail to mention that the Quebec Court of Appeal’s marriage decision, which had invalidated a measure passed by Parliament, the Federal Law-Civil Law Harmonization Act, No. 1.

on Civil and Political Rights because it refused to recognize same-sex marriage. “If same-sex marriage were a fundamental right,” Harper said, “then countries as diverse as the United Kingdom, France, Denmark and Sweden are human rights violators. These countries, largely under left-wing governments, have upheld the traditional definition of marriage while bringing in equal rights and benefits regimes for same-sex couples, precisely the policy that I and the majority of the Conservative caucus propose.”

Harper noted that the only other countries that had legalized same-sex marriage, the Netherlands and Belgium, had done so following political decisions and not judicial ones: “In other words, no national or international court, or human rights tribunal at the national or international level, has ever ruled that same-sex marriage is a human right.”

In concluding his nearly hour-long speech to Parliament, Harper linked multiculturalism with opposition to same-sex marriage when he said “New Canadians know that their cultural values are likely to come under attack if this law is passed. ... The Liberals may blather about protecting cultural minorities, but the fact is that undermining the traditional definition of marriage is an assault on multiculturalism.”

At the end of his speech, Mr. Harper moved an amendment to C-38, to trigger a second, separate vote on the marriage issue that both outlined his suggested alternative to redefining marriage (extending “civil unions” to gays and lesbians) and would cause Liberal MPs to vote against what might be seen as a compromise alternative to C-38. The language of the amendment was:

“That the motion be amended by deleting all the words after the word “that” and substituting the following: This House declines to give second reading to Bill C-38, an act respecting certain aspects of legal capacity for marriage for civil purposes, since the principle of the bill fails to define marriage as the union of one man and one woman to the exclusion of all others and fails to recognize and extend to other civil unions established under the laws of a province, the same rights, benefits and obligations as married persons.

While the motion was a sincerely held position of the Mr. Harper, it should be noted that this was not a truly substantive amendment to the legislation. It outlined reasoning for opposition to the legislation, but in no way actually attempted legislate the sentiments. It was an expression of principle, but also a political tactic to increase pressure on Liberal MPs who were considering voting for Bill C-38, to consider not merely voting against it, but voting for the expression of an alternative compromise that might be seen by their constituents as a satisfying their concerns.

By the end of that day in Parliament, the positions of the parties were clear. Paul Martin expressed his position with gusto and pride, Stephen Harper responded with energy, substance and conviction. The emotions of the issue were on display, and the political angling by the leaders was evident to observers. The next step in the process was the public debate and engagement that was unfolding, and, in the end, the vote in Parliament.

3.4 – A “FREE” VOTE AND A DECISION TO MAKE

Twice a year, every year, from the time I was first elected in November 2000 onward, our party caucus – comprised of Members of Parliament and Senators – holds a “retreat” where we consider issues, discuss our priorities, debate legislation, reflect on the success and failures of the past, and plan for the coming weeks. These retreats happen once in the middle of summer, and once either shortly before or after Christmas. The meetings are often held outside of Ottawa and in swing ridings – those electoral districts we do not represent at that moment, but in which we are very competitive. We would hold our meetings there in order to draw positive media coverage to our visiting the area, highlighting our desire represent the area, and to organize outreach events for members of caucus in the local community in the hopes of forging ties that will ultimately pay electoral dividends.

On Tuesday, January 25, 2005 our Conservative caucus met in Victoria, B.C. We had, as usual, a full itinerary, which included a discussion of Bill C-38. Vic Toews, MP from Provencher, Manitoba, a strong social conservative, and our party’s justice critic presented the topic to our caucus. Vic was first elected in 2000, as I was, but he was elected with much more political experience having been previously elected provincially to the Manitoba Legislative Assembly, and serving as Premier Filmon’s Attorney General. Vic Toews is well respected for his legal mind and his solid and reasoned conservative positions.

In his presentation to our caucus he was very matter of fact, simply outlining the substance of the legislation and its effect. He did not offer any political calculus, there was no polling data accompanying his presentation, there were no

assumptions made about the politics of voting for or against the legislation, nor was there any direct or implied pressure by our justice critic on the position one ought to take for policy, political or personal reasons. It was, to put it simply, just the facts.

Following his presentation, before any further discussion was entertained by our caucus chair, Stephen Harper spoke next. As was often the case when contentious, potentially divisive or challenging issues were considered by caucus, he would speak first. He would do so in order to frame the discussion, remind us of the broader principles that were at stake, or to warn us of the inherent dangers of taking one position or another.

In this case, his intervention was short and the purpose was clear. He began by declaring that, as promised in the election campaign, Members of Parliament will have a free vote on the legislation. Without a hint of bias to one position or another, he stated that while the matter would be a free vote for MPs to exercise and that we should have our eyes open about what kind of pressures that would come. There was a broad assumption that most Conservative MPs would be opposed to the legislation, but there was also recognition that that position would likely not be unanimous. So Mr. Harper asked simply that if any MP was planning on supporting C-38, to let him or the whip know so that they would be aware at the time of the vote in order to avoid any procedural confusion or surprises.

After outlining our approach, Stephen Harper then gave caucus members advice on communications around the subject. He said very firmly: "Canadians understand this issue and most respect differences of opinion on this issue. You (MPs) will not get in any trouble if you simply assert your position and suggest your

views are based on your personal conviction or your religious values. People will respect and understand that.” He continued, “Where you will get in trouble, is if you make any public judgments about anyone’s private sexual behaviour or about homosexuality.” Then came a warning, “I will treat very harshly anyone who makes any statement of that kind.”

Stephen Harper also made it clear to our caucus that he would not tolerate caucus members bickering in public or claiming that one who held the opposite view to their own was somehow not a “real Conservative”, anti-family, anti-equality, or any argumentative framing that would put colleagues in an awkward position of having to defend from attacks from within.

This principle about respecting the differences of opinion on this issue, and being sure not to deploy absolutist arguments that made holding an opposing view within the Conservative Party odious at best, was something Stephen Harper was always reminding us of. On March 18, 2005, at the new Conservative Party of Canada’s first convention in Montreal, in his keynote address, Stephen Harper spoke to the importance of this. In his speech he said “as your leader, if you disagree with me on these matters (abortion, same-sex marriage), I will not call you stupid or label you a threat to Canadian values. As leader, I care less about your views on these matters than whether you are prepared to respect the views of those who disagree with you.”⁶²

It was always clear that Mr. Harper was more concerned about politically damaging statements and botched expressions of opposition to same-sex marriage

⁶² Address by Stephen Harper to the Conservative Party of Canada Convention, Montreal, Quebec, Friday, March 18, 2005.

than he was for the ability of our party to tolerate disagreement on an important issue. And, his concern was well founded.

On November 28, 2003, Canadian Alliance MP Larry Spencer, a colleague of mine from Regina with whom I was first elected in the 2000 federal election, was removed from the Canadian Alliance caucus for suggesting in an interview with the *Vancouver Sun* newspaper that he would support any initiative to outlaw homosexuality in Canada.⁶³ Spencer suggested that gays conspired to recruit and seduce young boys in playgrounds and locker rooms, and that a “well-orchestrated” conspiracy has led to the recent successes in gay rights. Commenting on Prime Minister Pierre Trudeau’s decision in 1969 to legalize homosexuality, Spencer said, “I do believe it was a mistake to have legalized it.”⁶⁴

I remember reading those comments on my walk into work that Wednesday morning and feeling a great sense of anger at what Larry Spencer had said. His comments were homophobic, bigoted, and offensive. People with those views have no place in public life.

Recognizing both the intellectual banality of Spencer’s comments, and his responsibility to condemn the comments, Stephen Harper said to the media: “It is not acceptable to equate consensual homosexual activity with pedophilia... I consider it equally unacceptable to... equate legitimate social conservative debate, things like the definition of marriage, with homophobia or with all kinds of other things.” He continued: “Obviously, the statements made today are not party policy. They are not the policy of this party, and they are not going to be the policy of the

⁶³ “Gay Acts Should Be Illegal: Alliance MP,” by Peter O’Neil, *Vancouver Sun*, November 26, 2003.

⁶⁴ *Ibid.*

new party."⁶⁵ This was quite a shift from the days of the Reform Party. In his memoirs Preston Manning noted "the Reform Party was committed to upholding the freedom of its members to express their beliefs (religiously based or otherwise) about homosexuality."⁶⁶

The "new party" Harper was referring to was the Conservative Party of Canada, which was struggling to be created via a merger of the Progressive Conservative Party of Canada, and the Canadian Alliance Party. Stephen Harper was committed in 2003 not to allow nonsensical musings about homosexuality to prevent the creation of a competitive political alternative to the incumbent Liberal government, and the swift punishment he meted out to Larry Spencer was proof of this. While disagreeing on policy would be acceptable to the leadership, responsible communications and tempered public expression was of greater concern.

