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UPDATE REGARDING SAME-SEX MARRIAGE LEGISLATION (BILL C-38 AND BILL 171)

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

A. INTRODUCTION

Justice Minister Irwin Cotler introduced *An Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* ("*Civil Marriage Act*" or "Bill C-38") for a first reading in Parliament on February 1, 2005 and debate on Bill C-38 followed in the House of Commons on February 16, 18 and 21st 2005, with further debate to resume in March, 2005.[1] The Justice Minister expressed his desire to see this bill become law by June, 2005.[2] The purpose of Bill C-38 is to define civil marriage as "the lawful union of two persons to the exclusion of all others," and thereby extend the legal capacity to marry to same-sex couples.[3] Subsequently, the Attorney General for Ontario introduced *An Act to amend various statutes in respect of spousal relationships* ("Bill 171"), which, as of February 24th, 2005, had already received third reading.[4] Bill 171, when enacted, will have the effect of amending over seventy Ontario statutes to include or incorporate a definition of spouse that is inclusive of same-sex couples, and also includes some protective provisions for religious officials who are opposed to performing same-sex marriages.

[1] The full text of the Civil Marriage Act is available at http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=N&StartList=A&EndList=Z&Session=13&Type=0&Scope=I&query=4381&List=toc-1

[2] Tonda Maccharles and Sean Gordon, *Liberals to speed debate on gay-marriage rights*, Toronto Star, Feb.2, 2005.

This *Church Law Bulletin* ("Bulletin") reviews the content of Bill C-38, as well as the content of, and debates that took place in the legislature regarding Bill 171 in Ontario. Ideally, this Bulletin should be read in conjunction with *Church Law Bulletin* No.7 that provided an analysis of the Supreme Court's *Reference Re Same-Sex Marriage* decision.[5]

B. BACKGROUND

1. Charter Challenges to the Definition of Marriage

Same-sex couples have been bringing legal challenges to the opposite sex requirement in the definition of marriage since 1974, when a same-sex couple unsuccessfully challenged the Manitoba government's refusal to register their marriage.[6] After the *Charter of Rights and Freedoms* (the "*Charter*") [7]was adopted in 1982, a new challenge to the definition of marriage was brought on the basis that the opposite sex requirement of the traditional definition of marriage violated the guarantee in s. 15(1) of the *Charter* for all persons to "be equal before and under the law" and to "have the equal protection and equal benefit of the law without discrimination". The first successful challenge occurred in July 2002, when the Ontario Superior Court of Justice found that the opposite sex requirement of marriage was a violation of s.15(1) of the *Charter,* which violation, the court held, could not be saved under s.1 of the *Charter*.[8] The Court of Appeal for the Province of Ontario upheld this decision and agreed with the lower court that the Attorney General failed to demonstrate "any pressing and substantial objective for excluding same-sex couples from the institution of marriage" and that "the opposite sex requirement in the definition of marriage does not minimally impair the rights of claimants."[9] The Ontario Court of Appeal reformulated the common law definition of marriage to be "the voluntary union for life of two persons to the exclusion of all others" and stated that this new definition was to apply immediately.[10] The Courts of Appeal in British Columbia and Quebec soon followed upon the Ontario Court of Appeal

[3] .For further detail see Background paper entitled "Civil Marriage Act" at http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=N&StartList=A&EndList=Z&Session=13&Type=0&Scope=I&query=4381&List=toc-3
[4] http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b172.pdf
[5] *Church Law Bulletin* No.7 : The Supreme Court Same- Sex Marriage Reference: What are the Implications for Churches and Religious Officials. Full text of which can be found at www.churchlaw.ca
[6] *North v. Matheson* (1974), 24 R.F.L. 112
[7] *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*
[8] *Halpern v. Canada* (Attorney General), [2002] O.J. No.2714.
[9] Halpern v. Canada (Attorney General), [2003] O.J. No.2268 at para 125 and 138
[10] Ibid.

decision with similar decisions.[11] As of February 2005, 10 out of 11 provincial and territorial courts had ruled that the opposite sex requirement of marriage is unconstitutional.[12]

2. The Supreme Court Marriage Reference

Rather than appealing these Court of Appeal decisions to the Supreme Court of Canada, the Attorney General of Canada decided to send a *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* (the "Proposed Act"*)* on July 16, 2003, to the Supreme Court of Canada for a Reference. This Proposed Act contained only two clauses. The first clause purported to extend the legal capacity to marry to same-sex couples, while the second clause gave religious officials the freedom to refuse to perform same-sex marriages if these are contrary to their beliefs. Four questions were posed to the Supreme Court concerning this Proposed Act.

