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CHURCH LAW BULLETIN NO.7

JANUARY 10TH, 2005

Editor: Terrance S. Carter

SUPREME COURT SAME SEX MARRIAGE REFERENCE : WHAT ARE THE IMPLICATIONS FOR CHURCHES AND RELIGIOUS OFFICIALS?

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent and Mervyn F. White, B.A., LL.B.
Assisted by Anne-Marie Langan, B.A., B.S.W., LL.B.

A. INTRODUCTION

The Courts in seven provinces including Ontario, British Columbia, Quebec, the Yukon Territories, Nova Scotia, Manitoba, Saskatchewan, and most recently Newfoundland, have ruled that the common law recognition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others"[1] violates s.15(1) of the *Canadian Charter of Rights and Freedoms*[2] ("Charter") because it has the effect of limiting the right of gay and lesbian couples to marry.[3] Instead of appealing these decisions, the federal government decided to introduce new legislation, which at this time is entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* (the "Proposed Act")*.*[4] This Proposed Act would have the effect of recognizing the rights of same- sex couples to marry across Canada. The operative provisions of this Proposed Act are as follows:

[1] *Hyde v. Hyde* (1866), L.R. 1 P. &D. 130 at p.133.
[2] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982(U.K.), 1982, c.11.*
[3] *Equality for Gays and Lesbians Everywhere v. Canada* [2003] B.C.J. No.994 (B.C.C.A.); *Halpern v. Canada (Attorney General),* [2003] O.J. No. 2268 (O.C.A.); *Hendricks v. Quebec (Attorney General*)[2002] J.Q. No. 3816 (Q.C.A.); *Dunbar v. Yukon* [2004] Y.J. No.6.1; *Vogel v. Canada* (Attorney General) [2004] M.J. No. 418; *Boutilier v. Nova Scotia* (Attorney General) [2004] N.S.J. No. 357; *N.W. v. Canada* (Attorney General) [2004] S.J. No. 669;
[4] *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes, Order in Council P.C.* 2003-1055, Preamble, ss.1,2. ("Proposed Act")

> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> 2. Nothing in this Act affect the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.[5]

Rather than introducing this Proposed Act in Parliament, the Attorney General sent a reference to the Supreme Court of Canada entitled *Reference Re Same Sex Marriage* (the "Reference")[6] asking the Supreme Court the following questions:

> 1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
>
> 2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
>
> 3. Does the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
>
> 4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law-Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

This *Church Law Bulletin* summarizes the Supreme Court's decision, handed down on December 9, 2004, to these questions as contained in the Reference. The Bulletin will also attempt to describe what consequences this decision and the Proposed Act might have on churches and religious officials who are opposed to same sex marriage. Recommendations will then be provided about what these churches and religious officials can do in response to the Reference and the Proposed Act.

[5] *Supra*, note 4.
[6] *Reference re Same Sex Marriage*, [2004] S.C.J. No. 75.

B. FINDINGS OF THE COURT

In the Reference, the Supreme Court of Canada answered the four questions outlined above as follows:

1. Is the Proposed Act Within the Exclusive Legislative Authority of the Parliament of Canada?

The Supreme Court defined the issue before it as being whether the "Pith and Substance" of the Proposed Act falls within one of the powers of the federal government as outlined in s.91 of the *Constitution Act.*[7] The Supreme Court concluded that the "Pith and Substance" of s.1 of the Proposed Act is to define the legal capacity to marry and to ensure that "civil marriage as a legal institution is consistent with the Charter."[8] The Supreme Court confirmed that Parliament is granted the authority to define marriage by virtue of s.91 (26) of the *Constitution Act* which states that the federal government has the exclusive authority to legislate matters that have to do with "Marriage and Divorce."

