

SAME SEX MARRIAGE: WHAT CHURCHES AND RELIGIOUS ORGANIZATIONS CAN DO IN RESPONSE

By Terrance S. Carter, B.A. LL.B., and Esther S.J. Oh, B.A., LL.B

A. INTRODUCTION

This *Charity Law Bulletin* (“*Bulletin*”) provides a brief overview of recent developments in the law with respect to the proposed federal legislation regarding same sex marriage, as well as a brief summary of relevant human rights legislation and related cases. This *Bulletin* also outlines steps that churches and religious organizations may want to consider in responding to the issue of same sex marriage. To this end, this *Bulletin* provides general comments concerning the importance of specific constitutional documents for churches and religious organizations, as well as recommendations concerning proposed policies and other constitutional documents in order to determine whether those documents comply with applicable human rights legislation. Finally, this *Bulletin* outlines the importance of educating clergy and religious organizations concerning their legal rights on this issue.

For ease of reference, the term “churches” in this *Bulletin* refers to all forms of religious organizations, including temples, mosques, synagogues, etc., unless otherwise indicated. In addition, the term “constitutional documents” is used in this *Bulletin* to refer to organizational documents for churches and religious organizations.

Main Office Location

211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada, L9W 1K4
Tel: (519) 942-0001 Fax: (519) 942-0300

Toll Free: 1-877-942-0001

www.carters.ca
www.charitylaw.ca

Toronto Meeting Location

Toronto Dominion Bank Tower, Suite 4200
TD Centre, Toronto, Ontario, Canada
(by appointment) Tel: (416) 675-3766

It should be noted that the law involving same sex marriage is highly complex and rapidly changing. The comments that follow, therefore, are of a tentative nature only and are subject to change as the law continues to evolve. In particular, readers should note that the recommendations contained in this *Bulletin* are being made pending the introduction of proposed federal legislation and a reference regarding same sex marriage that is before the Supreme Court of Canada. While the proposed federal legislation provides religious officials with an exemption from solemnizing same sex marriages, it does not recognize the rights of religious organizations to refrain from solemnizing same sex marriages. As such, recommendations in this *Bulletin* that are aimed at enabling religious organizations to take advantage of the exemption from having to perform same sex marriages (which are based on the assumption that the *Halpern* case described below applies), may not be available if the proposed federal legislation is enacted. This issue is discussed further in this *Bulletin*.

It is also important that churches and religious organizations obtain legal advice before implementing any of the suggestions in this *Bulletin*. The comments contained in this *Bulletin* are of a summary nature and are not intended to provide legal advice that can be relied upon.

B. THE DEVELOPMENT OF THE LAW ON SAME SEX MARRIAGE

1. Case Law Developments Regarding Same Sex Marriage

The following is a brief summary of recent cases that are relevant to a discussion involving same sex marriage:

a) Cases Relevant to the General Rights of Same Sex Couples

In *Vriend v. Alberta* [1998] 1 S.C.R. 493 (S.C.C.)(QL), the plaintiff attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation. However, the plaintiff was unable to file a complaint because the *Individual Rights Protections Act* (Alberta) (“IRPA”) did not include sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada ruled that the exclusion of “sexual orientation” as a protected ground of discrimination under the Alberta *IRPA* was unconstitutional.

In *M. v. H.* [1999] 2 S.C.R. 3 (S.C.C.)(QL), the plaintiff, who had been formerly involved in a same sex common law relationship, made a claim for spousal support under section 29 of the *Family Law Act* (Ontario). The Supreme Court of Canada ruled that the opposite sex definition of “spouse” under the support provisions of the *Family Law Act* (Ontario) was unconstitutional.

In *Hall (Litigation guardian of) v. Powers* [2002] O.J. No. 1803 (QL), the Ontario Superior Court ruled that a grade 12 Catholic high school student was permitted to bring his boyfriend to his high school prom. Notwithstanding the formal position of the Catholic Church in the Church’s Catechism that “...homosexuality is contrary to natural law and can under no circumstances be approved...”, the Court in *Hall* relied upon the Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of Teachers* (2001), 199 D.L.R. (4th) 1 (S.C.C.) for the principle that “the freedom to hold beliefs is broader than the freedom to act on them.” As the court stated, “At the heart of the *Trinity Western (supra)* decision lies a distinction between holding a discriminatory view and actively discriminating against someone”.

b) Cases Relevant to the Specific Issue of Same Sex Marriage

A number of recent cases have challenged the constitutional validity of the opposite-sex requirement of marriage, including the B.C. case of *Equality for Gays And Lesbians Everywhere (EGALE) v. Canada* [2003] B.C.J. No. 994 (B.C.C.A.)(QL), and the Ontario case *Halpern v. Canada (Attorney General)* [2003] O.J. No. 2268 (O.C.A.)(QL).