1. Was the Proposed Act within the legislative authority of the Parliament of Canada?
2. Did the Proposed Act conform with the Charter?
3. Would the Proposed Act protect religious official from performing same-sex marriages if they were opposed to such marriages on religious grounds?
4. Is the opposite sex requirement for marriage constitutional?

The Supreme Court of Canada handed down its decision regarding the reference questions on December 9, 2004 (the "Marriage Reference").[13] The Department of Justice provides a useful summary of the basic findings of the Supreme Court as follows:

- Section 1 of the Government's proposed legislation extending civil marriage to same-sex couples is constitutional and that its very purpose flows from the Charter (para. 43);
- The Charter protects religious officials from being compelled to perform marriages between two persons of the same sex if it is contrary to their religious beliefs (paras. 59 and 60);
- Section 2 of the proposed legislation on the protection of religious freedom goes beyond federal jurisdiction into matters that are provincial jurisdiction. Religious freedom is already protected by the Charter, but if additional protections are desired, they would have to be done by the Provinces and Territories (para. 37);

[11] *Egale v. Canada* (Attorney General) (2003), 38 R.F.L. (5th) 32(B.C.C.A.); *Catholic Civil Rights League v. Hedricks*, [2004] J.Q. No. 2593.
[12] Mary C. Hurley, *Bill C-38: The Civil Marriage Act* Feb.2, 2005 full text online at http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/summaries/c38-e.pdf.
[13] *Reference Re Same-Sex Marriage*,[2004] S.C.J. No. 75.

- The Court declined to answer the question on whether the opposite-sex requirement for marriage is constitutional, as they felt it was unnecessary, in light of the unique combination of factors at play (para. 71).[14]

A more in depth review of the Marriage Reference decision of the Supreme Court of Canada, as well as a canvassing of the potential implications of this decision for religious officials and religious groups not in agreement with same-sex marriage can be found in our previous *Church Law Bulletin* No.7.[15].

While the Marriage Reference decision of the Supreme Court of Canada clarified that it is within the federal Parliament's powers to enact legislation concerning the legal capacity to marry, it did not adequately address the concerns expressed by certain interveners that the freedom of religion and conscience of religious groups and religious officials who are opposed to same-sex marriage would be restricted in the event that civil marriage for same-sex couples is legalized. The Supreme Court of Canada ruled that provincial governments and provincial human rights tribunals should provide exemptions to religious groups and officials who are opposed to same-sex marriage from having to perform, or to otherwise promote same-sex marriages.

3. Provincial legislation concerning the solemnization of marriage

In response to provincial court decisions declaring the opposite sex requirement of marriage to be unconstitutional, and to the Supreme Court Marriage Reference, the government of Ontario introduced Bill 171. The Attorney General for the Province of Ontario expressed his view that the purpose of Bill 171 is to "amend more than 70 statutes to bring them in line with court decisions that found same-sex marriage to be constitutional," as well as to "clarify that religious officials cannot be compelled to perform marriages or use their sacred places for the celebration of marriages that are inconsistent with their religious beliefs."[16] This legislation and the exemptions it provides for religious groups and officials who are opposed to same-sex marriage are reviewed in more detail later in this Bulletin.

[14] Department of Justice Canada, *Decision of the Supreme Court of Canada on the Marriage Reference*, full text of which can be found at: http://canada.justice.gc.ca/en/news/fs/2004/doc_31342.html.
[15] *Supreme Court Marriage Reference: What are the Implications for Churches and Religious Officials?* Full text of which is available at www.carters.ca.
[16] Ministry of the Attorney General, News Release Communique: *Ontario to amend laws to update legal definition of spouse* the full text of which is available at http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050222-spousalDefinition.asp

Despite the fact that the Supreme Court of Canada decision made it clear in the Marriage Reference that it is the responsibility of the provinces to enact legislation that would provide an exemption for religious groups and officials who are not in agreement with same-sex marriage on religious grounds, as of the date of publication, no other province has introduced legislation which has specifically addressed these concerns. This is perhaps due to the fact that the other provinces are waiting on the federal marriage legislation before introducing any legislation about same-sex marriage.