Certain interveners in the Reference argued that it is not within the powers of the federal government to legislate about the definition of marriage, since marriage was not defined by the common law: the common law was merely recognizing the existence of marriage, the existence of which pre-dates the common law recognition of it. In response to this argument, the Supreme Court drew an analogy to the *Persons* case which warned against allowing customs to become rooted in the law, "long after the reason for them has disappeared" and stands for the proposition that the Constitution is a "living tree" which needs to grow with the times.[9] Without directly addressing the issue of whether it is within Parliament's constitutional powers to redefine marriage, the Supreme Court concluded that since society's perception of marriage has changed over the years to include many different kinds of couples, it cannot be said that "marriage" in s.91(26) of the *Constitution Act*, 1867, read expansively, excludes same sex marriage."[10]

In contrast, the Supreme Court found that s.2 of the Proposed Act was *ultra vires* the powers of Parliament by virtue of the fact that s.92(12) of the *Constitution Act* gives the provinces exclusive

[7] *Constitution Act*, 1867, s.91
[8] *Supra* note 6 at para 42.
[9] *Reference re: Meaning of the word "Persons" in s.24 of the British North America Act*, [1930] A.C. 124 (P.C.)
[10] Supra note 6 at para 25.

jurisdiction over "the solemnization of marriage in the Province." Consequently, the federal government cannot create an exemption to existing solemnization requirements. Conversely, the provincial power over the solemnization of marriage does not confer on the provincial government the jurisdiction to make decisions about same sex marriage, since solemnization is consequential to the right to marry.

The Supreme Court rejected an argument made by intervening parties to the Reference, that, based on the reasoning in *Hyde v. Hyde*,[11] the definition of marriage as being between a man and a woman is entrenched in the *Constitution Act*. Instead, the Supreme Court took what they called a "large and liberal, or progressive" approach to interpreting the constitution and concluded that, "Marriage, from the perspective of the state, is a civil institution" and that there is nothing in the *Constitution Act* which would preclude same-sex marriage.[12]

2. Does the Proposed Act Violate the *Charter of Rights and Freedoms*?

The Supreme Court then responded to arguments made by intervening parties that the Proposed Act violates s.15(1) and s.2(a) of the Charter. Some interveners argued that the Proposed Act violates the equality provision in s.15(1) of the Charter as it has the effect of discriminating against religious groups who disagree with same-sex marriage and opposite-sex married couples. The Supreme Court's response to this question was that "the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another."[13] The same reasoning was used by the Supreme Court when rejecting the argument that the Proposed Act infringes the guarantee of freedom of religion under s.2(a) of the Charter.[14]

3. Does the Proposed Act Provide Protection for Religious Officials Who Do Not Believe in Same Sex Marriage?

The Supreme Court then attempted to address the argument that the Proposed Act might create an impermissible collision of rights between the rights of same-sex couples who want to marry and the rights of those who are against same sex marriage because of their religious beliefs. Intervening parties

[11] *Supra* note 1 at p.133.
[12] *Supra* note 6 at para.23 and 29.
[13] *Ibid* at para.46.
[14] *Ibid* at para 48.

pointed out that this conflict would be particularly acute for clergy and other religious officials who do not believe in same-sex marriage and do not want to perform them. The Supreme Court's response to this was as follows:

> The right to freedom of religion enshrined in s. 2(*a*) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice: *Big M Drug Mart, supra,* at pp. 336-337. **The performance of religious rites is a fundamental aspect of religious practice. It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(*a*) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*[emphasis added].**[15]

However, the Supreme Court noted that since the federal government has no constitutional authority to regulate the solemnization of marriage, it would be up to the provincial governments to pass legislation that would protect the rights of religious officials to not perform same sex marriages if this is contrary to their beliefs, while at the same time allowing for same-sex marriage. The Supreme Court also commented that the provincial human rights commissions should interpret their human rights codes in such a way as to provide protection for religious freedom in this regard. Therefore, it may be some time before the practical extend of the protection provided by this decision to religious officials who do not support same sex marriages is known, and may ultimately require that human rights challenges be brought by those who feel that their religious freedom is being limited.

4. Is the Definition of Marriage as Being Between a Man and a Woman Unconstitutional?

The Supreme Court stated that it was exercising its jurisdiction to refuse to answer this question because, in its opinion, it would be "unwise and inappropriate" to do so.[16] However, the Supreme Court pointed out that courts in five provinces (now seven) have already declared that the definition of marriage as being between a man and a woman is unconstitutional and that the Attorney General of Canada had conceded after each of these decisions that the common law definition of marriage violated

[15] *Ibid* at para 57 and 58.
[16] *Ibid* at para 64.

s.15(1) of the Charter. As a result, same-sex couples in these provinces have relied on these decisions and have gotten married, thinking that their marriages would be recognized by the federal government as being legal. According to the Supreme Court, therefore, this issue has "already been disposed of in lower courts". [17] It seems, therefore, that the Supreme Court's refusal to answer this question is premised on the fact that they feel that this question has already been conclusively answered in the affirmative by the lower courts.