This was not the first time distasteful and politically damaging comments about homosexuality were the cause of party discipline, while differing positions were tolerated. In fact, an earlier experience in Stephen Harper's political career could well have proven to be a test case in how he chose to approach the issue of free votes and communications on sensitive moral issues.

In 1996 the Liberal government of Jean Chretien tabled legislation to extend anti-discrimination protection in federal laws and statutes to include gay and lesbian Canadians. The legislation, Bill C-33, caused controversy and division in the Reform Party, of which Stephen Harper was a member. Of fifty-two Reform MPs

⁶⁵ "Alliance MP Suspended Over Anti-Gay Remarks," *CTV News*, http://www.ctv.ca/CTVNews/Canada/20031128/spencer_gay031127/

⁶⁶ Preston Manning, *Think Big: My Adventures in Life and Democracy* (Toronto: McClelland & Stewart, 2002) p.106.

only one, Calgary MP Jim Silye, voted in favour of the legislation. However, the handling of the legislation from a public communications side was a political disaster. Two Reform MPs, Bob Ringma from Nanaimo and Dave Chatters from northern Alberta, made comments that were seen by most observers as insulting and homophobic.⁶⁷ In reaction to their comments, a third Reform MP, Jan Brown of Calgary, publicly rebuked her colleagues for their comments.

In response to the Ringma, Chatters and Brown public comments, Reform Party Leader Preston Manning suspended Chatters and Ringma from the caucus for their comments on homosexuality. He also suspended Jan Brown for her public critique of her two colleagues. In reaction to her suspension, Brown chose to sit as an independent and later joined the Progressive Conservative Party. Meanwhile, Silye was not punished for voting in favour of Bill C-33 while the rest of his caucus voted against. What is of note, is that Silye was not punished for voting his conscience on an issue of gay rights, while Ringma, Chatters and Brown were suspended by the leader for making a public communications mess of the issue.

Nine years later at our caucus meeting in Victoria, I remembered this chapter in our party's history. It served to remind me that while our party would allow the exercise of a free vote on the definition of marriage, that freedom to vote freely could not be confused with a license to randomly speculate or theorize on the private lives of others or of the motives of my colleagues' voting decision. Free votes meant that while one could a vote of yea or nay, it was not to be taken as a license to intellectually meander on a sensitive issue without consequences.

⁶⁷ Alan Frizzell and Jon Pammett, *The Canadian General Election of 1997*, Toronto: Dundurn Press (1997), p.116.

3.5- CONTEXT: MY PERSONAL AND POLITICAL BACKGROUND

I was born on June 10, 1976 in New Westminster, British Columbia, I am the youngest of three children, and I was raised in the city of Coquitlam. I am the son to a dentist and a teacher, and the home in which I was raised was not a religious one, and my parents were not particularly dogmatic in their political views. This was not due to a lack of education, social engagement or awareness of current events – my parents always read the daily newspapers, watched television news, voted in every election, and were always up to date on that latest happenings. My upbringing could only be described as loving, structured, middle-class, and with moral boundaries of behaviour rooted in common sense and decency, not religious teachings. My parents always described themselves as “agnostic” whenever the subject of faith was raised.

All my life I have attended public, secular schools, and all through my life my closest friends have largely been those who have not been particularly religious. All through my upbringing I have been exposed to a diversity of cultural experiences, and my friends have been of all different ethnic, religious and political backgrounds. I underline these facts of my socializing and upbringing to contextualize the kind of social or moral biases I may or may not possess in the consideration of moral and public matters.

While I was growing up, my father was, from time to time, politically active, but he certainly would not be classified as a party militant of any sort. His purpose for engagement in the political process was frustration with the centre-left

economic policies of the NDP Governments in British Columbia, but he could not be categorized a simple partisan unwilling to think for himself. Social issues rarely were discussed in a political context in the home, though I do distinctly remember my parents time and again referencing favourably the famous quote of former Prime Minister Trudeau when he asserted that “the government has no place in the bedrooms of the nation.”⁶⁸

In sum, it would be safe to categorize my parents as socially centrist or liberal, though they were not strident or demonstrative in their expression of their views. Nor were they intolerant of those with whom they may have had disagreements. I do not recall my parents at any point in my upbringing having strong views on homosexuality, either in opposition or in support of gay rights.

My first involvement with partisan politics was in the 1993 federal election – I was 17 years old and in the 11th grade. I was spurred into politics by my interest in the 1992 referendum on the Charlottetown Accord and the debates therein. After a project in a social studies class where we were instructed to summarize the Charlottetown Accord and the differences of opinion around the substance of the Accord, I developed a quick and instinctive judgment about my ideological views.

In particular, the concept of legally recognizing Quebec as a “distinct society” bothered my sense of fairness and equality; so too did the idea of aboriginal self-government in undefined terms; as well as the Accord’s guaranteed provision of one-quarter of Parliament’s seats to Quebec regardless of how the province’s

⁶⁸ John Robert Colombo, *John Robert Colombo’s Famous Lasting Words: Great Canadian Quotations* (Toronto: Douglas & McIntyre, 2000) p.424.

population may change in the future.⁶⁹ All three of these provisions struck me as unfair, imbalanced, and, in time, setting the stage for greater antagonisms within Canada.

In my studying of the Accord and the debates surrounding it, I found myself agreeing most with Preston Manning, then the leader of the Reform Party of Canada. After the Accord's defeat in the 1992 national referendum, I decided I wanted to volunteer in the next federal election for Preston Manning's party. I was a volunteer in the 1993 federal campaign, hammering in signs, and pamphleteering in the neighbourhood I grew up in. On October 25, 1993 in my community and home riding of Port Moody-Coquitlam, Reform Party of Canada candidate Sharon Hayes was elected as our Member of Parliament.

After graduating high school in 1994 I stayed active in the local Reform Party riding association, becoming vice president and attending the Party's national "assembly" in Vancouver in 1996.⁷⁰ After the 1997 federal election I was hired to work in Preston Manning's Office of the Leader of the Opposition bureau, or "OLO" as it is commonly referred to. My title was "communications advisor to the Leader of the Opposition", which was a glorified title for a junior staffer working on communications projects for the party. I learned a great deal about parliamentary procedure, policy and political realism in my job working for Preston Manning.

After eighteen months of employment in Ottawa, I returned to British Columbia, earned my Bachelor of Arts degree in political science at the University of

⁶⁹ Russell, Peter. *Constitutional Odyssey*, 2nd ed. (Toronto: University of Toronto Press, 1993)

⁷⁰ Unlike other political parties, the Reform Party eschewed the word "convention" and referred to the national meetings with the more populist "assembly" moniker to denote that we were a more grassroots oriented party.

Northern B.C. in Prince George, and chose to run for the nomination of the Canadian Alliance Party in my home riding of Port Moody-Coquitlam-Port Coquitlam, which was by then represented by a Liberal MP, Lou Sekora. Lou Sekora was elected in a by-election in March 1998 when Sharon Hayes chose to vacate her seat in Parliament in order to care for her ailing husband. Two others contested the Canadian Alliance Party nomination in 2000, but I was successful on the first round of balloting, earning 57% of the vote of party members at our nomination meeting at Port Moody Secondary School.

On November 27, 2000, at the age of 24, I was elected the MP for Port Moody-Coquitlam-Port Coquitlam in the general election. I defeated Lou Sekora by a margin of over 11,000 votes, or 49.6% for my candidacy versus 29.3% for the Liberal incumbent.⁷¹ Not at any time, in either the nomination campaign for the Canadian Alliance, or the 2000 general election campaign, did the subject of same-sex marriage surface.

3.6 – CONSERVATIVE PARTY POLICY ON SAME-SEX MARRIAGE

In the fall of 2004 and winter in early 2005, in considering how I might vote in Parliament, I had to reflect the specific policies and campaign platform on which I campaigned for office and was elected. This was my second term as a Member of Parliament, having been re-elected on June 28, 2004 as a Conservative Member of Parliament. I was first elected on November 27, 2000 as a Canadian Alliance

⁷¹ Parliament of Canada, *History of Federal Ridings Since 1867*
<http://www2.parl.gc.ca/Sites/LOP/HFER/hfer.asp?Language=E&Search=Det&Include=Y&rid=1231>

Member of Parliament. This distinction between my mandate from the 2000 election versus the 2004 election is important to understand as it had an impact on what the perceptions were of which policies and which platform I was responsible to represent in the 2005 vote on same-sex marriage. Perceptions that were held by my parliamentary colleagues, the partisan activists who helped elect me, and by many of my constituents.

