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# **THE 2005 ANNUAL CHURCH & CHARITY LAW™ SEMINAR**

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## **The Legal Impact of Same-Sex Marriage on Religious Organizations**

**(Powerpoint Presentation)**

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**INTRODUCTORY COMMENTS**

- The purpose of this presentation is to:
  - Provide a summary of recent developments in the law on Same-Sex Marriage
  - Offer preliminary advice on how churches and religious organizations can ensure they are in compliance with recent legal developments
- See Church Law Bulletins #1, #7, #8 and #12 at [www.churchlaw.ca](http://www.churchlaw.ca) for more details
- This area of law continues to be 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 continues to unfold

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**Recent Cases**

- Recent cases that have challenged the constitutional validity of the exclusivity of opposite-sex marriage
  - B.C. case of *Equality for Gays and Lesbians Everywhere* (EGALE) (2003) British Columbia Court of Appeal, and
  - Ontario case of *Halpern v. Canada (Attorney General)* (2003) Ontario Court of Appeal
  - 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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- *Catholic Civil Rights League v. Hendricks* (2004) Quebec Court of Appeal

Appeal quashed of trial decision that:

- The statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the *Charter*
- Section 15 of the Canadian *Charter of Rights and Freedoms* does not specifically guarantee equality based on “sexual orientation” but the courts have found it to be analogous grounds to those protected in section 15

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- *Dunbar v. Yukon*, [2004] Y.J. No. 61
  - Attorney General conceded that the opposite sex requirement for marriage is unconstitutional as not consistent with the equality rights guarantee in the *Charter* and is not justifiable.
  - Court reformulated the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”.
- Courts in several other provinces found that opposite sex requirement for marriage is unconstitutional, including Manitoba, Nova Scotia, Saskatchewan, Newfoundland/Labrador

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**SUPREME COURT OF CANADA’S  
REFERENCE AND FEDERAL  
LEGISLATION (BILL C-38)**

- Background
  - In the summer of 2003, the federal government confirmed it would not appeal the decisions of the B.C., Ontario and Quebec courts
  - Proposed *Civil Marriage Act* was prepared by the federal government and referred to the Supreme Court

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- In the Marriage Reference, SCC found that
  - Section 1 of the proposed *Civil Marriage Act* extending civil marriage to same-sex couples was constitutional and its very purpose flows from the *Charter*
  - The *Charter* also protects religious officials from being compelled to perform marriages between two persons of the same sex if it is contrary to their religious beliefs

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- Section 2 of the proposed legislation on the protection of religious freedom goes beyond federal jurisdiction into matters that are of 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
- For more information refer to Church Law Bulletin No.7 at [www.churchlaw.ca](http://www.churchlaw.ca)

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- New Federal Legislation (Bill C-38) *Civil Marriage Act*
  - Bill C-38 received Royal Assent on July 19, 2005
  - Very similar to proposed *Act* that was referred to SCC with some exceptions:
    - Very extensive preamble explaining purpose of legislation

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- Last minute amendments to *Civil Marriage Act* offers some exemptions:
  - 3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, ... solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion ...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.

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– Section 149.1 of the *Income Tax Act* is amended by adding the following:

- ...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... solely because it ... 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*.

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**ONTARIO'S SPOUSAL RELATIONSHIP AMENDMENT ACT, 2005**

- Adds the following exemption:

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* (Ontario) 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

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- Also added new exemptions to *Marriage Act* (Ontario):

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

20 (7) In subsection (6), "sacred place" includes a place of worship and any ancillary or accessory facilities.