C. IMPLICATIONS OF THIS CASE FOR CHURCHES AND OTHER RELIGIOUS GROUPS

Many Canadian Churches and religious groups who are opposed to same sex marriage are anxious about the possible consequences of legalizing same sex marriage for their clergy and their members. One of their main concerns is that clergy and churches will be forced to conduct same-sex weddings even though this may be contrary to their religious beliefs and church teachings.[18]

Section 2 of the Proposed Act was an attempt by the federal government to address this concern by including an explicit statement that the Proposed Act would not affect the freedom of religious officials to refuse to perform marriages that are not in accordance with their religious beliefs. As discussed above, in the Reference the Supreme Court ruled that section 2 of the Proposed Act is *ultra vires* parliament and stated that it was up to the provincial governments to provide protection for clergy with respect to matters relating to the solemnization of marriage and as such the federal government could not legally provide such an exemption. As such, no protection could be provided in the Act.

It should be noted, however, that the Reference may provide some protection to clergy and churches who are opposed to same sex marriage, as the Supreme Court therein explicitly stated more than once in its decision that any form of state compulsion that serves to force a religious official to perform a same sex wedding when such a wedding is contrary to the tenets of his or her faith would violate s.2(a) of the Charter and could not be justified under section 1. The same principle is applied to the use of sacred places for the celebration of same sex marriages. The Supreme Court distinguishes between "civil marriage" and "religious marriage" and explicitly states that "the Proposed Act is limited in its effect to marriage for civil purposes" and "cannot be

[17] *Ibid* at para 61-71 with quote at para.68.
[18] See *Same Sex Marriage in Canada* at http://www.ecumenism.net/news/marriage.htm .

interpreted as affecting religious marriage or solemnization."[19] The Reference also directs provincial governments and human rights commissions to legislate and interpret their respective provincial legislation accordingly.

Now that the Supreme Court has confirmed that the definition of civil marriage includes same sex marriage, each province is responsible for enacting legislation and creating policies concerning the solemnization of same sex civil marriages. Some provinces, such as Manitoba and Saskatchewan have instituted policies that marriage commissioners must perform same sex civil marriages if they want to keep their licenses, whereas other provinces, like New Brunswick, are enacting legislation which explicitly allows those who would normally be required to perform same sex marriages when they are legalized, to opt out of performing them if they are opposed to same sex marriage. The current policy in British Columbia is that marriage commissioners can opt out of performing same sex marriages as long as they refer the same sex couple to a person who will perform the ceremony for them. This has resulted in the resignation of twelve marriage commissioners who were opposed to same sex marriages. Two marriage commissioners from Manitoba have also quit their jobs because of the new policy concerning same sex marriage and have filed human rights complaints.[20] It will be interesting to see how the Manitoba Human Rights Commission deals with these complaints. Will they find that the Manitoba government's policy concerning marriage commissioners is discriminatory on the grounds of religion, as was suggested in the Reference?

The Supreme Court warns that the protection of religious freedom expressed in s.2(a) of the Charter may be limited to situations where the state is involved, since the Charter only applies to State action.[21] As well, churches and other religious groups may be limited from asserting a Charter right by the principle expressed in several cases that "freedom of religion and conscience does not extend to a corporation."[22]

Another related concern of some churches and some clergy that oppose same sex marriage is that by legalizing same sex marriage the federal government is establishing "a particular ideological opinion as a universal and binding norm" and that consequently all those who are not in agreement with this ideological

[19] *Supra* note 6 at para 55.
[20] Campbell Clark, "Prairie Officials compelled to perform gay marriages" *The Globe and Mail* December 18, 2004.
[21] *Ibid* at para 55.
[22] *Brockie v. Ontario (Human Rights Commission),* [2002] O.J. No. 2375; *R. v. Big M. Drug Mart Limited* (1985), 18 D.L.R. (4th) 321.

