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Same Sex Marriages: What Churches and Religious Charities Can Do in Response (Power Point Presentation)

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A. INTRODUCTORY COMMENTS

- The purpose of this presentation is to:
 - Provide a summary of recent developments in the law to date on same sex marriage
 - Offer preliminary advice on how churches can ensure that they are in compliance with recent legal developments
- This area of law is in a state of flux and is highly controversial. As such, the comments that follow are of a tentative nature and are subject to change as this evolving area of the law unfolds

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B. OVERVIEW OF TOPICS

- General overview of recent legal developments regarding same sex marriages
 - Case law developments
 - Draft federal legislation
 - Impact of Bill C-250 on same sex marriage
 - Impact of human rights legislation
- What churches and religious charities can do in response
 - The importance of constitutional documents
 - Conducting a legal audit
 - Education of clergy

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C. THE DEVELOPMENT OF THE LAW ON SAME SEX MARRIAGE

1. Recent Case Law Developments Regarding Same Sex Marriage
 - *M. v. H.* [1999] 2 S.C.R. 3 (S.C.C.)(QL) – Supreme Court of Canada
 - The opposite sex definition of “spouse” under the support provisions of the *Family Law Act* (Ontario) is unconstitutional

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- *Vriend v. Alberta* [1998] 1 S.C.R. 493 (S.C.C.)(QL) – Supreme Court of Canada
 - The exclusion of “sexual orientation” as a protected ground of discrimination under the *Alberta Individual’s Rights Protection Act* is unconstitutional
- *Hall (Litigation guardian of) v. Powers* [2002] O.J. No. 1803 (QL) – Ontario Superior Court
 - In its decision, the court stated that there was “...no...single position within the Catholic faith community” in relation to same sex couples notwithstanding the traditional teaching of the Catholic Church

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- Recent cases that have challenged the constitutional validity of the opposite-sex requirement of marriage
 - B.C. case of *Equality for Gays and Lesbians Everywhere* (EGALE) [2003] B.C.J. No. 994 (B.C.C.A.)(QL), and
 - Ontario case of *Halpern v. Canada (Attorney General)* [2003] O.J. No. 2268 (O.C.A.)(QL)
 - In the above cases the respective Courts of Appeal ruled that the existing common law definition of marriage as the “union of one man and one women” is unconstitutional

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- The Court of Appeal in the *Halpern* case also stated the following:
 - “Freedom of religion under s. 2(a) of the Charter ensures that religious groups have the option of refusing to solemnize same-sex marriages”
- Neither the *Halpern* nor the *EGALE* cases have been appealed to the Supreme Court of Canada

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- *Hendricks v. Quebec (Attorney General)* [2002] J.Q. no 3816(QL) Quebec Superior Court
 - The statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the Charter
 - This case is being appealed to the Quebec Court of Appeal
- Section 15 of the Canadian Charter of Rights and Freedoms does not specifically guarantee equality based on “sexual orientation” but the courts have found analogous grounds to those protected in section 15

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2. Draft Federal Legislation

- In the summer of 2003, the federal government confirmed that it would not appeal the decisions of the Courts of Appeal in B.C., Ontario and the Quebec cases referenced above
- Draft federal legislation was prepared by the federal government in the summer of 2003
- 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 draft legislation recognizing the union of same sex couples

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- The actual wording of the proposed draft legislation entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* 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.”
- Section 2 does not establish a new right, it only recognizes what is assumed to be an existing right

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- Changes to other federal statutes will also be made as a result of the new legislation
- For further details see http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html
- 3. Impact of Bill C-250 (Hate Crimes) on Same Sex Marriage
- When considering the topic of same sex marriage, churches need to be aware of Bill C-250 (Hate Crimes) [See presentation by Bruce Long]
- Statements opposing same sex marriage might in some situations be considered as a hate crime offence

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- Until Bill C-250 is passed, there will remain some uncertainty about the impact of this legislation
- 4. Impact of Human Rights Legislation
 - a) The *Ontario Human Rights Code*
- Part 1 of the HRC enumerates areas in which individuals have the right to be treated “equally” and without discrimination