The social policies of the Canadian Alliance, and its platform in the 2000 election on which I was elected, were based largely on the policies of the Reform Party of Canada. The Reform Party of Canada's policy on same-sex marriage was unambiguous. It stated: "The Reform Party believes a family should be defined as individuals related by blood, marriage or adoption. Marriage is the union of a man and a woman as recognized by the state and this definition will be used in the provision of spousal benefits for any program funded or administered by the federal government."⁷²

The Canadian Alliance platform held that in Parliament, the Canadian Alliance Party would "protect the institution of marriage as the exclusive union of one man and one woman." However, it also noted that Members of Parliament would be accorded the right to vote freely on "matters of conscience." I always found this to be curious phrasing, but it was widely understood that issues such as same-sex marriage, abortion, euthanasia and capital punishment were the issues considered to be "matters of conscience." This was a significant shift in policy from

⁷² Speech by Reform MP Eric Lowther, Parliament of Canada Hansard, 36th Parliament, 1st Session, Number 240, Tuesday, June 8, 2005.
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=hansard&mee=240&parl=36&ses=1&language=E&x=1#T1020>

the Reform Party. Whereas the Reform Party would allow MPs to vote freely only when an MP could demonstrate that he or she was deviating from party policy in order to represent his or her constituents (an objective formula for determining this was never articulated or demonstrated in the 13 years of the party's existence), a Canadian Alliance MP could vote freely based on his or her "conscience." This evolution of the usage of free votes was significant to those of us who chose to present ourselves as candidates for both the Reform Party and the Canadian Alliance and was a frequent source of conversation when issues would arise that could trigger the allowance of a free vote.

In 2004, I was elected as a Conservative Party of Canada Member of Parliament. Our policy was different from that of both the Reform Party and the Canadian Alliance. The Conservative Party Platform was entitled "Demand Better," and under the section "Demand Better Accountability," the approach to same-sex marriage was outlined as follows:

"The Conservative Party believes that Parliament, not unelected judges, should have the final say on contentious social issues like the definition of marriage. We do not support the current reference case, which will ask the Supreme Court to rule on the constitutionality of same-sex marriage legislation before it has been debated by Parliament. Since the definition of marriage had never been questioned until recent years, the Parliament of Canada has never passed legislation defining marriage.

A Conservative government led by Stephen Harper will withdraw the current marriage reference case before the Supreme Court and hold a free vote in

Parliament on the definition of marriage.”⁷³

Note the language, “a free vote in Parliament.” Not a free vote to represent one’s conscience, or a free vote only in the circumstance where one might be representing the views of ones constituents. Rather, a “free vote in Parliament,” which may or may not include those or other rationale for the decision of the Member of Parliament in the Conservative caucus. This was, in my mind, clearly a softening of the position of the party, and, an invitation for Members of Parliament to consider their positions on the issue and how they might arrive at a position taking into account the expectations and roles of an MP.

What made this evolution in policy challenging politically is that many Members of Parliament, and members of the party at-large, held to the Reform Party definition of marriage, or the Reform Party definition of when a free vote is to be exercised, or the Canadian Alliance understanding of marriage, or the Canadian Alliance understanding of when a free vote is to be exercised. For each member of the parliamentary caucus, and for each member of the party at-large, there were different assumptions about how a Member of Parliament ought to exercise this “free vote.”⁷⁴

⁷³ Conservative Party of Canada. 2004. Party Platform.

⁷⁴ Something worth noting: the 2004 Liberal Party platform, entitled “Moving Canada Forward” made no mention whatsoever of the word “marriage” or “same-sex” or “gay” or “homosexual.” This, after then Justice Minister Martin Cauchon’s 2002 white paper on the future of marriage, after multiple lower court rulings, and, in full knowledge that this issue was going to be a widely discussed issue in the 2004 campaign. While Conservatives saw this issue and their position as something to highlight and promote, the Liberals were clearly less sure about the political outcome of this issue for their party.

3.7 – POLITICAL PRESSURES AND CONSIDERATIONS

Hal Griffin is a large, loud and imposing man, and in the fall of 2004, he also happened to be the vice-president of the Canadian Alliance executive in my constituency and he provided me with my first tough test of what lay ahead for me on the same-sex marriage file in my constituency. At our monthly meeting in early December 2004, I informed Hal, and the entire board that I was undecided on how I was going to vote on the same-sex marriage issue and I asked them for their feedback on the issue.

Our riding association executive had 30 members, and I remember about 20 or so being in attendance at this particular meeting at the Coquitlam Recreation Centre. When I said to the group that my position was not yet determined and that I wanted to hear what they had to say on the matter a clear schism went through the room. On one side were those who were happy that their Member of Parliament had enquired about their views and they felt, I suspect, somewhat privileged to have such direct access to contribute their opinion to their MP face to face. On the other side were those who were shocked, and in some cases openly angry, that I was even considering supporting same-sex marriage.

Hal Griffin exhaled loudly, and with a steely glare in his eyes took direct aim at me. He was one of the longest serving members on my riding executive, and was one of the very first people I met when I joined the Reform Party during the federal election in October of 1993. He was the first person to speak and he didn't hold anything back. "James, I can't believe what I'm hearing," he said. "You're becoming just another goddamn politician and you're going against what people expect of you

and you'd better support the traditional family or I'm outta here," he said in a loud tone staring angrily in my direction. In trying to engage him on his comments I found it nearly impossible to break through what his understanding was of my role and what the community's "expectations" were of me. I told him "Hal, our party's position is to allow free votes, it is not to oppose gay marriage, it is to allow MPs to vote freely." He replied angrily, "no it's not, and it's not why I support this party and if you're telling me you're going to support homosexual marriage, I'm outta here," he thundered. The room fell silent and everyone felt awkward at what had been said. What started out as a genuine exercise to gauge the opinions of my supporters was quickly backfiring.

Trying to cool the temperature in the room I chose to let his views stand without further rebuttal and to continue on to others' comments. Greg Watrich, a married family man in his mid-thirties, who had only recently joined our riding executive, spoke next. "James, either you're for the family, or you're not. Either you understand morals or you don't. You should vote for the traditional definition of marriage," he said in a more gentle tone than had Hal.

Teressa Harwood was a long-standing member of the executive, who was involved in the local party since the 1993 campaign. She was adamantly in favour of same-sex marriage and said simply: "James, for me, this issue is about equality. Preston (Manning) was against 'distinct society for Quebec' because all Canadians are supposed to be equal, we're against affirmative action because we're supposed to be equal, and we shouldn't be against gay marriage, because we're all supposed to be treated equally."

There were others who expressed their support for the traditional definition marriage, some who supported allowing same-sex marriage, and others who didn't care which way I voted and were deferential both to me and to Parliament as they considered the issue to be inconsequential to them personally and to the community.

When I left the meeting that night, I remember having an extended conversation in the parking lot of the Recreation Centre with my father (also a member of the executive) and David Bassett, the riding association president. We talked about the comments that were made and whom else in the local party, beyond the riding executive, I should touch base with on the issue. We came up with a dozen names of people whose political temperature it was worth taking to gauge what kind of reaction I could expect if I was to vote either in favour or against same-sex marriage. One thing that was made very clear that night, however, was that this was in no way going to be easy.

When I was first elected as a Member of Parliament on November 27th, 2000, the issue of same-sex marriage was not on the agenda of any political party and was not raised as an issue in the national campaign or the local campaign in my constituency. However, when Justice Minister Martin Cauchon tabled his white paper on the future of marriage in November of 2002, there was an immediate engagement by the public on the issue like no other issue I have ever experienced in my public life. Deeply held views on the issue were quick to surface, many made instinctive judgments, the floodgates of public pressure opened, and correspondence from Canadians poured into my office. This correspondence arrived in different formats, advocated different positions, was typically inaccurate

in their substantial understanding of the issue, and often demonstrated differing expectations of what my obligations were as a representative in parliament.

Those trying to influence my position on the issue contacted me in every manner imaginable. I received hundreds of faxes, hundreds of personal and form letters, thousands of emails, postcards from organized campaigns were sent to my Ottawa and Port Moody offices, phone calls were steady, unscheduled visits to my office from concerned constituents were common, and I had requests for countless meetings from those hoping to convince me of their point of view. One of the real challenges my office faced was trying to determine which correspondence was from a constituent, and which was from outside the riding. The sheer volume made this task nearly impossible as many postcards were unsigned, many voicemails were simply a statement of opinion without contact information, and email correspondence was not accompanied by proof of residency in the constituency.

