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## **IMPLICATIONS OF RECENT AMENDMENTS TO *CIVIL MARRIAGE ACT* FOR RELIGIOUS GROUPS AND OFFICIALS**

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### **A. INTRODUCTION**

Bill C-38, now entitled the *Civil Marriage Act*, S.C. 2005, c. 33, received Royal Assent on July 20, 2005, and is now in full force.<sup>1</sup> The current version of the *Civil Marriage Act* contains two amendments aimed at protecting individuals and organizations opposed to same-sex marriage on religious grounds from being sanctioned under law or losing their charitable status. In this *Church Law Bulletin* we explore the possible implications of these new amendments for religious groups and religious officials.<sup>2</sup>

### **B. BACKGROUND**

The preamble of the *Civil Marriage Act* describes its primary purpose as granting access to marriage for same-sex couples, while at the same time respecting the “guarantee of freedom of conscience and religion [in the *Charter of Rights and Freedoms* (“Charter”)] and, in particular, the freedom of members of religious

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<sup>1</sup> For the full text of the *Civil Marriage Act* go to:

<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>

<sup>2</sup> For more information regarding the *Civil Marriage Act* and other legal information regarding same-sex marriage please refer to *Church Law Bulletin* No. 8, “Update Regarding Same-Sex Marriage Legislation” and *Church Law Bulletin* No.7 entitled “Supreme Court Same-Sex Marriage Reference: What are the Implications for Churches and Religious Officials?” which can be found at [www.churchlaw.ca](http://www.churchlaw.ca).

groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.”<sup>3</sup>

The *Civil Marriage Act* defines marriage as “the lawful union of two persons to the exclusion of all others,”<sup>4</sup> and states that, “[f]or greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.” Sections 5 to 15 of the *Civil Marriage Act* contain consequential amendments to various federal statutes, including the *Divorce Act* and the *Income Tax Act*.

The first version of the *Civil Marriage Act*, which was introduced in February 2005, contained a clause stating 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.”<sup>5</sup> During the debates and committee hearings surrounding Bill C-38, several members of Parliament and religious groups and officials expressed a concern that this clause would not provide sufficient protection for those opposed to same-sex marriage on religious grounds from being sanctioned under the law for expressing their beliefs about marriage. There was also the concern that a religious organization might put into question its charitable status as a result of having expressed opposition to the legal recognition of same-sex marriage, arguably because to do so would be against the accepted public policy of the government of Canada.

In response to these concerns, some amendments were made to Bill C-38 in June 2005 and are now part of the *Civil Marriage Act*. One of these amendments, found at section 3.1 of Bill C-38 states that:

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

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

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<sup>3</sup> *Civil Marriage Act*, preamble.

<sup>4</sup> *Ibid.* at s. 2

<sup>5</sup> Bill C-38, s. 3, full text of which 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>

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

### C. THE POTENTIAL SCOPE OF THESE NEW AMENDMENTS

It is important to keep in mind that since the *Civil Marriage Act* is federal legislation, the impact of these latest amendments will generally be limited to situations that fall within federal jurisdiction. It will now be up to provincial governments to decide whether they will make similar amendments to provincial legislation to include protections for individuals and groups opposed to same-sex marriage on religious grounds from having to perform same-sex marriages or to make their facilities available to same-sex couples getting married. This has already been achieved in Ontario, to some extent, by the passing of the *Spousal Relationships Statute Law Amendment Act, 2005*,<sup>6</sup> which contains amendments to the *Ontario Human Rights Code* and the *Marriage Act*, providing protection for religious officials opposed to same-sex marriage from having to solemnize these marriages, and allowing religious officials to restrict the use of sacred places for the performance of opposite sex marriages.<sup>7</sup>

In the preamble to Ontario's *Spousal Relationships Statute Law Amendment Act*, it is recognized that "(t)he *Charter of Rights and Freedoms* protects the right to manifest religious belief by religious practice and it protects the right of religious officials who solemnize marriages and control the use of sacred places to do so in accordance with their religious beliefs."<sup>8</sup> The premier of Alberta, Ralph Klein, has publicly announced he will be introducing similar legislation in that province sometime in the Fall of 2005. Other provinces, like British Columbia and Quebec already had passed legislation that had the effect of amending various provincial statutes to include same-sex couples, but these statutes do not directly address the issue of religious freedom or freedom of conscience.

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<sup>6</sup> *Spousal Relationships Statute Law Amendment Act, 2005*, S.O. 2005, c. 5, the full text of which is available at: [http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2005/S05005\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2005/S05005_e.htm)

<sup>7</sup> For further information regarding the *Spousal Relationships Statute Law Amendment Act* see *Church Law Bulletin* No. 8 which is available at [www.churchlaw.ca](http://www.churchlaw.ca).

<sup>8</sup> *Supra* note 6, preamble.

Interestingly, many of the legal conflicts arising over same-sex marriage have been in situations falling within the jurisdiction of the provincial governments. The most recent examples of this includes a situation in Manitoba where a Christian camp is responding to a human rights complaint brought by a gay choir that was denied the use of the camp's facilities, and in British Columbia where a same-sex couple brought a human rights complaint against the Knights of Columbus for refusing to rent their hall to them for their wedding reception. In several provinces, marriage commissioners have been let go for refusing to solemnize same-sex marriages and have brought complaints to the human rights commissions in their provinces.<sup>9</sup>

In British Columbia, the Court of Appeal recently upheld a decision of the British Columbia College of Teachers to suspend a teacher for having written a letter to the editor that, in their opinion, was "discriminatory, demonstrating that he was not prepared to accommodate the core values of the education system."<sup>10</sup> In its decision, the court noted that, because Kempling's religion was not identified, and because there was no evidence that his ability to practice religion would be compromised if he were restricted from making "discriminating public statements about homosexuals," there was not an infringement of Kempling's freedom of religion.