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- Section 1 states as follows regarding the provision of services:

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
- Section 5 of the HRC 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

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- However, section 24 of the HRC permits discrimination to occur in the context of employment where:
 - The nature of the employment requires the discrimination
 - The qualification is a reasonable and bona fide qualification for the employment
 - Example: A requirement that a minister subscribe to a church's Statement of Faith and objects

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- **Section 11(1) of the HRC:**

Extends the prohibition of discrimination into areas that are not contemplated by Section I of the HRC, where the discrimination results in the exclusion of an "identifiable group" as set out in the HRC, except generally when the requirement, qualification or factor is reasonable and bona fide in the circumstances

- b) *The Canadian Human Rights Act*

- **Section 3 defines "prohibited grounds of discrimination" as follows:**

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.

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- **Section 5 defines "discriminatory practice" as follows:**

5. 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.

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- c) **Recent key human rights decisions**

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

"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."

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- *Ontario (Human Rights Commission) v. Brillinger* [2002] O.J. No. 2375 (QL) – Ontario Superior Court
 - In furtherance of his religious beliefs, the owner of a printing shop felt he could not assist in the printing and distribution of information intended to spread the acceptance of homosexual lifestyles. However, he had not refused service to homosexual customers
 - In finding the owner in violation of the Ontario Human Rights Code the court upheld the “right to be free from discrimination based on sexual orientation in obtaining commercial services”

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D. WHAT CHURCHES AND RELIGIOUS CHARITIES CAN DO IN RESPONSE

1. The Importance of Constitutional Documents
 - a) The legal nature of religious organizations
 - Churches and other religious organizations are a voluntary association of persons who come together for a collective purpose as reflected in their respective governing agreement, namely their constitution

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- b) The need for churches and religious charities to clearly articulate their beliefs through a constitution
 - Since a church is nothing more than what the individuals forming it decide it to be, it is essential for churches to clearly state what they believe and, where possible, relate those beliefs to Scripture
 - If the church fails to articulate what it is and what it believes, it will be left up to the courts to determine it on behalf of the church. The church may then be left more vulnerable to challenge under proposed federal legislation, the HRC and Bill C-250

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- The way in which the church articulates what it believes is through the church constitution
- For unincorporated churches, a constitution is usually a single document that is neither issued nor sanctioned by the government
- For incorporated churches, the constitution usually consists of a collective of the following documents:
 - Letters patent
 - General operating by-law
 - Policy Statements

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2. Possible Options Regarding Specific Constitutional Documents

- In light of recent changes in the law, churches and other religious organizations can take the following steps
- a) Statement of Faith
 - A Statement of Faith should always be part of the constitution of a church
 - Scripture is open to differing interpretations. A more literal and/or orthodox interpretation would likely be more consistent with a position not in support of same sex marriage

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- If applicable, the church's Statement of Faith should reflect the church's theological belief in a literal and/or orthodox interpretation of Scripture
- General Scriptural passages such as those contained in the Apostle's Creed can be inserted in the Statement of Faith
- However, Scriptural passages that may be construed as promoting hatred against an identifiable group may leave the church open to civil and even criminal liability

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- According to the case of *Owens v. Saskatchewan (Human Rights Commission)* [2002] S.J. No. 732 (QL), Scriptural references may be found to be promoting hatred

b) Charitable objects

- The church's charitable objects are set out in its letters patent and should clearly indicate a religious purpose with references, where possible, to Scripture, i.e. "propagating the Gospel of Jesus Christ"
- The church's charitable objects should also make reference to upholding the church's Statement of Faith, where possible

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c) General operating by-law

- The general operating by-law should define membership
- Conditions for church membership could include:
 - Adherence to the church's constitution and its Statement of Faith
 - Members would be subject to church authority
 - A requirement to sign a membership statement by a member indicating they agree to comply with the church constitution and its Statement of Faith

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- Individuals involved in or leading church ministries or programs, as well as key employees, should also be required to be members
 - The by-law should also have a provision authorizing the directors to implement operating policies for the church, together with an effective discipline procedure
- d) Policy Statements
- Policy Statements can be of assistance in articulating a practical manifestation of the church's beliefs