An examination of the correspondence I received shows that it was overwhelmingly opposed to same-sex marriage. In my experience, this is usually the reality of correspondence to an MP's office on any issue. Constituents rarely contact an MP to advocate *for* a change that is being proposed. To those who support a given change in policy; the very fact that a proposal for change has emerged often signals that there is already some momentum for a position they hold, and there is not much motivation sparked to engage on that issue. Correspondence is, on all issues, usually directed at opposing a change that is being proposed or contemplated rather than encouragement for a proposed change.

I received political threats from many who claimed to have supported me in the past that they would never do so again. Most of these threats of withdrawal of electoral support were in a firm tone, but on occasion the threats were quite creative and aggressive. One email read: "Dear Mr. Moore. Pack your bags. Your political career is done if you support gays marrying. Goodbye asshole." There were some threats of physical violence: "Hey Moore, watch your back. You support homosexuals, you've got an enemy in me for life." This kind of extreme threat never really bothered me and did not influence my vote. What did strike me about those who opposed same-sex marriage was just how adamant and absolute they were in their positioning – so much so that many seemed not only intolerant of those with whom they disagreed, but unable to comprehend those who did not hold their view.

Surprising to me in the process was how little was discussed amongst Members of Parliament on the issue and how people planned to vote. Unless I chose to engage a colleague in a discussion of the issue, people generally chose to keep their views to themselves and allow others to declare their position in their own way. This may have been because most Conservative MPs assumed their fellow Conservatives were going to vote against same-sex marriage, but more often than not, people respected the privacy of other to declare their voting intentions and to communicate it as best they saw fit given the pressures they were managing.

There was one exception to this rule for me, and that was when I arrived at my constituency office in December shortly before Christmas 2004 to find over 200 people protesting in front of my office. Those in my district who were opposed to same-sex marriage had noticed that I had not declared my opposition to same-sex

marriage and decided to have a rally in front of my office to pressure me to declare my position – hopefully in opposition to same-sex marriage. I later learned that a man named Travis Trost had organized the rally, which was populated almost entirely by constituents from the Chinese Christian community in my riding. Travis Trost was an employee of a fellow B.C. Conservative MP, Nina Grewal from Surrey, and he is the brother of my colleague Brad Trost, a Conservative MP from Saskatoon. I learned later that they both had approved his campaign to protest my office, and I was firm with both my colleagues that I would not tolerate any further such efforts in my riding.

This event caused me to consider a couple questions that I am sure all of my colleagues from all of the parties in Parliament considered at some point: what does my leader think of my position? What does he expect? At no point did Stephen Harper ever assume anyone in our caucus' position on this issue. At no point did he signal there would be any political punishment to stigmatization of those who did not vote as he did. This genuine openness to disagreement – properly and professionally expressed – was one of the reasons I chose to join both the Reform Party of Canada and the Conservative Party. Liberal MPs did not have the same degree of freedom of expression or to vote. In a CTV report, it was noted that “Despite talk of a free vote, when it comes down to it, (Paul) Martin has said he expects all of his cabinet ministers and parliamentary secretaries to support the bill.”⁷⁵ There were many Liberal MPs who were openly envious of our genuinely

⁷⁵ Kieron Lang, “Same-Sex Marriage: Party Battle Lines” *CTV News* (June 27, 2005) http://www.ctv.ca/servlet/ArticleNews/print/CTVNews/20050627/equalmarriage_partylines_200501215/20050627/?hub=Canada&subhub=PrintStory

free vote, and they were openly antagonistic to Prime Minister Martin. Pat O'Brien, a Liberal MP from London, Ontario said "I will use every single possible peaceful democratic tactic I can think of to defeat this legislation."

Not long after my December executive meeting, I attended one of the larger annual public events in my community, the Tri-Cities Chamber of Commerce Business Excellence Awards Gala. The room is typically filled with local politicians – current, past, and aspiring – Members of Parliament, Members of the Legislative Assembly and other assorted community and business leaders. The ballroom at the Coquitlam Inn was filled with over six hundred guests, and I expected many people approached me to share their views on same-sex marriage.

It is important to note that the "Tri-Cities" encompasses the cities of Coquitlam (population 125,000), Port Moody (population 30,000) and Port Coquitlam (population 55,000). While I represented most of the Tri-Cities, I shared roughly a third of the area with a fellow Conservative Member of Parliament, Paul Forseth at that time. Paul was first elected in 1993 as a Reformer and was, consistently, very socially conservative. Long before Bill C-38 Forseth had been an open opponent of same-sex marriage and when the legislation was drafted, he quickly declared his full opposition to the Bill. Local media, activists and community leaders expected his opposition, but in quickly rushing out to declare his opposition, the attention then turned to me and when I might declare my position on the issue.

I remember sitting at a large table at the Chamber of Commerce Dinner and a man sitting almost directly across from me broke the small talk at the table and, in a

voice purposefully loud so everyone at the table would notice, asked me aggressively, “so how are you going to vote on the marriage issue Mr. Moore?” I shot back quickly, “do you have any advice?” He replied “well, I read in the Tri-City News that my MP – Forseth – is voting against my equal right to marry, so I’m pretty pissed off with that. I hope you’re not planning on joining him,” he said.

Then, he said something that was very profound, he held up his left hand near his face exposing a wedding band on his ring finger and he said: “What’s Forseth’s plan? Does he want me to take this off now? Does he want me to take it off, or is he gonna come get it himself and take the marriage certificate I have with Craig off my living room wall too while he’s at it?” The table fell silent with both awkwardness and, truth be told, respect for a point very well made. The point he made was that, as a Member of Parliament, if you hold a position on an issue based on principle, ideology, or even one based on some wave of quantifiable popular mandate; you have an obligation to be clear about how that policy would actually be implemented. Put more simply, if one is going to be opposed to same-sex marriage, that’s fine. However, as a legislator from the Province of British Columbia, where same-sex marriage was made legally permissible by a B.C. Court of Appeal decision on July 8, 2003, how would you plan to address, in practical terms, the reality of thousands of gay and lesbian British Columbians – many of whom might be constituents – who are now married? As a Member of the national legislature, Paul Forseth, myself, and all MPs had an obligation to not only speak in loose terms about “equality” or “family” or “traditional marriage” without also doing the practical examination of what a vote either for or against Bill C-38 might mean for our

constituents and their established legal rights. It is simple and easy to make broad statements, but legislators also have an obligation to address the practical questions of how their beliefs might be realized, and what the consequences therein might be.

Sadly, this dynamic of established marriage rights for gay and lesbian Canadians in some Provinces being contradicted by the federal Parliament was never a source of debate or even conversation for my colleagues. However, for me, it emerged as a central obstacle to me voting against Bill C-38.

The B.C. Court of Appeal ruling in *Barbeau v. British Columbia* was clear and unequivocal in its language. The ruling notes:

"The Court declared that the common law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" constituted a common law bar to same-sex marriage and was of no force or effect on the basis that it violated s.15 of the *Canadian Charter of Rights and Freedoms* and could not be saved under s. 1.

In these circumstances, the Court is satisfied that it is appropriate to amend the order in these appeals to lift the suspension of remedies, with the result that the declaratory relief and the reformulation of the common law definition of marriage as "the lawful union of two persons to the exclusion of all others" will take immediate effect.⁷⁶

After this ruling, many of my constituents who were gay or lesbian decided to get married and had done so with the expectation that this right, once established,

⁷⁶ *BarBeau v. British Columbia*, 2003 BCCA 406 (CanLII)
<http://www.canlii.org/en/bc/bcca/doc/2003/2003bcc406/2003bcc406.html>

would never be reversed. The B.C. courts had ruled, the B.C. Government had signaled it would not in any way oppose the new extension of marriage rights to same-sex couples, and people had moved forward with their lives. In fact, according to the Vital Statistics Agency of the Government of British Columbia, 1470 males and females were married in same-sex marriages in B.C. in 2003.⁷⁷

So what were those MPs from B.C. who were opposed to same-sex marriage suggesting? The B.C. Court of Appeal was wrong? If so, on what basis? And, further, what would the legal consequences be of the federal Parliament voting against re-defining marriage in 2004 federally, when the B.C. courts had so clearly ruled in 2003 in favour of same-sex marriage, resulting in 1470 of our constituents getting married as a result? I kept thinking to myself “where is the responsibility?” Where was the responsibility of those who were so stridently opposed to same-sex marriage, to actually explain how their vote would practically impact the reality for their constituents. It is one thing to posture and glorify oneself as a “defender of the family,” but if there wasn’t equal measure given to a practical implementation of the rhetoric, it was all just for show I thought to myself. In thinking about this, I remember quoting often the fictional character of Francis Urquhart of the BBC series “House of Cards,” when he said slyly in one episode: “If you will the ends, you must will the means.”