In the *EGALE* and *Halpern* cases, the respective Courts of Appeal ruled that the then existing common law definition of marriage as the “union of one man and one woman” was unconstitutional.

In the *Halpern* decision, the Ontario Court of Appeal reformulated the common law definition of marriage to read as “the voluntary union for life of two persons to the exclusion of all others.”

In the Quebec case of *Hendricks v. Quebec (Attorney General)* [2002] J.Q. No. 3816 (QL), the Quebec Superior Court found that the statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the Charter. This case is currently being appealed to the Quebec Court of Appeal.

c) Application of the *Canadian Charter of Rights and Freedoms*

Section 15 of the *Canadian Charter of Rights and Freedoms* (“Charter”) does not specifically guarantee equality based on an individual’s “sexual orientation”. However, the courts in the above-mentioned cases have generally found that “sexual orientation” is an analogous ground to those protected in section 15 and by implication is therefore protected by the *Charter*.

2. Proposed Federal Legislation

In the summer of 2003, the federal government confirmed that it would not appeal the decisions in the B.C, Ontario and Quebec cases referenced above.

Later in October 2003, the federal government submitted its factum to the Supreme Court of Canada in support of a reference to determine the constitutionality of its proposed legislation. It is not expected that this reference will be heard until early in 2004.

The proposed federal legislation entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* begins with a preamble that reads as follows:

“marriage is a fundamental institution in Canadian society”; and

“access to marriage for civil purposes should be extended to couples of the same sex”
in accordance with the Charter.

The specific wording of the proposed legislation is as follows:

Section 1: “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”

Section 2: “Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs”

Changes to other federal statutes will need to be made as a result of this proposed legislation, assuming that it is passed in its present form.

3. Impact of Bill C-250 (Hate Crimes) on Same Sex Marriage Issues

When considering how to address the topic of same sex marriage, churches will need to be aware of Bill C-250, which had proposed amendments to the Criminal Code provisions regarding hate propaganda, since statements opposing same sex marriage might in some situations be considered as hate crime offences.

Although Bill C-250 recently died on the order paper in the Senate, it might still be relevant to a discussion of same sex marriage issues, since there is a distinct possibility that Bill C-250 may in some form be re-introduced by Parliament in the future. For further details and background information regarding Bill C-250, please see the seminar materials from a presentation by Bruce Long found at: <http://www.carters.ca/pub/seminar/chrchlaw/2003/index.html>.

4. Brief Overview of the Ontario *Human Rights Code*

When responding to the issue of same sex marriage, churches and religious organizations need to be aware of the application of human rights legislation. The following is provided as a brief overview of applicable human rights legislation and relevant case law.

a) Statutory Law

i) The Ontario *Human Rights Code*

Statements made against same sex marriage may in some situations violate the Ontario *Human Rights Code* (“HRC”). In this regard, Part I of the *HRC* enumerates the contexts within which individuals are guaranteed the right to be treated equally and without discrimination. The applicable provisions are:

Section 1 which states as follows, regarding the provision of services:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same sex partnership status, family status or disability. [*emphasis added*]

Section 5 which states the following regarding employment:

- 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same sex partnership status, family status or disability. [*emphasis added*]

Section 24 of the *HRC*, however, permits discrimination in the context of employment where the following limited conditions apply:

- ♦ the nature of the employment results in the discriminatory qualification.
- ♦ the qualification is a reasonable and bona fide qualification for the employment.

An example of a bona fide requirement under Section 24 of the *HRC* would be where a minister is required to subscribe to the church’s statement of faith and charitable objects as a condition of his or her employment.

Section 11(1) of the *HRC* extends the prohibition of discrimination into areas that are not contemplated by Part I of the *HRC* where the discrimination results in the exclusion of an

“identifiable group” as set out in the *HRC*. A general exception to section 11(1) may apply when the requirement, qualification or factor is reasonable and bona fide in the circumstances.

ii) *The Canadian Human Rights Act*

Some religious organizations may also be subject to federal human rights legislation. Section 3 of the *Canadian Human Rights Act* lists the following as prohibitive grounds of discrimination:

For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

These prohibited grounds are different in certain respects from those contained in the Ontario *HRC*. Unlike the provincial *HRC*, the *Canadian Human Rights Act* does not prohibit discrimination based upon “same sex partnership status”.