opinion will be socially ostracized. For example, in their factum for the Reference, the Canadian Conference of Catholic Bishops express a concern that,

> Once this social and moral orthodoxy is established, it would be a small step to remove charitable status and other public benefits from individuals, religious groups, or affiliated charities who publicly teach or espouse views contrary to this claimed orthodoxy.[23]

In response to this concern, the Supreme Court denied that it was possible for the conferral of rights upon one group to constitute the violation of rights of another and that this "alleged collision of rights is purely abstract," and that the scope of Charter rights cannot be decided in the absence of an actual fact situation. Despite their denial that the Proposed Act might cause a conflict of Charter rights, the Supreme Court went on to say that in the event such a conflict occurred, "the jurisprudence confirms that many if not all such conflicts will be resolved within the Charter, by the delineation of rights prescribed by the cases relating to s.2(a)."[24]

This finding that "the right to religious freedom enshrined in s.2(a) of the Charter is expansive"[25] is echoed in the recent Supreme Court of Canada decision *Syndicat Northcrest v. Amselem* ("Amselem") wherein the majority found that,

> Regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or the subject or object of his or her spiritual faith and as long as that practice has a nexus with religion, it should trigger the protection of ..s.2(a) of the Charter.[26]

The Amselem decision makes it clear that the s.2(a) Charter right of freedom of religion includes the right to hold a particular opinion based on your religious beliefs whether or not this belief is the official doctrine of your particular religion.

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[23] William J Sammon, *Factum of the Intervener: The Canadian Conference of Catholic Bishops*.
[24] *Supra* note 6 at para 52.
[25] *Supra* note 6 at para.50.
[26] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 SCC 47. also see case comment entitled "Supreme Court of Canada Adopts Broad View of Religious Freed" in *Chartiy Law Bulletin* No.51 available at www.carters.ca.

However, in several recent s.2(a) cases, the Supreme Court has warned that, "The freedom to exercise genuine religious belief does not include the right to interfere with the rights of others."[27] This principle was applied in *Ontario Human Rights Commission v. Brillinger* which involved a complaint that was made by the Canadian and Lesbian Gay Archives against a printer, Scott Brockie, for refusing to print one of their pamphlets which contained material that Mr. Brockie objected to because of his religious beliefs. In this case the Ontario Superior Court found that,

> Limits on Mr. Brockie's right to freedom of religion in the peripheral area of the commercial marketplace are justified where the exercise of that freedom causes harm to others; In the present case, by infringing the Code right to be free from discrimination based on sexual orientation in obtaining commercial services.[28]

One implication of these decisions is that while it would appear to be permissible to hold a discriminatory opinion, it would not appear to be permissible to discriminate against someone because of that view in the provision of goods, services and facilities to the public. In the *Brillinger* decision the court also warns that "the further the activity is from the core elements of the freedom [of religion], the more likely the activity is to impact on others and the less deserving the activity is of protection."[29]

On the other hand, the human rights objective of ensuring that groups are provided services and facilities should be balanced against the right to freedom of religion and conscience. An argument could be made that if the provision of a service or facility conflicts with a core religious belief of an individual or religious group, he, she or it should not be forced to provide it. Consequently if a religious official or church is opposed to same sex marriage, that official or church could argue that they should not be forced to perform a civil same sex marriage, allow such a marriage to be performed on their premises or to make a referral regarding a same sex marriage as this would conflict with one of their core religious beliefs or that it would be no different from being forced to advance such a lifestyle.

The same sex marriage decisions have all held that the definition of marriage as the "union of one man and one woman" is unconstitutional. It is therefore possible that, if a cleric or a religious person who is a licensed

[27] *Trinity Western University v. British Columbia College of Teachers* (2001), 199 D.L.R. (4th) 1 (S.C.C.); also see *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at 336-37 and *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825.
[28] *Ontario (Human Rights Commission) v. Brillinger* [2002] O.J. No. 2375.
[29] *Ibid* at para.51.