I remember time and again asking colleagues from British Columbia how they saw their vote in opposition to a court decision in British Columbia was a practical thing to do, and I never received a satisfactory answer. I remember time

⁷⁷ Marriage Statistics, Vital Statistics Agency of the Government of B.C., p.129.
<http://www.vs.gov.bc.ca/stats/annual/2003/pdf/marriages.pdf>

and again shaking my head at the incoherence of colleagues in their understanding of what a vote in opposition to an established B.C. Court of Appeal ruling would mean symbolically to their constituents who were gay or lesbian. I remember asking an experienced MP from my party why he thought he was right and the unanimous ruling of the B.C. Court of Appeal was wrong, and he replied simply, "I'm not a judge or a lawyer, my job is to represent my constituents and this is what they're telling me to do." I thought to myself "telling you to do?" On what basis? Through what process? Was there some objective data collection process of constituent views that took place that I don't know about and is a mystery to all inquiring minds?

It was abundantly clear to me, in conversation after conversation, that MPs were unaware of the larger dynamic in which they were casting their vote in Parliament. To the vast majority of them, a vote on same-sex marriage was simply casting a value judgment on the issue of same-sex marriage, not a substantive contribution to the debate on the subject of marriage, or on Parliament's role within the expansion of equality rights to citizens through a tangled legislative and judicial process. They knew what they knew to be right on the subject of the definition of marriage and homosexuality, and they were ready to cast their votes. It was as simple as that, and there was no discussion of the more complex issues at stake either within our caucus or within the Parliament of Canada as a whole.

This, to me, was a learning experience in the application of free votes and a consequence of free votes that is rarely, if ever, discussed: free votes isolate Members of Parliament from one another. Conversations take place informally,

pressures can emerge from social cliques within social circles of parliamentarians, but ultimately a free vote is cast by a private member and the political consequences are largely local. “Do what you have to do to keep peace back home,” was the advice of a colleague of mine who had been through this process before. MPs would sometimes ask one another how they planned to vote and why, what people back home thought, and how we thought others might vote or what the final numbers might be on the third reading vote of the legislation. But the conversations were almost uniquely political, which is to say a curiosity of the immediate political impact of voting one way or another and how others may take advantage of certain voting choices in different regions of the country. To say the conversations were substantively unsophisticated would be an understatement.

Politics was another consideration that is never overlooked by a representative. I remember a conversation with my colleague Monte Solberg, a Reform turned Canadian Alliance MP from Medicine Hat, Alberta, when we discussed the heat associated with peoples’ views on the issue. “The thing you need to remember,” he counseled me “is that people who are *really* supportive of gay marriage won’t vote for you. But those who are *really* against gay marriage all voted for you. You need to remember that and what voting for gay marriage will mean for your re-election, your nomination and the kind of headaches you want to create for yourself,” he said. “Just keep asking yourself: is it worth it.”

In a purely Machiavellian context, Monte was mostly right on all his points. In supporting same-sex marriage, as I learned at my local Conservative executive meeting, those who had supported me and the party longest were those who would

react most aggressively against such a position. Whereas those who were most assertively in favour of same-sex marriage, were mostly people for whom voting Conservative would never be a possibility.

While I understood and agreed with Monte's assessment of the fallout, it was, to me, not an argument that carried much weight. All through the process of considering how I was going to vote, personal political calculations were a very minor factor. This wasn't true of all MPs, in fact I remember a conversation with a colleague from Saskatchewan who said bluntly, "James, if I don't vote against gay marriage, I'll get killed back home, I won't get the (party) nomination."

For many Members of Parliament, they represent ridings that are strongholds that only on the rarest of occasions are tight contests in the general election. For those Members of Parliament the calculus in considering a vote on a contentious issue like same-sex marriage isn't what is in Canada's interest, or what is in their province's interest, or necessarily what is in their constituents' interest, or what the right policy position overall might be; but rather, how party members in their riding will react, for it is the party membership that will determine if they will be the party's nominee, which is to say, if they will be easily elected in a subsequent campaign.

This pressure of making sure you are on the side of the members of the party in your constituency first and foremost was very much a preoccupation of some Conservative MPs in the consideration of same-sex marriage. The new Conservative Party had only recently been formed, and many MPs were having a difficult time bringing together those who were previously members of the Reform/Canadian

Alliance and Progressive Conservative parties. Many Conservative MPs saw themselves as peacemakers in their districts and, for them, same-sex marriage was an issue that was simply not worth the hassle of causing a division back in their ridings.

In my constituency, this was never a concern of mine. The PC Party of Canada was defeated in my riding in 1988 when the NDP swept most PC MPs out of office in the province in that election when British Columbians overwhelmingly opposed the expansion of free trade with the United States. My district association was dominated by activists – like me – who had a history in the Reform Party. My riding elected a Reform MP in 1993 and 1997, and a Canadian Alliance MP in 2000, while the PC Party finished in fourth place in all three elections.

In other parts of the country, however, the need to build a new healthy local party organization was a great challenge because of the parity of strength of the two parties, and, therefore, the threat that the incumbent Member of Parliament might be without his supporters and powerbase within the new party. Same-sex marriage for those MPs, therefore, became a possible landmine to avoid in order to keep the local dynamic at peace and to avoid inspiring a challenger for the party nomination in the next election.

It was against this backdrop of strong local opinions, divided activists in my constituency, tacit pressure from caucus colleagues through their staff, correspondence from my electors and from across Canada, the political considerations of the health of my local association and the views of my leader, as

well as my own biases and instincts that framed the vote I was to cast in Parliament on same-sex marriage.

3.8 – MY VOTE AND WHY

Back in 1992, when I was in the eleventh grade, and as part of a social studies project, we were asked to study, summarize and develop an opinion of the Charlottetown Accord, it was my first substantive engagement in understanding constitutions, and, the Canadian debates around how we ought to organize ourselves collectively. As mentioned above, after learning about some of the elements of the Charlottetown Accord, I became ideologically self-aware. The proposals in the Charlottetown Accord to legally recognize some Canadians as a “distinct society”, the interpretation of which would be made by the Supreme Court, and the idea that Canadians would not be considered equal under the law in such interpretations, has always struck me as being incongruent with the principle of equality under the law, and therefore unjust. So, too, was the proposal to guarantee Quebec one-quarter of the seats in Parliament, regardless of whether or not Quebec constituted one-quarter of Canada’s population, struck me as being another affront to an important value in democratic institutions: equality of representation.

It was the public position of the Reform Party in the 1992 referendum on the Charlottetown Accord that drew me to support that party. In fact, I remember standing along Barnett Highway in Port Moody holding a sign in the 1993 election that read “Equality, Not Distinct Society”. My view was then, and remains today, that all Canadians must be treated equally under the law. However, over time, I

came to learn that my more absolute view equal status under the law was not shared by all of my colleagues, or, at least was not understood in the same way. In his autobiography, Preston Manning explained his views on equality and homosexuality this way: “The Reform Party was committed to the principle of the equal treatment of all Canadians in law, regardless of their personal characteristics, and we opposed discrimination against homosexuals. But we also felt that basing entitlement to protection from discrimination on personal characteristics like sexual orientation was unwise and itself discriminatory.”⁷⁸ Simply put, with regard to same-sex marriage, I profoundly disagreed with this definition of equality and this understanding of homosexuality.

After a great deal of soul-searching, study and reflection, I made my up my mind that I was going to vote in favour of Bill C-38. I informed my constituents via an open letter that I posed on my website, mailed to my supporters, circulated in my quarterly newsletter, and published my two community newspapers. Above all of the considerations that impinged on my decision to vote in favour of Bill C-38, the most important factor was my long-standing personal commitment to legal equality. However, I was also aware that, as an MP, I was involved in a dialogue with Canadian courts over the definition of Charter rights. As the letter makes clear, the courts’ decisions on same-sex marriage and the constitutional division of federal-provincial powers made it impossible for the federal government to undo the same-sex marriages already completed, legislate civil unions, or simply allow churches to define marriage without resorting to the extreme measure of invoking the

⁷⁸ Preston Manning, *Think Big: My Adventures in Life and Democracy* (Toronto: McClelland & Stewart, 2002) p.106.

notwithstanding clause. In the context of these constitutional restrictions and the positions taken by Canadian courts, I felt that my commitment to legal equality would be best expressed by voting in favour of Bill C-38. The letter is as follows:

Dear Constituents,

Since I was first elected on Nov.27th/2000, there has not been a single issue that I have studied more, nor wrestled with more intensely than same-sex marriage and the principles inherent in the debate. I have read just about everything that can be read on the subject, from Andrew Sullivan to William Bennett, to all of Canada's court decisions, to the debates in the U.S. on the 'Defense of Marriage Act', to Jonathan Rauch, Focus on the Family, the Family Research Council, the Canada Family Action Coalition, Andrew Coyne, REAL Women, Margaret Sommerville, Christopher Hitchens, Robert Bork and all thinkers in between. More than Iraq, the ethic of pre-emptive war and the Kyoto Accord, same-sex marriage is an issue that I have wrestled with greatly for some time, taking into account all constitutional, legal, political, philosophical, practical and ethical considerations from the perspective of my role as a Member of Parliament, a representative and a Canadian who holds conservative values.