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- A “person registered under the *Marriage Act*” is defined as follows:

20 (3) 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;

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(b) that the person is duly recognized by the religious body... as entitled to solemnize marriage;

(c) that the religious body ... 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;

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- Issue of whether all marriage commissioners can also benefit from exemption was addressed during debates

– David Zimmer, MPP Willowdale, explained that new exemption only applies to religious officials, not to other marriage commissioners and that other commissioners would have to rely on employment exemption in the *Human Rights Code*

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- Therefore would only protect religious officials who are licensed to perform marriages under the *Marriage Act*, and would not serve to protect lay persons, such as deacons, elders, or members of para church organizations like Knights of Columbus.
- This Act extends the exemption for religious officials to “any event related to the solemnization of a marriage,” which presumably would include a wedding reception

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- However, the words “ancillary or accessory facilities” in definition of “sacred place” are open to many different interpretations and could be read down by the courts and human rights tribunal to exclude church halls or even church basements
- Legislature’s intention was to include in this definition,
 

“properties such as church halls and other spaces connected with religious bodies or used by religious congregations... The intention is to protect religious organizations from challenges to their freedom of religion with respect to the use of their properties and facilities.”

*David Zimmer, MPP Willowdale*

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- The Act only provides protection to religious groups where facilities and services of the religious group are being rented out to or provided for purposes associated with the solemnization of marriage
- Does not include other uses, such as a choir competition or music recitals
- 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.”

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**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
- A church constitution is a civil law document that can only reflect church law if it is made a part of the church constitution

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**b) The need for churches and religious charities to clearly articulate their identity and 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 *Human Rights Code* and Bill C-250

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- By articulating what a church believes and practices it can avail itself of section 18.1(1) of the Ontario *Human Rights Code*
- 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 *Owens v. Saskatchewan (Human Rights Commission)* (2002) (Sask. Q.B.) 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 applicable

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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, could collectively 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 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 consistent with applicable human rights legislation
- Examples of the types of policy statements 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 would need to be prohibited from conducting or solemnizing a same-sex marriage
- A facility use policy providing for the following:
  - Prohibiting the use of any church facility including all places ancillary or accessory for the solemnization of a same-sex marriage or an event related to the solemnizing of a same-sex marriage
  - 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

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- Since a church can discriminate in terms of membership and services per s.18 of the *Human Rights Code*, a church may restrict the use of the facilities to only those holding membership status
- If church facilities are restricted for use by members, a church that does not support same-sex marriage may have the ability to prohibit the use of its facilities for conducting same-sex marriages and related events by non-members and members alike beyond what the federal and new Ontario legislation provides for

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- However, such facility use policies must be prepared in a manner consistent with the requirements of the *Human Rights Code* and therefore cannot exclude an identifiable group, except where permitted by S.18 and S.18.1 of the *Human Rights Code*
- 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

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- Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the *Human Rights Code*
- Churches should ensure their policy statements are enforced in a consistent manner, otherwise, the following may occur:
  - The church may waive its ability to enforce its policy statement
  - 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 an article on church discipline at <http://www.carters.ca/pub/article/church/1995/disciplin.pdf>

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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
- The church should determine if its statement of faith and policy statements are part of its constitution

**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 *Human Rights Code* and federal and new provincial 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 the clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole
- The new *Civil Marriage Act* recognizes the right to freedom of conscience and freedom of religion but cannot provide specific exemptions for clergy from having to perform same-sex marriages contrary to their beliefs as this is the purview of the provinces
- It is therefore important for local churches and/or denominations to provide education to both clergy and church

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**SUMMARY COMMENTS**

In light of recent developments in the law concerning same-sex marriages, churches and religious organizations 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, which could be reflected in the constitutional documentation of churches, 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 may be of assistance in articulating a practical manifestation of the beliefs of a church
- Policy statements should be drafted using neutral wording where possible and avoid negative or pejorative wording or wording that refers to an identifiable group
- Policy statements should be prepared in compliance with legal developments regarding the solemnization of same-sex marriages, Bill C-250 and the *Human Rights Code*
- Ensure policy statements are enforced in a consistent manner

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- 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 to prohibit the use of church facilities for same- sex marriage as contemplated by section 18.1 of the *Human Rights Code*, and to restrict use of church facilities to church programmes and/or members

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- Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to the *Human Rights Code*
- 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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