marriage commissioner and is opposed to same sex marriage was challenged for refusing to perform a civil same-sex wedding, a court might find that this person has crossed the line between holding a discriminatory view and discriminating against someone by refusing to provide a public service to them, and as a result the cleric or religious person could be found to have violated a human rights code. It is also possible that a church or religious group, who normally makes its premises available to the general public for many different purposes and activities and charges for the use of their facilities, and then refuses to rent out that premise to a gay or lesbian couple for the purposes of celebrating a civil same sex marriage, could be found to be discriminating in the provision of a facility. There is no explicit defence based on having a *bona fides* reason for the discrimination in the Human Rights Codes of many provinces, including Ontario, when it comes to the provision of goods, services and facilities, which means that a conscientious objector can only rely on the Charter right to freedom of religion as a defence. It is not clear whether the protection afforded by s.2(a) of the Charter would protect a marriage commissioner who is opposed to same sex marriage from having to perform a civil same sex marriage ceremony or, as in B.C., having to refer the same sex couple to another person who can perform the marriage, or would protect a church who rents out its facilities to many different groups but wants to refuse to rent it out for the purposes of hosting a same sex marriage.

Given that the Supreme Court has now made it clear that same sex couples have the legal right to civil marriage and that it is not yet clear what protections, if any, will be available to religious officials or churches who are opposed to same sex marriage in any provincial legislation that is passed regarding the solemnization of civil same-sex marriages, churches would be wise in the meantime to heed the advice contained in a Bulletin published by Carter and Associates in December 2003 entitled "Same Sex Marriage: What Churches and Religious Organizations Can do In Response."[30]

The Bulletin explains that courts have generally recognized the existence of and the right of a church to fulfill its religious objectives, but warns that churches must ensure that their identity is adequately articulated within the civil law context so that it can be protected at civil law. Churches should, if at all possible, undergo a legal audit whereby a lawyer would review the church's constitutional documents to ascertain whether they meet with applicable legal requirements. Other steps that churches and religious groups can take include:

[30] *Church Law Bulletin* No.1 which is available on our website at www.carters.ca.

- Clearly articulating its adherence to a literal and/or orthodox interpretation of scripture and reflecting this in its constitutional documents.
- Developing a clear policy statement with regards to the church's beliefs and teachings about marriage which 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 and having this policy reviewed by legal counsel.
- Avoiding any statements that could be construed as promoting hatred against an identifiable group and instead drafting all policy statements using neutral wording and avoiding negative or pejorative language against any identifiable group.
- Enforcing any policies in a consistent manner.
- Defining its membership and discipline procedures and requiring that any individuals who are involved in church ministries or programs and any church employees should also be members.
- Restrict the use of any services offered by the church and facilities owned by the church to church members for purposes relating to the Church's charitable objectives.
- Educating clergy and members about the legal rights of clergy and of churches.

Many of the larger denominations have already discussed these issues with their legal counsel and developed clear policies about marriage. An article entitled "Same Sex Marriage in Canada," which can be found at www.ecumenism.net, provides a useful review of some of these church policy statements. It would be prudent for all religious groups who are opposed to same-sex marriage to follow suit and to carefully re-evaluate their constitution and operating policies in consideration of the potential impact of the Proposed Act and of the provincial legislation which will almost certainly ensue.

D. CONCLUSION

It is clear from the reference that it is within the constitutional powers of the federal government to change the common law definition of marriage to the definition contained in the Proposed Act, namely, "the lawful union of two persons to the exclusion of all others", whereas the solemnization of marriage is within the scope of provincial powers and the federal government cannot create a legislative protection for religious officials who are opposed to same sex marriage from being forced to perform civil same sex marriages. In the Reference the Supreme Court Justices assure us that the freedom of religion as guaranteed in s.2(a) of the Charter is expansive and extends far enough to provide protection to religious officials from being forced to perform same sex marriages and to churches from having to allow same sex marriages to take place in their places of worship.

The practical implications of this decision are still unclear. One of the questions that remains unanswered is whether marriage commissioners who are opposed to same sex marriage on religious grounds can lose their license for refusing to perform a same sex marriage ceremony. It is also impossible to tell what other practical effects the legalization of same sex marriages will have on religious groups who are opposed to same sex marriage now that the Supreme Court has made it clear that such views run contrary to Charter values. Given these uncertainties it would be prudent for religious groups to clearly articulate their policies and beliefs concerning marriage and to undergo a legal audit to ensure that the group's policies, by-laws and publications conform as closely as possible with legal requirements and are not unnecessarily discriminatory.

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