During the debates over Bill 171 that took place in the Ontario legislature on February 23, 2005, Mr. David Zimmer, the MPP for Willowdale, pointed out that, although Bill 171 would not protect marriage commissioners who are not religious officials, other provisions of the Human Rights Code may provide some assistance. In response to concerns expressed by constituents that marriage commissioners in Ontario who are not in agreement with same-sex marriage for personal, cultural or religious reasons, but who are not religious officials will be forced to perform these marriages he stated:

> Whether or not a particular individual has a right to refuse to perform a marriage based on that employee's religious beliefs will depend upon the circumstances of the case and the ability of the municipality to provide services free of discrimination. Under the Human Rights Code, employers are already under an obligation to reasonably accommodate the employees' religious beliefs.[17]

4. Provincial Human Rights Codes

In its 1995 *Egan v. Canada* [18]decision, the Supreme Court of Canada found that sexual orientation was an "analogous ground" for the purposes of interpreting s. 15 (1) of the *Charter*. Subsequently, in *Vriend v. Alberta*, the Supreme Court affirmed that sexual orientation must be included as a ground of discrimination in all provincial human rights codes. As a result, it has been illegal in every jurisdiction in Canada to discriminate on the basis of sexual orientation in the provision of services, accommodation and employment since 1998.[19]

There are limited exemptions provided for religious organizations in some provincial human rights codes. The *Ontario Human Rights Code* provides an exception as follows:

[17] *Ibid* at 1550.
[18] [1995] 2 S.CR. 513
[19] *Vriend v. Alberta* [1998] 1 S.C.R. 493 (S.C.C.)

> s.18 The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.[20]

Bill 171, if passed in its present form would add the following additional exemption to the Ontario Human Rights Code:

> s.18.1 (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the Marriage Act refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,
> (a) the person's religious beliefs; or
> (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.
> Same
> (2) Nothing in subsection (1) limits the application of section 18.
> Definition
> (3) In this section,
> "sacred place" includes a place of worship and any ancillary or accessory facilities.

Courts have historically found that in order for exemptions such as these to apply, there must be a nexus between the service or facility and the purposes of the religious, philanthropic, educational, fraternal or social institution or organization. For example, in *Hall v. Powers*, wherein a student brought a human rights complaint against his Catholic school for refusing to allow him to bring his homosexual partner to the school prom, the court found that the school was discriminating against Hall based on sexual orientation and commented that,

> "it is important to note that the prom in question is not part of a religious service (such as a mass), is not part of the religious education component of the Board's activity, is not held on school property and is not educational in nature"[21]

Although this case was not decided based on Ontario *Human Rights Code* provisions, it is quite possible that a similar type of analysis would have taken place where it decided within that framework.

[20] *Human Rights Code* R.S.O. 1990, c.H.19, s.18 the full text of which is available on-line at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90h19_e.htm#P228_19260
[21] *Hall (Litigation Guardian of) v. Powers*, 213 D.L.R. (4th)308 (O..S.C.J.)

Similarly, in *Brillinger v. Ontario*, a printer was found to have breached section 1 of the Ontario *Human Rights Code* when he refused to provide printing services for the Gay and Lesbian Archives. Mr. Brockie argued that the court should "draw a distinction between acting for customers who are homosexual and acting in furtherance of a homosexual lifestyle" and further argued that: "a person's dignity should not be demeaned by being conscripted to support a cause with which he disagrees because of an honestly held and sincere religious belief."[22] The court rejected Brockie's arguments on the grounds that:

> The Ontario legislature has provided exemptions and defences in respect of the Code's prohibitions of discriminatory conduct in the areas of housing and employment. The legislature has chosen not to provide any defence in respect of the Code's prohibition of discrimination with respect to the supply of services, goods and facilities.[23]

And then concluded that,

> Accordingly, 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.

As a result, at the present time, religious groups are allowed to show a preference towards their own members, when it comes to the provision of services and use of facilities. However, religious groups that are providing services and facilities which can be characterized as being available for use to third parties instead of to members only, or are commercial in nature, and are not obviously linked to a religious purpose, could be exposing themselves to human rights challenges.