This purpose of this first paragraph was to let constituents know that I took this issue seriously, that I arrived at my decision after great reflection, and that I made a genuine effort to consider all arguments. I also wanted to make sure that

readers understood how seriously and that this issue ranked highly on the list of the more contentious contemporary issues with which Parliament has dealt. The final sentence was phrased in such a way to try to reassure those who voted for me, that, yes, I was indeed a conservative Member of Parliament, and that I was not walking away from ideals that I had always held and strived to represent.

In an ideal world, the federal government would not be in the marriage business at all. What would be established would be registered domestic partnerships or civil unions for all Canadians, and the word 'marriage' would be fenced off from politics and left in the hands of religious institutions. However, Canada's constitution mandates that the federal government define the word 'marriage', and that definition must respect the Charter principle that all Canadians must be treated equally under the law. In a perfect world, the two principles of equality and respecting the origins of the word 'marriage' would be met with registered domestic partnerships or civil unions for all couples. However, this compromise is not possible given Canada's current legal framework.

My object here was to try to inform constituents who wished there would be a compromise that, in this case, the only compromise that was publicly mused about, was simply not possible. Canadians, perhaps to a fault, strive for compromise and avoidance of conflict. On this issue, there was simply no compromise – one has to be either in favour of, or opposed to, redefining the legal interpretation of “marriage”.

This leads us to today's debate. In seven of Canada's thirteen provincial or territorial jurisdictions same-sex couples have the right to marry. In fact, here in British Columbia, thousands of gays and lesbians have wed. The Supreme Court ruling on the same-sex marriage legislation noted that the Charter of Rights and Freedoms protects religious institutions from having to perform same-sex unions if they don't want to. It ruled that in Canada there is a separation between church and state in order to protect churches from the state. This is a positive development. On the question of the definition of marriage, the court ruled that Parliament must decide how it is to be defined. However, and this point must be noted, if the House of Commons votes 308 to 0 AGAINST same-sex marriage, gays and lesbians in the province of British Columbia would still have the right to marry. Legally, in British Columbia, the right to marriage for gays and lesbians, whether one likes it or not, is a closed legal question. The equality right to marriage for same-sex and opposite-sex couples is a right in British Columbia that can only be taken away by invoking the notwithstanding clause, or amending the Constitution. Polls have consistently shown that Canadians overwhelmingly do not support either such action.

Like the previous paragraph, this too was an attempt to inform the public of what was legally accurate. As I have mentioned above, I was frustrated throughout much of the public debate surrounding same-sex marriage that the practical

questions surrounding this issue were seldom discussed even though they were central to the consequences of the actual vote. This was also my attempt to cool the anger of those whom were going to be angry by what they were to read in the subsequent paragraphs. My goal was to let them know that, regardless of the vote, this same-sex marriage was an established legal fact, and, that they needed to appreciate that this was not going to change.

So where does that leave me? I will work aggressively in Parliament, and with Canada's provincial Attorneys General, to ensure that Canada has clear laws to protect religious freedoms. Protections for both the right of religious institutions not to perform marriages if they choose not to, and the right of Justices of the Peace and Marriage Commissioners to not perform same-sex marriages if they choose not to by ensuring their freedom of conscience must be enshrined in law, not merely assumed to be protected by the Charter. While we extend tolerance to gays and lesbians, I fear we are not being as aggressive in extending the same ethic of tolerance to Canadians of faith who might choose, in good faith, to conscientiously object to same-sex marriage. Stephen Harper has been leading the way in outlining these concerns, and I agree completely with his efforts to force an amendment to the government's legislation to protect religious freedom.

This section represented my effort to try to assuage the fears that did exist around the questions of religious freedom and tolerance. Even after the Supreme

Court reference these concerns did exist and were ultimately acknowledged by the Liberal government when they amended the legislation to include a specific protection for religious freedom. While Irwin Cotler believed the Supreme Court reference's affirmation of the Charter protections for religious freedom were adequate, I did not. I met with Minister Cotler on two occasions and pleaded with him to add a specific amendment to the government legislation as a sign that the government and Parliament were speaking clearly on the issue of religious freedom. It was also important, I felt, that this was going to be within the context of the marriage legislation that was voted on and adopted by the legislature, and not merely affirmed by the judiciary.

After I wrote this open letter, I wrote to each of Canada's thirteen provincial and territorial Attorneys General to enquire how they planned to take action to address the fears that existed across Canada on this aspect of the change of federal law. I followed up the letter with a phone call to each of them and had mixed reactions about my inquiry and mixed satisfaction on the protections each jurisdiction was offering.

In short, I believe in equality under the law for all Canadians for civil marriages, which in a perfect world would be termed civil unions. And I also believe strongly in the separation of church and state in order to protect the rights of religious institutions and people of faith from having to embrace or perform same-sex marriages if they choose not to. As a result, I plan to vote in favour of equal access to civil marriage for all

Canadians.

Sincerely,

James Moore, MP

Port Moody-Westwood-Port Coquitlam

Reaction to my stated position came in very quickly from my long-time supporters who were not pleased with my decision. Tom Baker is a constituent from Port Coquitlam whom I first met when I was seeking the Canadian Alliance nomination in the fall of 2000. He is a kind, mild-mannered gentleman who supported me from the very beginning of my political career. He never had but good things to say in support of me. The same day my letter was published Tom called me and said: "James, I like you and I've always supported you, but I just can't anymore at this point." He was soft spoken, but firm. His voice sounded of hurt and sadness, sadness that I had somehow lost my way or that I was becoming just another politician who can't be counted on. Tom told me he was resigning from my local executive and he asked that I no longer contact him and he told me that I can no longer count on his support "in any way."

In a short and angry email, Hal Griffin, who had been my riding vice-president, wrote: "I'm done with Moore, I'm off the board, don't contact me anymore. His support of homosexual marriage is a disgrace." I chose not to contact Hal as it would only make matters worse and there was clearly no hope of changing his

opinion. He was the second person on my thirty-member executive to resign.

One afternoon I was at my desk in my Port Moody office when my assistant Eva Staley walked in and said "There's a call for you on line one. It is Sharon Hayes." I remember thinking to myself "this is going to be interesting" as I reached for the phone. Sharon Hayes was a Reform MP and my predecessor with a still significant following in my riding even though she lived at that moment in south Surrey. After some quick pleasantries, Sharon cut straight to the point, "how can you support homosexual marriage? It's not what the community believes and it's not what your supporters expect," she said. Sharon was always a staunch social conservative. When she served as an MP from 1993 to 1997 in the Reform Party caucus, she was appointed the chair of the "family caucus" by Preston Manning.⁷⁹ Her reputation with religious and social conservatives was solid and influential within my riding association.