As well, section 5 of the *Canadian Human Rights Act* provides for the following in relation to the provision of goods and services:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

b) *Related Case Law*

The following is a brief summary of excerpts from key cases involving the Charter and various human rights legislation relevant to same sex marriage:

i) *Trinity Western University v. British Columbia College of Teachers (2001), 199 D.L.R. (4th) 1 (S.C.C.) – Supreme Court of Canada*

In its decision in *Trinity Western*, the Supreme Court of Canada held as follows:

“The freedom to hold beliefs is broader than the freedom to act on them. The freedom to exercise genuine religious belief does not include the right to interfere with the rights of others.”

- ii) *Ontario (Human Rights Commission) v. Brillinger [2002] O.J. No. 2375 (QL) Ont. Sup. Ct.*

In the *Brillinger* case, a Christian who owned a printing shop had refused to print certain materials on the basis of his religious beliefs, since he believed that he could not assist in the distribution of information intended to spread the acceptance of homosexual lifestyles. However, he had not refused to serve homosexual customers.

In finding the owner in violation of the Ontario *HRC*, the court relied upon the *Trinity Western* case and upheld the “*right to be free from discrimination based on sexual orientation in obtaining commercial services*”.

C. WHAT CHURCHES AND RELIGIOUS ORGANIZATIONS CAN DO IN RESPONSE

1. The Importance of Organizational Documents

a) Explanation of The Legal Nature of Religious Organizations

Most churches and religious organizations operate simultaneously in two distinct realms: the first being the church law realm, which is generally governed by the church’s understanding of scripture, and the second being the civil law realm, which involves the application of the relevant statutory law and relevant cases to churches. Although church law and civil law are separate in many respects, they also overlap. When overlap occurs, church law will generally not be permitted to violate civil law.

Within the church law context, the identity of a church is generally derived from scripture, i.e. a literal understanding of the New Testament by evangelical Christians or a reliance upon the Canon Code by Roman Catholics.

Within the civil law context, the legal nature of a church is characterized as a voluntary association of persons who come together for a collective purpose as reflected in the church’s constitutional documents.

Where individuals have voluntarily decided to associate together in order to fulfill the religious objectives of a church, the courts have generally recognized the existence of and the right of a church to fulfill its religious objectives.

However, churches must ensure that their identity that is derived from the church law context is adequately articulated within the civil law context so that it can be protected at civil law. The primary means through which a church articulates its church law identity in the civil law context is

generally through its constitution. The need for a clear articulation of a church's identity and beliefs in its constitution is particularly important in the context of same sex marriages.

b) The Need for Churches and Religious Organizations to Articulate Their Identity and Beliefs Through a Constitution

Within a civil law context, since a church legally is nothing more than what the individuals who comprise it determine it to be, it is essential for churches to clearly articulate what their identity and beliefs are, and where relevant, to relate those beliefs to the understanding of scripture followed by the church.

If a church or religious organization fails to articulate what it is and what it believes, then by default the courts will be called upon to determine the church's beliefs and identity based upon the materials that are available for review by the court. If this occurs, the church may then be left more vulnerable to challenge under proposed federal legislation dealing with same sex marriage and human rights legislation than if it had carefully articulated its identity and its beliefs in its constitution.

For unincorporated churches, a constitution is generally a single internal organizational document that is not issued or specifically sanctioned by any government. For incorporated churches, a constitution usually consists of a collective of the following documents:

- The letters patent issued by the Federal or a Provincial government, which is generally analogous to the birth certificate of the church;
- The general operating by-laws of the church, which sets out the structure of the church; and
- Policy statements, implemented from time to time to document the practical position of the church on a particular issue.

As indicated earlier, for the purposes of this *Bulletin*, when the term "constitution" is used, the term means the constitution of a church or religious organization, whether it is incorporated or unincorporated.

With respect to recent developments in the law, it would be opportune for unincorporated churches that are considering incorporation to do so sooner as opposed to later, since their incorporation documents and accompanying policy statements could be drafted to reflect their theological position on marriage in general terms and specifically with respect to same sex marriages, where applicable.