At least two such matters are before provincial human rights tribunals at the present time: One involves a complaint against the Knights of Columbus in British Columbia for refusing to rent out their hall to a same-sex couple for their wedding reception, The other involves a complaint against a camp in Manitoba that refused to rent its camp facilities to a gay boys choir. Unfortunately, the British Columbia and Manitoba Human Rights Commissions have not yet rendered their decisions on these matters and it is difficult to predict what their findings will be. Barbara Findlay, the lawyer representing the same-sex couple in the Knights of Columbus case, argued that,

[22] [2002] O.J. no.2375 at para 3 and para 19.
[23] *Ibid* at par 35.

> The religious freedom of the Roman Catholic Church to refuse to marry same-sex couples could not be equated to religious freedom of a lay organization of Catholics to refuse to rent premises for the celebration of a same-sex marriage—not if the premises were generally offered to the public[24]

Whereas the lawyer for the Knights of Columbus submitted that,

> If it's lawful to say no to a same-sex marriage, it's lawful to say no to celebrating the event. To celebrate an event against your religious belief is the same as conducting the event yourself.[25]

The Human Rights Tribunals in B.C. and Manitoba will therefore have to decide whether the freedom of religion extends far enough to protect the religious freedom of members of a "lay organization," whether it extends to religious groups who are offering a service to the public and whether the "celebration" of a marriage should be distinguished from the solemnization of a marriage.

C. REVIEW OF BILL 171

As noted above, Bill 171 contains provisions exempting religious officials who are opposed to same-sex marriage from having to perform, or otherwise promote, a same-sex marriage. The two key provisions in this regard are the one cited above that would amend the Ontario *Human Rights Code*, and the following amendment that would be made to the *Marriage Act*:

> 20(6) A person registered under this section is not required to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to do so would be contrary to,
> (a) the person's religious beliefs; or
> (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.
> Definition
> (7) In subsection (6),
> "sacred place" includes a place of worship and any ancillary or accessory facilities.

This clause refers to "a person registered under this section" which is defined in s.20(3) of the *Marriage Act* as follows:

[24] Michael Valpy, "The Knights and the lesbians: Exhibit A in same-sex marriage debate", *The Globe and Mail*, February 2, 2005 *,at .A1*
[25] *Ibid*.

> No person shall be registered unless it appears to the Minister,
>
> (a) that the person has been ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is, by the rules of that religious body, deemed ordained or appointed;
>
> (b) that the person is duly recognized by the religious body to which he or she belongs as entitled to solemnize marriage according to its rites and usages;
>
> (c) that the religious body to which the person belongs is permanently established both as to the continuity of its existence and as to its rites and ceremonies; and
>
> (d) that the person is resident in Ontario or has his or her parish or pastoral charge in whole or in part in Ontario; provided that in the case of a person who is in Ontario temporarily and who, if resident in Ontario, might be registered under this section, the Minister may register him or her as authorized to solemnize marriage during a period to be fixed by the Minister. R.S.O. 1990, c. M.3, s. 20 (3).[26]

It should be noted that the amendments provided in Bill 171 would only protect religious officials who are licensed to perform marriages under the *Marriage Act*, and would not serve to protect lay persons like members of the Knights of Columbus. On the other hand this bill would extend the exemption for religious officials to "any event related to the solemnization of a marriage", which presumably would include a wedding reception. During the debates in Ontario's provincial parliament, the following clarification about the scope of the exemptions was provided by David Zimmer, MPP for Willowdale :

> What is the effect of this bill on religious organizations, and in particular, will religious groups affiliated with religious organizations, such as the Knights of Columbus, be protected from having to rent their facilities to same-sex couples in the proposed legislation? The answer to that question is that the proposed legislation protects religious officials and sacred places in relation to the solemnization and celebration of same-sex marriage. This means that only religious officials registered to perform marriages under the Marriage Act are protected. It does not contain protections for non-religious officials or non-sacred places. But section 18 of the Human Rights Code protects certain organizations that are formed to serve the interests of a particular group of people, including members of a particular religion. If a group falls within section 18 of the code, the organization may be allowed to restrict access to the services or facilities to members of their group. This protection existed before the Supreme Court decision, and it continues to exist today. **However, where an organization makes its services or premises commercially available to others outside its recognized group, it must do so without discrimination**.[27]

[26] *Marriage Act*, R.S.O. 1990 c.M-3 full text of which is available at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90m03_e.htm

[27] David Zimmer, MPP for Willowdale, Official Report of Debates (Hansard) 38th Parliament, Session 1 Wed 19 Nov 2003 - L110A - Wed 23 Feb 2005 / Mer 23 fév 2005 at 1550. Full text at http://www.ontla.on.ca/hansard/house_debates/38_parl/Session1/L110A.htm.

