Civil Marriage Act designed to protect those opposed to same-sex marriage

S. 3.1 of Bill C-38 states: "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 *Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman ..."

By Terrance S. Carter and Anne-Marie Langan

Bill C-38, now entitled the *Civil Marriage Act,* 2005, c.33 received Royal Assent on July 20 and is now in full force. The current version of the *Civil Marriage Act* contains two amendments that are aimed at protecting individuals and organizations who are opposed to same-sex marriage on religious grounds from being sanctioned under law or losing their charitable status. One recent amendment found at s. 3.1 of Bill C-38 states:

"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 *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 other is a consequential amendment to the *Income Tax Act* which states as follows:

"A registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it, or any of its members, officials, supporters or adherents, exercises in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*."

The purpose of adding these two amendments was to alleviate some of the concerns expressed by various groups who are opposed to same-sex marriage on religious grounds.

Although the previous version of Bill C-38 recognized that the guarantee of freedom of religion in the *Charter* should be protected, it did not contain any clauses that would provide direct protection against being prosecuted for speaking out against same-sex marriage or from a religious organization losing its charitable status as a result of having expressed opposition to the legal recognition of same-sex marriage, arguably because to do so would be against the accepted public policy of the Government of Canada.

Since the *Civil Marriage Act, 2005,* is federal legislation; the impact of these latest amendments will be limited to situations that fall within federal jurisdiction, such as matters pertaining to the *Criminal Code* of Canada or to the *Income Tax Act*.

Terrance S. Carter

It will now be up to provincial governments to make amendments to provincial legislation to include similar protections. This has already been achieved in Ontario, to some extent, by the passing of the *Spousal Relationships Statute Law Amendment Act*, *2005*, which contains amendments to the *Ontario Human Rights Code* and to the *Marriage Act* that provide protection for religious officials who are opposed to same-sex marriage from having to solemnize these marriages and allows religious officials to restrict the use of sacred places for the performance of opposite-sex marriages.

The premier of Alberta, Ralph Klein, has publicly announced that he will be introducing similar legislation in that province in the Fall.

Interestingly, many of the legal conflicts that have arisen over same-sex marriage have been in situations that fall under provincial jurisdiction. The British Columbia Court of Appeal released a decision in June, *Kempling v. British Columbia College of Teachers* [2005] B.C.J. No. 1288, wherein the court upheld the School Board's decision to suspend a teacher who had written letters to the editor condemning same-sex marriage on the grounds that they, "found his writings to be discriminatory, demonstrating that he was not prepared to accommodate the core values of the education system. One such value is non-discrimination, which the Panel said includes the recognition of homosexuals' rights to equality, dignity, and respect."[at para.3]

Anne-Marie Langan

In two other situations in Manitoba and British Columbia, religious groups have had human rights complaints lodged against them for denying the use of their facilities to same-sex couples.

In several provinces marriage commissioners have been let go for refusing to solemnize same-sex marriages and have brought complaints to the human rights commissions in their provinces.

Now that the *Civil Marriage Act, 2005,* has passed, religious charities that were worried about losing their charitable status for being opposed to same-sex marriage on religious grounds can take some comfort in these amendments.

It is also now unlikely that anyone would be criminally charged for speaking out against same-sex marriage, provided that the relevant hate crime provisions in the *Criminal Code* have not been violated.

However, individuals and groups who are opposed to same-sex marriage will likely continue to face provincial human rights challenges. It will be up to the provincial governments, and to the provincial human rights tribunals, to determine how best to balance the *Charter* right to freedom of religion and conscience with the relevant provisions of the provincial human rights codes.

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Provincial judges critical of Supreme Court decision on pay

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ordered them to pay the province's costs. The decision in their case could oblige them to stump up several thousand dollars in addition to the $3,000 to $5,000 they each paid their own lawyer to fight the case, he said. In addition the 26 judges also borrowed more than $10,000 from the national association to help them pay for the litigation.

"I think the judges won't have the heart or the money to litigate again," Judge Lampert told *The Lawyers Weekly* in Vancouver.

"You can't believe the demoralization in our court."

Both judges said the litigation was necessary, and in the public interest, to clarify the Supreme Court's landmark 1997 *PEI Judges Reference* decision, which mandated the creation of effective independent judicial compensation commissions across the land.

Subsequently the governments of Alberta, Ontario, Quebec and New Brunswick declined to fully implement the recommendations of separate independent commissions, sparking the constitutional challenges by JPs, and provincial and municipal court judges to determine whether commissions' recommendations are, in general, binding or merely advisory.

The Supreme Court unanimously opted for the latter, in a *per curiam* judgment. It admonished courts to show deference when they engage in judicial review of a government's refusal to follow commission recommendations, given the government's right to determine spending priorities.

The upshot, in the opinion of many judges, was to shift power back to governments in judicial pay disputes, losing ground gained by the judiciary in the *PEI Judges Reference. W*ritten by now-retired Supreme Court Chief Justice Antonio Lamer in 1997 with the aim of ending decades of frustrating strife between governments and judges, the *PEI Judges Reference* established that the constitution's guarantee of judicial independence requires governments to set up independent pay commissions, and to abide by their recommendations, or be prepared to justify why not in court (none of the Supreme Court's present members participated in the 1997 judgment).

Lilles said last month's quartet of cases was the crucible for the principles set out in *PEI Judges Reference.* "There was an understanding during the [argument in the] court that the Supreme Court recognized that [the system] was broke and needed to be fixed, and so we were looking for a fix," he observed. "We don't think this is it. The cornerstone of their decision is that governments will be fair and honest and act in good faith and indeed if they do the system of independent commissions will be effective. Unfortunately past history does not strongly support that premise."

Judge Lilles concluded, "I don't think any [judges] will be rushing to litigate or to expend funds on judicial compensation commissions with these rules in place."

Judge Lilles acknowledged the system could still work if governments act in good faith and take commission recommendations seriously. "But I am disappointed when the Supreme Court says the recommendations are merely consultative," he added, pointing out governments and judges spend millions of dollars on the commission process.

"Everyone spends a lot of money, and a lot of time and energy producing independent recommendations, and then to say: 'Well it's only consultative and the government needs to look at the recommendations seriously' ... but, based on the criteria set out by the Supreme Court of Canada it would not be very difficult to avoid the recommendations, if that's what governments wanted to do? It doesn't make any sense to me."

Judge Lilles concluded, "I don't think any [judges] will be rushing to litigate or to expend funds on judicial compensation commissions with these rules in place."