2. Possible Options Regarding Specific Constitutional Documents

In response to developments in the law and in particular with regard to the proposed federal legislation regarding same sex marriage, churches may want to consider taking the following steps to review and/or amend their constitutional documentation. However, it should be noted that given the complex and evolving nature of the law, none of the steps listed below on their own necessarily ensure compliance with applicable case law, human rights legislation or the proposed federal legislation, since the circumstances of each church would need to be individually considered with the assistance of legal counsel.

a) Statement of Faith

Churches should ensure that their beliefs are clearly articulated in a statement of faith or similar doctrinal statement reflecting their particular interpretation of scripture, since an understanding of scripture is often subject to differing interpretations. A more literal and/or orthodox interpretation will generally be more consistent with a position that is not in support of same-sex marriage. As such, where a church does not wish to support same sex marriage, the church's statement of faith will likely need to reflect the church's theological belief in a more literal and/or orthodox interpretation of scripture.

General scriptural passages, such as those contained in the Apostle's Creed, can be inserted in a statement of faith. However, scriptural passages that might be construed as promoting hatred against an identifiable group may leave a church open to civil liability. According to the decision of *Owens v. Saskatchewan (Human Rights Commission)* [2002] S.J. No. 732 (QL), certain scriptural references, such as Leviticus 18:22, Leviticus 20:13 and 1 Corinthians 6:9-10, may in some situations be found to be promoting hatred.

For federally incorporated churches, the church's statement of faith could be inserted in its letters patent. In Ontario, a provincially incorporated church, however, can only have its statement of faith included in its general operating by-law instead of its letters patent.

b) Charitable Objects

The charitable objects of a church are contained in its letters patent and should clearly indicate a religious purpose with references, to scriptural mandates where possible, such as "propagating the Gospel of Jesus Christ".

The charitable objects of a church should also include upholding the church's statement of faith, where applicable.

c) General Operating By-law

The general operating by-law of a church should define “membership”. The definition may contain conditions for church membership, which could include:

- adherence to the church’s constitution and statement of faith;
- agreeing to be subject to the authority of the church;
- a requirement to sign a membership statement by which a member would agree to comply with the church constitution and its statement of faith; and
- individuals leading or participating in church programs, as well as key employees, could collectively be required to be members of the church.

The by-law could also contain a provision authorizing the directors to establish and implement operating policies for the church, together with an effective discipline procedure to enforce church policies where applicable.

d) Policy Statements

Policy statements can be of assistance in articulating a practical manifestation of the church’s beliefs. In this regard, a church should state that its policy statements are to be applied in accordance with its statement of faith.

As indicated in section (c) above, the authority of a church to adopt policy statements would be derived from the church’s general operating by-law, which may require membership approval for the policy statement prior to its adoption. However, policy statements must be prepared in a manner that is consistent with applicable human rights legislation.

Some examples of policy statements that a church might adopt with regard to same sex marriage are as follows:

- A policy on marriage could include the following provisions:
 - ♦ If the church does not wish to support same sex marriage based upon a literal and/or orthodox interpretation of scripture, then the policy could contain a statement recognizing marriage as a holy sacrament or institution of the church and defining marriage as being between one man and one woman.
 - ♦ The clergy for a church could be required to subscribe to the church’s constitution, including its statement of faith as discussed below.

- ♦ A statement could be included indicating that marriage is to be solemnized only by clergy of the local church or by other clergy approved by the church who subscribe to the statement of faith and constitution of the church.
- ♦ The church could confirm that clergy retain the right to decide whether or not they wish to proceed with solemnizing a marriage if doing so would be contrary to his or her religious beliefs.
- A policy on the use of the church facilities could include the following provisions:
 - ♦ Restricting the use of church facilities to church programs and/or use by members but only for purposes that are consistent with the statement of faith and constitution of the church.
 - ♦ The drafting of a facility use policy would have to be consistent with the requirements of human rights legislation and could not exclude an “identifiable group” contrary to applicable human rights legislation as explained above.

Churches are cautioned to draft their policy statements utilizing neutral wording where possible and avoid negative or pejorative wording, as well as wording that distinguishes an “identifiable group”. Churches are also cautioned from implementing conduct or lifestyle statements if to do so would result in distinguishing an identifiable group contrary to applicable human rights legislation.

Churches must ensure that their policy statements are enforced in a consistent manner; otherwise, either or both of the following may occur:

- A church may be found to have waived its ability to enforce policies in the future because they have neglected to do so in the past.
- A church may become vulnerable to allegations of discrimination where the church inconsistently enforces its policies. For example, where a church neglects to enforce provisions contained in a conduct statement with regard to one activity, i.e. prohibition on drinking, but enforces prohibitions on another matter, i.e. adultery.