The legislative debate about Bill 171 focused heavily on the scope of the definition of "sacred place" provided in the Proposed Act, namely "sacred place includes a place of worship and any ancillary or accessory facilities." Many members pointed out that the words "ancillary or accessory" are open to many different interpretations and could easily be read down by the courts and human rights tribunal to exclude church halls or even church basements. Jim Flaherty, the M.P.P. for Whitby-Ajax, clarified that the government's intention was to include in this definition,

> not only property used for religious ceremonies, but also property used by religious organizations in connection with their faiths. For example, the legislative language is intended to include properties such as church halls and other spaces connected with religious bodies or used by religious congregations. The intention of the expansive definition which has been given to the term "sacred place" is to broadly protect property used or accessed by religious bodies. The intention is to protect religious organizations from challenges to their freedom of religion with respect to the use of their properties and facilities.[28]

At the beginning of the debate, the Hon. Michael Bryant explained that Bill 171 was being introduced in fulfilment of the Province's obligations to, as was stated in the Supreme Court Marriage Reference,

> …legislate in a way that protects the rights of religious officials while providing for solemnization of same-sex marriage.[29]

The new Ontario *Human Rights Code* exemption presently being contemplated in Bill 171 only provides protection to religious groups where facilities and services of the religious group are being rented out to or provided for members of the religious group, for purposes that are associated with the solemnization of marriage. Courts and tribunals will be left to interpret what part of the lands and buildings of a church or religious organization will be included as 'ancillary and accessory' facilities as well as what events will be considered to be "related to the solemnization of marriage." It is clear, however, that Bill 171 only applies to events that are related to the solemnization of marriage and does not address events sponsored by a church or religious organization that is unrelated to marriage.

[28] *Ibid* at 1620
[29] S*upra* note 13.

Given that courts and tribunals have a tendency to interpret human rights exemption narrowly, in order to avoid human rights complaints, such as the one against the Knights of Columbus in British Columbia, it would be prudent for religious groups who are not in agreement with same-sex marriage to have a facility use policy that restricts the use of church facilities to church programs and/or members for purposes which are consistent with the statement of faith and constitution of the church. The wording in such a policy should be prepared in a manner consistent with the Ontario *Human Rights Code* or other provincial human rights codes as applicable, and should be neutral where possible, avoiding negative or pejorative wording or wording that refers to an "identifiable group." Any services provided by a church should have a "nexus" to the charitable purpose of the group and if not, must be open to all members of the public, failing which the church could be seen as discriminating in the provision of a service. Any such policy should be enforced in a consistent manner; otherwise the church may waive its ability to enforce the policy, since inconsistency can be interpreted as "discrimination in enforcement." *Church Law Bulletin* No. 1 contains more information about how to draft policies on the use of church facilities.[30]

This legislation was also passed in contemplation of Bill C-38 and would change the definition of spouse in several provincial statutes to make it coincide with the definition of marriage in s.2 of Bill C-38.

D. CONTENTS OF BILL C-38

Bill C-38 is based on the Proposed Act that was sent to the Supreme Court of Canada for a Marriage Reference.[31] It includes a lengthy preamble which seeks to explain the purpose of the legislation, four clauses which directly address the issue of the redefinition of marriage, and consequential amendments to several pieces of federal legislation, including the *Divorce Act* and the *Income Tax Act*.[32]

[30] Full text can be found on-line at www.carters.ca.
[31] *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, Order in Council P.C. 2003-1055.
[32] *Income Tax Act* S.S. c.1 (5th Supp.); Divorce Act R.S. c.3 (2nd Supp.)