I responded to her by saying "Sharon, I respect your position, but we just don't agree, my mind is made up." Unimpressed she sighed and said "James, I've supported you, but this is just wrong. I'm very disappointed in you. I don't think your representing the area that I knew as the MP before you, and I don't think you'll get re-elected." In my heart, I knew she was wrong. In time, she was proven wrong. That said, it was still very uncomfortable to have the person for whom I worked on my first two elections confront me in this way. Sharon and I were close, I helped elected Sharon Hayes in 1993 and again in 1997 when she sought re-election. I served as one of her lead campaign organizers and worked full time on her re-

⁷⁹ Preston Manning, *Think Big: My Adventures in Life and Democracy* (Toronto: McClelland & Stewart, 2002) p.108.

election in very difficult circumstances.⁸⁰

Shortly thereafter my riding president informed me that Greg Watrich had resigned from the executive as well, becoming the third person to do so as a result of my decision to support same-sex marriage. In December 2005, Watrich ran as an independent in the federal election in my riding on the issue of same-sex marriage. In an interview with the Vancouver Sun, Watrich said he was still a support of the Conservative Party and of Stephen Harper, but he wanted to teach me a lesson because, as Watrich said “There is a strong Conservative base here who feels they’ve been betrayed by James Moore.” He added “James Moore is voting with the Liberals already. So whether James Moore gets in or a Liberal, there’s nothing to lose.”⁸¹

On Tuesday, June 28, 2005, the House of Commons held the Third Reading Vote on Bill C-38, The Civil Marriage Act. The House of Commons was tense and every MP was paying attention to every vote, wondering how everyone else was voting and keeping score of all the yeas and nays. I sat in the front row in the Official Opposition, two seats to the right of Stephen Harper, and when my turn to vote came, I stood to the applause of most Liberal MPs, some member of the public gallery, and, to my surprise, Stephen Harper. I remember looking to my left and seeing him applaud out of respect for the decision I had made, even though he was personally in disagreement. At no time before or after the vote did he directly ask me for my reasoning or encourage me to vote along with his position. This was a

⁸⁰ A few days before the beginning of the June 1997 federal election, Sharon’s husband Doug had a heart attack and a stroke within a 24-hour period and was in intensive care. Due to his poor health Sharon did not campaign but for a few hours once or twice in the 36 day campaign. The circumstances were emotional and difficult to manage.

⁸¹ Vancouver Sun, “Independent Running on Same-Sex Marriage Issue”, December 21, 2005. <http://www.canada.com/vancouversun/news/story.html?id=ccef4240-3f14-4c89-9658-f44d906b456a>

true free vote from his influence and pressure, and respected my choice.

In the end, 3 other Conservative MPs, Jim Prentice from Calgary, Gerald Keddy from Nova Scotia, and Belinda Stronach from Newmarket-Aurora, joined me in voting in favour of C-38.⁸² When the voting was done, the clerk read the results aloud, “Yeas/Pour: 158. Nays/Contre: 133,” and Peter Miliken, the Speaker of the House of Commons, rose in his chair and said “I declare the motion carried.” A big cheer erupted on the Liberal, Bloc Quebecois and NDP caucuses and in the galleries of Parliament. Meanwhile, most Conservative MPs sat in either silence, or walked out in disgust at what had just happened. I sat quietly and just watched the whole scene. Some of my Conservative colleagues shot dirty looks my way, and one colleague, a fellow British Columbian, Darrell Stinson walked past me shaking his head and said simply “you fucked up on that one kid. Good luck in the next one (election).”

I knew the coming weeks and months were going to have their challenges, three of my board members had resigned over my vote, my predecessor was openly condemning me, some of my caucus colleagues were upset, and one of my former board members announced he going to run against me in the next election as an independent candidate to defeat me because of my vote for C-38. But on that night, I knew without hesitation that my position was just, thought out, honestly communicated, and was the right thing to do. Consequences would surely come, but I knew I had exercised my vote responsibly and to this day I have absolutely no

⁸² Parliament of Canada Hansard, 38th Parliament, 1st Session, Tuesday, June 28, 2005. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=hansard&mee=124&parl=38&ses=1&language=E>

regrets.

4.1 – CONCLUSION: THE DIALOGUE

As demonstrated by the contemporary example of same-sex marriage, the establishment of the *Charter*, the debates surrounding its development, the implementation of the *Charter*, the shifting politics since 1985, the emergence of judicial review as a force for social and legal change, and the reaction of legislatures and the public to the establishment or defining of rights in this era of *Charter* policy making and dialoguing between branches of government, Canada has forever changed. The coming to fruition of equal rights for gays and lesbians provides us with a clear example of this delicate dance between Canada's courts and legislatures in serving the public interest, protecting rights, and respecting the need for a responsible "dialogue" between institutions.

Based on my personal experience as a Member of Parliament it is clear to me that the dynamic of a dialogue between courts, legislatures and Canadians is robust and is having a significant impact on public policy in Canada. What is equally clear to me, is that many of those in the legislature are either unaware or uninterested in this changing fact of Canadian policy making. This is particularly troubling given the power MPs have when voting in the House of Commons on an issue of equality rights in the House of Commons in a free vote – as was the case in the issue of same-sex marriage.

In the introduction to his November 2002 discussion paper entitled "Marriage and Legal Recognition of Same-Sex Unions," then Justice Minister Martin Cauchon wrote "The court challenges show that marriage has a continuing value to both those seeking to maintain the opposite-sex requirement and those in the gay

and lesbian community who are seeking to marry. The Government of Canada believes that Parliament is the best place to debate how we as a society should address this question.” By the time of the spring 2005 parliamentary vote on Bill C-38 had arrived, this statement was exposed for its over-simplicity in understanding the struggle MPs faced in considering their votes on this rights issue.

As I outlined in chapter three, the Conservative Party of Canada and its caucus membership had an evolved policy on free votes that lead to differing perceptions on the role of an MP in the “free vote” construct. The pressures I faced as an MP were enormous, and all future Members of Parliament would do very well to study this case to glean an appreciation for what will likely be an increasingly common sight in legislatures across Canada: votes, sometimes free, on *Charter* issues that are riddled with complexities both legal and political.

The Liberal Party of Canada had a quasi “free vote” on C-38, where backbench MPs were allowed to vote freely, while Cabinet Ministers and Parliamentary Secretaries were forced to vote along with the Prime Minister. This policy lead to then-Cabinet Minister Joe Comuzzi of Thunder Bay to quit the Liberal Cabinet so he could vote freely against his Government’s legislation.⁸³ Comuzzi later crossed the floor and served as a colleague of mine in the Conservative Party of Canada caucus. Another Liberal Cabinet Minister who was opposed to same-sex marriage – John Efford, the Natural Resources Minister of the day – chose to abstain from the vote rather than cross his leadership.⁸⁴

⁸³ “Comuzzi quits cabinet over same-sex bill,” *CBC News* (June 28, 2005)
<http://www.cbc.ca/canada/story/2005/06/28/comizzi-quit050628.html>

⁸⁴ *Ibid*

Ultimately the Liberal parliamentary management of the file was quite ham-handed and resulted in what successful leaders do their utmost to try to avoid: a split in the parliamentary caucus. Their struggles in their approach to this issue, even though it was at their initiative and timing, also stands as evidence of an area of representative democracy in the *Charter* era that continues to be inadequately understood, commonly misconstrued, and still a source of great political strife.

As testament to this last point, consider the New Democratic Party and their choice to force all their MPs to vote in favour of Bill C-38 regardless of their personal views, constituent pressures, or political calculus – either locally or nationally. For Churchill, Manitoba NDP MP Bev Desjarlais, who was opposed to same-sex marriage and Bill C-38, she was forced to choose between her conscience and her membership in the NDP caucus. She chose to vote against her leaders' wishes, she opposed the legislation, and was ejected from the NDP caucus.⁸⁵

The point here is that while the “dialogue” between Canada’s courts and legislatures has been well examined, and continues to be a source of debate and evolution with each decision, each reference, each review, and each vote in each of Canada’s legislatures, there is also a “dialogue” within the legislative side of the equation. Based on my personal experience with the legislation on same-sex marriage serves as a reminder that there remains much learning to be done yet by the political/legislative branch of governance in how *Charter* issues are addressed by Parliament in general, and managed by individual MPs in particular.

The tug-o-war that we have been witness to in this debate forces us to

⁸⁵ Paul Samyn, "Vote puts NDP MP in leader's bad books", *Winnipeg Free Press*, 30 June 2005, A3.

consider the rights of citizens and how they might best be guarded. The often indelicate, sometimes ungraceful, occasionally inspired results of the dialogue between courts and legislatures in Canada is still in its infancy. The challenging questions related to the role and responsibility of both the courts and legislatures in serving the public interest will continue to stir significant debate, ongoing examination and, one hopes, a deeper appreciation of the balance of interests and powers in protecting the rights of Canadians.

It is my hope that this thesis will contribute a valued perspective on an area of academic study that will continue to grow in importance with each passing Parliament. The new *Charter* politics is a challenge we must examine with increasing intensity so as to assure effective governance, accountability, and proper balancing of the rights of all Canadians within our representative and deliberative institutions.

BIBLIOGRAPHY

Abbott, Elizabeth. *A History of Marriage* (Toronto: Penguin Canada, YEAR) p.365.

Alberta Law Reform Institute, *Recognition of rights and obligations in same sex relationships*. (January 2002) (Research Paper no.21) [Call no.KEA458.3.G39 R42 2002]

Bailey, Martha. "Regulation of Cohabitation and Marriage in Canada." *Law & Policy*. 26(1): 153-175, 2004.