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- Churches should ensure that their Policy Statements make reference to being applied in accordance with the church's Statement of Faith, where applicable
- Policy Statements must be prepared in a manner that is consistent with recent developments in the law
- Examples of the types of Policy Statements that a church might adopt with regard to same sex marriage are as follows:
 - A policy on marriage including the following, where applicable:

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- If the church does not support same sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, the policy should contain a statement recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith
- Clergy should be required to subscribe to the church's constitution, including its Statement of Faith
- Marriage can only be solemnized by clergy of the local church or other clergy approved by the church who have subscribed to the Statement of Faith and constitution of the church

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- The clergy is confirmed to have the right to decide whether or not he or she wishes to proceed with solemnizing a marriage if doing so would be contrary to his or her religious beliefs
- A facility use policy providing for the following:
 - Restricting use of church facilities to church programs and/or members and for purposes which are consistent with the Statement of Faith and constitution of the church
 - However, such facility use policies must be prepared in a manner consistent with the requirements of the HRC and therefore cannot be worded to refer to any "identifiable groups"

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- Churches are cautioned to draft their Policy Statements utilizing neutral wording where possible and avoid negative or pejorative wording or wording that refers to an “identifiable” group
- Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the HRC
- Churches should ensure that their Policy Statements are enforced in a consistent manner, otherwise, the following may occur:
 - The church may waive its ability to enforce
 - The church may be vulnerable to allegations of discrimination for inconsistency in enforcement

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- An example is where the church neglects to enforce provisions in a conduct statement with regard to a particular activity, i.e. prohibition on drinking alcohol, but enforces prohibition against adultery
- The church needs to set out a procedure of church discipline reflecting principles of fairness and natural justice. For further details, see the articles on church discipline at www.charitylaw.ca

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3. Review of existing constitutional documents
 - If the church has an existing constitution, it should be reviewed to determine whether the church’s documents are consistent with recent developments in the law
 - Also, does the church have a Statement of Faith and Policy Statements?
4. Conducting a legal audit
 - Given the severity in liabilities for non-compliance with changes in the law, churches should consider a legal audit of all of their policies and constitutional documents, as well as of their liturgies and teaching materials

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- The purpose of a legal audit would be to:
 - Review whether the church’s existing constitutional documents may be inconsistent with applicable legal requirements under Bill C-250, the HRC and federal draft legislation on same sex marriage
 - Review whether the documents reflect any discrimination or promotion of hatred against an identifiable group

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5. Education of clergy concerning their legal rights

- It would be prudent for local churches and/or denominations to educate clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole
- The draft federal legislation recognizes the freedom of officials of religious groups to refuse to perform marriages contrary to their religious beliefs, but does not recognize a similar freedom for religious groups as contemplated by *Halpern*
- It is therefore important for local churches and/or denominations to provide education on the rights of both the clergy as well as the rights of the church

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F. SUMMARY COMMENTS

In summary, in light of the recent developments in the law concerning same sex marriages, churches should consider some or all of the following:

- Where applicable, a church should articulate its adherence to a literal and/or orthodox interpretation of Scripture
- This adherence should be reflected in the constitutional documentation of the church, including its charitable objects, and should, where applicable, encompass a clear religious purpose with reference to upholding the Statement of Faith of the church

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- Churches should avoid Scriptural references in its Statement of Faith where 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 or leading church ministries or programs, as well as key employees, should also be required to be members

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- Policy Statements can be of assistance in articulating a practical manifestation of the beliefs of a church
- If the church does not support same sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, a Policy Statement on marriage should contain a statement recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its Statement of Faith
- Prepare an appropriate facility use policy

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- Policy Statements should be drafted using neutral wording where possible and avoid negative or pejorative wording or wording that refers to an “identifiable” group
- In preparing Policy Statements, churches will need to prepare them to be in compliance with legal developments regarding the solemnization of same sex marriages, Bill C-250 and the HRC
- Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the HRC

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- Churches must ensure their Policy Statements are enforced in a consistent manner
- A legal audit should be considered for existing and proposed policies and constitutional documents to review 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 the church

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