In this regard, a church should adopt a procedure for church discipline in its by-law reflecting approved principles of natural justice. For further details in this regard, please see an article on church discipline at <http://www.carters.ca/pub/article/church/1995/discplin.pdf> entitled "A Legal Analysis of Church Discipline in Canada and Church Discipline Update".

3. Review of Existing Constitutional Documents

If the church has an existing constitution and is drafting additional clauses for inclusion dealing with same sex marriage, the constitutional documents should be reviewed by a lawyer in order to determine whether the documents are consistent with recent developments in the law. In addition, the church could determine whether it has a statement of faith in its constitutional documents and/or appropriate policy statements.

4. Conducting a Legal Audit

Given the severity of liabilities for non-compliance with changes in the law, churches should consider conducting a legal audit of all of their policies and constitutional documents, as well as their liturgies and teaching materials.

The purpose of a legal audit would be to do the following:

- ◆ Review whether the church's existing constitutional documents may be inconsistent with applicable legal requirements under human rights legislation, as well as proposed federal legislation on same sex marriage; and
- ◆ Review whether such documents reflect possible discrimination or the promotion of hatred against an identifiable group.

5. Education of clergy concerning their legal rights

As well, it would be prudent for both local churches and/or denominational organizations to educate clergy of their legal rights in relation to the carrying out of their ministerial duties and in relation to the operations of the church as a whole.

Churches should be aware that while the proposed federal legislation recognizes the rights of officials of religious groups to refuse to perform marriages contrary to their religious beliefs, the proposed legislation does not recognize a similar freedom for religious groups as contemplated by the *Halpern* case described above. It is therefore important that local churches and/or religious denominations be aware of the need to educate clergy regarding the rights of clergy, as well as the rights of the church in general.

D. CONCLUSION

In summary, given the recent developments in the law and proposed federal legislation concerning same sex marriages, churches and religious organizations may want to consider some or all of the following in conjunction with advice from legal counsel:

- ◆ Where applicable, a church may want to articulate its adherence to a literal and/or orthodox interpretation of scripture.
- ◆ This adherence could be reflected in the constitutional documentation of a church, including its charitable objects, and should, where applicable, encompass a clear religious purpose to uphold the statement of faith of the church.
- ◆ A church should avoid scriptural references in its statement of faith if such scriptural passages may be construed as promoting hatred against an identifiable group.
- ◆ The church's general operating by-law should define membership, authorize policy statements and establish a procedure for church discipline.
- ◆ Individuals involved in leading church ministries or programs, as well as key employees, should also be required to be members.
- ◆ Policy statements may be of assistance to a church in articulating a practical manifestation of the beliefs of the church.
- ◆ If the church does not wish to support same sex marriage as a result of a literal and/or orthodox interpretation of scripture, a policy statement on marriage could contain a statement recognizing marriage as a holy sacrament or institution of the church and defining marriage as being between one man and one woman in accordance with the church's statement of faith.
- ◆ Policy statements should be drafted using neutral wording and avoiding negative or pejorative wording or wording that distinguishes an identifiable group contrary to applicable human rights legislation.

- ◆ A policy on marriage and/or facility use policy could be prepared, where applicable, but with the assistance of legal counsel in order to ensure that the church is in compliance with applicable human rights legislation with respect to same sex marriage.
- ◆ Churches are cautioned against implementing policies on conduct or lifestyle that may be construed as discrimination against an identifiable group contrary to applicable human rights legislation.
- ◆ Churches should ensure that their policy statements are enforced in a consistent manner.
- ◆ Consideration should be given to conducting a legal audit of all existing and proposed policies and constitutional documents in order to determine whether those documents are in compliance with recent developments in the law.
- ◆ Local churches and/or denominations should educate their clergy regarding the legal rights of clergy, as well as those of the local church.

In light of the recent developments in the law, churches and religious organizations will need to carefully re-evaluate their constitution, as well as their operating policies, in order to give consideration to the potential impact of proposed same sex marriage legislation, and to avoid being found in breach of the existing human rights legislation and proposed federal legislation on same sex marriage.

Main Office Location211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada, L9W 1K4
Tel: (519) 942-0001 Fax: (519) 942-0300
Toll Free: 1-877-942-0001**www.carters.****Toronto Meeting Location**Toronto Dominion Bank Tower, Suite 4200
TD Centre, Toronto, Ontario, Canada
(by appointment) Tel: (416) 675-3766
"Proactive Advice"[™]**www.charitylaw.**