1. The Preamble

The government's stated purpose for including a lengthy preamble in Bill C-38 is to "establish a context and rationale" for the legislation and to explain the government's intentions for enacting it.[33] It does this by:

- asserting Parliament's commitment to uphold the Constitution and equality rights under section 15 of the Canadian Charter of Rights and Freedoms (Charter) (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);
- 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. 8);
- affirming Parliament's responsibility to support the fundamental institution of marriage (par. 9); and
- asserting that in light of Charter values, access to civil marriage for same-sex couples should be legislated (par. 10).[34]

2. The Content of the Bill

Section 1 of Bill C-38 states that the Bill should be referred to as "the *Civil Marriage Act*," and sections 5 through 12 outline the consequential amendments to several federal statutes. The second section seeks to redefine marriage as: "the lawful union of two persons to the exclusion of all others." An attempt to protect religious officials from being forced to perform same-sex marriages is made in section 3 of Bill C-38 which states that:

> It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

[33] Mary Hurley, *Legislative History of bill C-38* February 2, 2005.
[34] *Ibid* at 8.

The Proposed Act that was referred to the Supreme Court of Canada for the Marriage Reference contained a similar provision which stated that,

> 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.

In the Marriage Reference, the Supreme Court of Canada found this section of the Proposed Act to be *ultra vires* the federal parliament, as it encroaches on the provincial power over the solemnization of marriages, which is provided for in s.92(12) of the *Constitution Act, 1867*.[35] As was pointed out by the federal government in the legislative history of Bill C-38:

> There may be questions as to whether the recognition language set out at clause 3 is sufficiently distinct from that of the more declaratory language of the former draft provision to pass constitutional muster.[36]

The Department of Justice also confirmed that the Federal Government cannot legislate exemptions for religious groups or officials in the passage that follows:

> This is not a new issue. This bill has no effect on how this matter would be resolved. Most specific situations involving religious freedom are not within federal jurisdiction, but would fall within provincial or territorial human rights legislation. The outcome would depend on the specific facts. However, the Supreme Court was clear that religious freedom is fully protected by the Charter, and that human rights tribunals must also consider how to protect this fundamental freedom[37]

D. CONCLUSION

As a result of the court decisions and the new legislation about same-sex marriage, it is very important for churches and religious groups who are not in agreement with same-sex marriage to clearly articulate their identity and beliefs through a constitution and clearly state, wherever possible, how their beliefs relate to Scripture. If a church or religious group fails to do this, it will be left up to the courts to determine what constitutes a "tenet of faith" of the church and whether or not that tenant of faith is reasonable, thereby leaving the church exposed to legal challenges. Furthermore, churches should set out their religious purposes as clearly as possible in their letters patent with references, wherever possible, to Scripture and to upholding

[35] *Constitution Act*, 1867.
[36] *Supra* note 33 at 10.
[37] Department of Justice Canada, *Frequently Asked Questions: The Civil Marriage Act*, February, 2005. full text can be found at http://canada.justice.gc.ca/en/news/nr/2005/doc_31378.html

the church's statement of faith. Churches should limit the use of their facilities to members and for activities relevant to the Church's religious purpose. Furthermore, churches should clearly define their membership and require their members to sign a statement indicating that they agree to comply with the church's constitution and statement of faith. Finally, all policies should be drafted in a way that is consistent with human rights legislation and should be applied in a consistent manner.

Whether or not the concerns outlined above are valid remains to be seen. In the meantime, given the severity of liabilities for non-compliance with the law, churches and religious groups would be well advised to undergo a legal audit to ensure that they are not exposing themselves to legal challenges and possible liability. A legal audit would review the church's existing documents to ensure that they are consistent with applicable legal requirements and to ensure that they do not reflect any discrimination or promotion of hatred against an identifiable group. Churches and religious groups should educate their clergy regarding the new laws and their implications for religious groups and officials.[38]

[38] For further recommendations on how to develop church policies, see *Church Law Bulletin* No.1 at www.churchlaw.ca.

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BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with **Fasken Martineau DuMoulin** LLP

Main Office Location
211 Broadway, P.O. Box 440
Orangeville, ON, Canada, L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300
Toll Free: 1-877-942-0001
www.carters.ca

National Meeting Locations
Toronto (416) 675-3766
Ottawa (613) 212-2213
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