British Columbia Law Institute. *Report on Recognition of Spousal and Family Status*. British Columbia Law Institute, Vancouver, 1998.

Boyd, Susan and Claire F.L. Young. "From Same-Sex to No Sex?: Trends Towards Recognition of (Same-Sex) Relationships in Canada." *Law and Sexuality*, 1(3): 757-793. 2003.

Bussey, Barry, Seventh-Day Adventist Church, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 18 February 2003.

Canada. Department of Justice. *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*, 1986.

Canada, Department of Justice, *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*. <http://dsp-psd.pwgsc.gc.ca/Collection/J2-189-2002E.pdf>

Canada. Department of Justice. "Reference to the Supreme Court of Canada," *Backgrounders*, Ottawa, 17 July 2003.

Canada. Parliament. House of Commons. Sub-Committee on Equality Rights. *Equality for All: Report of the Parliamentary Committee on Equality Rights*. 1985.

Canadian Bar Association, Submission to the Legislative Committee on Bill C-38, June 2005.

Chambers, David. "Couples: Marriage, Civil Union, and Domestic Partnership" in *Creating Change: Sexuality, Public Policy, and Civil Rights* (New York: St. Martin's Press, 2002).

Cere, Daniel and Douglas Farrow, *Divorcing Marriage* (Montreal: McGill-Queen's University Press, 2005).

Cohen, Joanne, Coalition of Canadian Liberal Rabbis, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 18 February 2003.

Colombo, John Robert , *John Robert Colombo's Famous Lasting Words: Great Canadian Quotations* (Toronto: Douglas & McIntyre, 2000).

Cossman, Brenda, Osgoode Hall Law School, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 10 April 2003.

Cotler, Irwin, "Marriage in Canada – Evolution or Revolution?" *Family Court Review*, Vol. 44, No. 1, January 2006. p.63.

Criminal Law Amendment Act, S.C. 1968-69, c. 38, s. 7.

DeCoste, F.C., "The *Halpern* Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law" in *Alberta Law Review* 41.2 (2003): 619.

de Souza, Raymond J. "Thinly Disguised Totalitarianism." *First Things*, April: 9-11. 2004.

Dunbar v. Government of the Yukon Territory, 2004 YKSC 54 (Yukon Territory Supreme Court, July 14, 2004),
<http://www.samesexmarriage.ca/docs/yukon140704.pdf>

EGALE Canada/CEM, Submissions to the Legislative Committee on Bill C-38.

EGALE Canada Inc. v. Canada (Attorney General) (also styled *Barbeau v. British Columbia (Attorney General)*), 2003 BCCA 251, 13 B.C.L.R. 4th 1, 225 D.L.R. (4th) 472, [2003] 7 W.W.R. 22 (B.C. Ct.App., May 1, 2003),
http://www.samesexmarriage.ca/legal/bc_case/Decision.htm

Eskridge, William, Yale University, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 12 February 2003.

Fisher, John, EGALÉ Canada, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 4 February 2003.

C.E.S. Franks, *Free Votes in the House of Commons: A Problematic Reform*, Policy Options (November 1997).

Fry, C.L. *New Methods for Old Research* (Boston: Bergin and Garvey, 1986), p.2.

Glass, Christy M. G. and Nancy Kubasek, "The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights," *Michigan Journal of Gender & Law*, 15:143-204 (2008).

Grey, Julius, "Equality Rights Versus the Right to Marriage: Toward the Path of Canadian Compromise" in *Policy Options* (Oct. 2003): 33.

Halpern v. Attorney General, Docket C39172 (Ontario Court of Appeal, June 10, 2003), opinion on Court website,
<http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>

Halpern v. Canada (Attorney General), 215 D.L.R. (4th) 223, 60 O.R. (3d) 321, (Ontario Divisional Court, July 12, 2002),
<http://www.canlii.org/en/on/onscdc/doc/2002/2002canlii42749/2002canlii42749.html>

Hiebert, Janet L. "From Equality Rights to Same-Sex Marriage – Parliament and the Courts in the Age of the Charter." *Policy Options*, Vol. 24 (2003).

Hiebert, Janet L., *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's, 2002), p.163.

Hogg, Peter. "Canada: the Constitution and Same-Sex Marriage." *International Journal of Constitutional Law*, 4:712-721 (2006).

Hogg, Peter, "A Comparison of the Bill of Rights and the Charter," *The Canadian Charter of Rights and Freedoms: Commentary*, (Carswell, Toronto, 1982) p.11.

Hyde v. Hyde and Woodmansee (1866), L.R. 1 P.D. 130 at 133 .

Katz, Leslie, "The Scope of the Federal Legislative Authority in Relation to Marriage," *Ottawa Law Review*, Vol. 7 (1975).

Kinsman, Gary, "challenging Canadian and queer nationalisms." In Terry Goldie, ed. *in a queer country: Gay and Lesbian Studies in the Canadian Context*. Vancouver: Arsenal Pulp Press (2001).

Krause, Harry, "Marriage for the New Millennium: Heterosexual, Same-Sex – or Not At All?" in *Family Law Quarterly* 34 (2000).

Lahey, Kathleen and Kevin Alderson *Same-Sex Marriage: The Personal and the Political*. Toronto: Insomniac Press (2004).

Law Commission of Canada. *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*. Law Commission of Canada, Ottawa (2001).

Layland v. Ontario (Minister of Consumer and Commercial Relations) (1993), 14 O.R. (3d) 658 (Div. Ct.).

Le Bourdain, Céline, "The Changing Face of Conjugal Relationships." *Canadian Social Trends*, Spring (2000).

Mitchell, Lois, Canadian Baptist Ministries, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 8 April 2003.

Monahan, Patrick, "The Supreme Court of Canada in the Twenty-First Century," *Canadian Bar Review*. Vol. 80, 374-398 (2001).

Monahan, Patrick, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987).

Morton, F.L. and Rainer Knopff, eds. *The Charter Revolution and the Court Party*. Broadview Press, Peterborough, ON (2000).

Nathanson, Paul, McGill University, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 20 February 2003.

Parkin, Andrew, "A Country Evenly Divided on Gay Marriage." *Policy Options*. October: 39-41 (2003).

Petersen, Cynthia, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 11 April 2003.

Rauch, Jonathan, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America.* New York: Times Books (2004).

Rayside, David, "The Structuring of Sexual Minority Activist Opportunities in the Political Mainstream: Britain, Canada, and the United States." In Mark Blasius, ed. *Sexual Identities, Queer Politics*. Princeton: Princeton University Press (2001).

Roberts, Rev. Meg, Unitarian Church of Montreal, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 20 February 2003.

Ross, Becki L., *The House That Jill Built: A Lesbian Nation in Formation*. Toronto: University of Toronto Press (1995).

Ross, Ruth, Executive Director, Christian Legal Fellowship, Brief to the Legislative Committee on Bill C-38, 18 May 2005.

Ryder, Bruce, "Becoming Spouses: The Rights of Lesbian and Gay Couples," in *Family Law: Roles, Fairness and Equality*, Special Lectures of the Law Society of Upper Canada, Carswell, Toronto (1993).

Sigurdson, Richard, "Left- and Right-Wing *Charterphobia* in Canada: a Critique of the Critics," *International Journal of Canadian Studies* 7-8 (Spring-Fall 1993), p.113.

Smith, Miriam, "Segmented Networks: Linguistic practices in lesbian and gay rights

organizing." *Ethnicities*, 4 (1): 99-124 (2004).

Smith, Miriam, "Recognizing Same-Sex Relationships: The Evolution of Recent Federal and Provincial Policies." *Canadian Public Administration*, Vol. 45 (2002).

Smith, Miriam, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking 1971-1995*. University of Toronto Press, Toronto (1999).

Smith, T. Alexander Smith and Raymond Tatalovich, *Cultures At War: Moral Conflicts in Western Democracies* (Peterborough: Broadview Press, 2003).

Sniderman, Paul, Joseph F. Fletcher, Peter H. Russell, and Philip Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy*. New Haven, CT: Yale University Press (1996).

Sommerville, Margaret A., McGill Centre for Medicine Ethics and Law, *Evidence*, House of Commons Standing Committee on Justice and Human Rights, 29 April 2003.

Waite, Linda J. and Maggie Gallagher, *The Case for Marriage*. New York: Doubleday (2000).

Warner, Tom, *Never Going Back: A History of Queer Activism in Canada*. Toronto: University of Toronto Press (2002).

Weiler, Paul C., "Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?" *Dalhousie Review* (1980) Issue 205, p.232.

Wintemute, Robert, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter*. Clarendon Press, Oxford (1995).

Wintemute, Robert, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*. Hart, Oxford (2001).