Another recent British Columbia Supreme Court decision concluded that the common law definition of adultery needs to be broadened so that the definition of marriage includes same-sex as well as opposite sex couples. Although there is no statutory definition of adultery, the common-law has always defined it as being a sexual relationship between a man and a woman who are not married to each other when one of them is married to someone else. The B.C. court ruled that the definition of adultery should include the situation where the affair is between two people of the same gender.<sup>11</sup>

The legal challenges described above highlight that there are some legal consequences of changing the definition of marriage that were unforeseen or were beyond the control of the legislators responsible for drafting and enacting the *Civil Marriage Act*. It is clear that it will be some time before all of the legal implications of this new legislation are apparent.

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<sup>9</sup> None of these human rights complaints have yet been fully processed and as a result no decision has yet been rendered by any provincial human rights tribunal that directly addresses this issue.

<sup>10</sup> *Kempling v. British Columbia College of Teachers*, [2005] B.C.J. No. 1288 at para 3.

<sup>11</sup> *P.v. P.* decision rendered on August 29, 2005, but not published at the time of the publication of this bulletin.

## D. IMPLICATIONS FOR RELIGIOUS GROUPS AND OFFICIALS WHO ARE OPPOSED TO SAME-SEX MARRIAGE

Now that the *Civil Marriage Act, 2005* has received Royal Assent, religious charities worried about losing their charitable status for being opposed to same-sex marriage on religious grounds can take some comfort in these amendments. It is unlikely that any religious organizations will be at risk of losing its charitable status for teaching their beliefs regarding their understanding of marriage and same-sex marriage. However, religious groups with charitable status must be careful that the way in which they address the same-sex marriage issue is not interpreted as being partisan, as this could give the Canada Revenue Agency grounds for revoking their charitable status for having engaged in prohibited political activities.

The amendments make it less likely that someone would be criminally charged for their views on same-sex marriage, provided they have not violated the relevant hate crime provisions in the *Criminal Code*. The relevant hate crime provisions (emphasis added) of the *Criminal Code* are found in section 319(2), which states:

**319.(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of**  
**(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or**  
**(b) an offence punishable on summary conviction.**

### **Defences**

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

**(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;**

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

### **Forfeiture**

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of

the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent

**(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.**

Definitions

(7) In this section,

**"communicating" includes communicating by telephone, broadcasting or other audible or visible means;**

**"public place" includes any place to which the public have access as of right or by invitation, express or implied;**

**"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.**

At least one judicial decision in Canada (*Owens v. Saskatchewan (Human Rights Commission)* (2002), 228 Sask. R. 148 (Sask. Q.B.)) has held that certain passages in the Bible expose homosexuals to hatred. There is reason to believe that parallel passages in the Koran, the works of Buddha, or any Hindu writings would be similarly characterized. The hate crime provisions may still be interpreted in such a way as to put a religious leader who is speaking about the moral aspects of homosexuality at risk of being exposed to prosecution under this section of the Code. As a result, it would be prudent for churches and other religious organizations to consider taking precautions, such as avoiding public criticisms of identifiable groups or their activities, limiting opinions to private conversation, and if targeted or investigated, relying on the constitutional right to remain silent.<sup>12</sup>

In addition, individuals and religious groups opposed to same-sex marriage on religious grounds will likely continue to face provincial human rights challenges in the future. As a result, it is important for religious groups to clearly articulate their beliefs about marriage and human sexuality and relate these beliefs to their respective Scriptures. As is the case for the common law, religious groups may want to broaden the definitions they have been using for adultery to include reference to same-sex relationships. If a religious group fails to adequately define its beliefs in a way that addresses the issue of same-sex relationships, they

<sup>12</sup> For more information regarding the hate crime legislation, please refer to *Church Law Bulletin* No. 6, entitled "Criminal Code Amendments: Bill C-250," which can be found at [www.churchlaw.ca](http://www.churchlaw.ca).

may be leaving it up to a court or human rights tribunal to decide what constitutes a “tenet of their faith,” thereby exposing themselves to legal challenges. For the same reason, it may also be wise to outline religious purposes in an organization’s letters patent, where possible, with references to Scripture and to upholding the group’s statement of faith. In an effort to avoid liability, churches, synagogues, mosques and temples can restrict the use of their facilities to members for activities relevant to the organization’s religious purpose. It is also important for the group to define their membership and require their members to sign a statement indicating that they will comply with the constitution and statement of faith. Most importantly, all policies should be drafted in a way that is consistent with human rights legislation and should be applied in a consistent manner.<sup>13</sup>

It is the role of the provincial governments, and the provincial human rights tribunals, to determine how best to balance the Charter right to freedom of religion and conscience with the relevant provisions of the provincial human rights codes. In the meantime, religious organizations that are concerned about the implications of this new legislation would be well advised to undergo a legal audit to ensure that they are not exposing themselves to unnecessary and potentially costly legal challenges.

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<sup>13</sup> For more suggestions on how religious groups can protect themselves from liability, see *Church Law Bulletin* No. 1, entitled “Same-Sex Marriage: What Churches and Religious Organizations Can Do in Response,” which is available at [www.churchlaw.ca](http://www.churchlaw.ca).