
CONGREGATIONAL CHRISTIAN CHURCHES IN CANADA LEGAL WORKSHOP

Brantford – July 8, 2004

Presentations

- An Explanation of Bill C-250 (Hate Crimes)
 - Bruce Long
- Same Sex Marriages – Legal Context, Including Human Rights Issues and What Churches Can Do in Response
 - Terrance Carter & Mervyn White

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LEGAL WORKSHOP**
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**An Explanation of Bill C-250
(Hate Crimes)**

By Bruce Long, B.A., LL.B.
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**Sections 318 and 319 of the *Criminal Code*
Will Read**

Section 318 - Hate Propaganda

Advocating genocide

- (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- (2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

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- (a) killing members of the group; or
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
- (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General
- (4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion (or) ethnic origin or sexual orientation.

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Section 319

- (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace 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.
- (2) Every one who, by communicating statements, other than in private conversation, willfully 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

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(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, he expressed or attempted to establish by 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

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(4) Not applicable

(5) Not applicable

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

(7) In this section,

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group” has the same meaning as in section 318;

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“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.

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Notes

- Are two separate offences – “communicating statements” and “promoting hatred”
- The “communicating statements” offence does not require Attorney General consent nor does it have 4 statutory defences
- Both offences allow for arrest however, it must comply with S.495 of the *Criminal Code*

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- The “promoting hatred” offence has 4 defences:
 - Truth
 - Good faith religious opinion
 - Public benefit
 - Removal of hatred and it requires Attorney General consent
- “Communicating statements” offence can result in a conviction even if 4 defences are present

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- Identifiable group – meaning of “orientation” is unclear. If it includes “inclination” and/or “actions” may protect polygamists, bisexuals, pedophiles or child pornographers
- Passages in Koran, Torah, Bible, etc. may be designated as promoting hatred
- “Communicate”: includes all means of disseminating information
- The religious good faith defence has not succeeded in Canada

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- “Promoting hatred” may only require willful blindness
- Freedom of religion is relative to equality rights of minorities
- Defences to “communicating statements” offence include:
 - Not stir up hatred
 - Not in public place
 - Not lead to danger to public or property
 - Victim criticized for another reason

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Suggestions
Suggestions until the law is settled:

- Avoid public criticisms of identifiable groups or its activities
- Limit opinions to private conversations
- Continue to express views to M.P.s
- If targeted or investigated, rely on constitutional right to remain silent. Inasmuch as offence is directly related to intention and motive, silence is usually preferable at initial stages

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**CRIMINAL CODE AMENDMENTS
BILL C-250
(HATE PROPAGANDA)**

*By Bruce W. Long B.A., LL.B. (Counsel)*¹

A. INTRODUCTION

A Private Members' Bill was introduced in 2002 to the House of Commons as Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*. Bill C-250 was given third reading on September 17, 2003. The Bill died in December 2003, but was re-introduced into the House of Commons on February 2, 2004, and received second reading in the Senate on February 20, 2004. Bill C-250 seeks to add sexual orientation as an "identifiable group" which will receive additional protection from hate propaganda. This *Church Law Bulletin* comments on Bill C-250 from the standpoint of its impact on churches and religious charities in Canada.

B. THE CONTEXT FOR LEGISLATIVE AMENDMENT

Bill C-250 does not extend legal protections to anyone who has been legally unprotected up to this time. It only expands legal protections that are already in place. Some of the existing legislative provisions presently available to victims of hate propaganda are:

¹ Former Regional Crown Attorney for Southwestern Ontario.

- a) Section 320.1 of the *Criminal Code* provides for the seizure of hate propaganda;
- b) Section 22 of the *Criminal Code* makes it an offence to encourage another person to commit an assault or to damage the property of anyone;
- c) Section 718.2 of the *Criminal Code* provides that a sentence should be increased if it was motivated by prejudice based on sexual orientation;
- d) The *Canada Post Act* authorizes the seizure of anyone's mail if there are grounds to believe that person is publicly promoting hatred;
- e) The *Customs Act* prohibits the importation of hate propaganda into Canada;
- f) The *Canadian Human Rights Act* and provincial Human Rights Codes prohibit discrimination based on sexual orientation;
- g) Section 298 of the *Criminal Code* prohibits published matters which may expose a person to hatred, contempt or ridicule.

The foregoing provisions would lead one to conclude that there is already adequate legal protection for people in Canada who are identified by sexual orientation. Whether the legislative amendments to the *Criminal Code* are in fact necessary in order to ensure that sexual orientation does not become a basis for hate propaganda will remain a matter of discussion. However, the impact of Bill C-250 on churches and religious organizations will be significant.

C. THE PROPOSED AMENDMENTS

Bill C-250 adds to the present definition of an "identifiable group" by including any section of the public distinguished by sexual orientation. It further adds to section 319(3)(b) of the *Criminal Code* (the "Code") by providing for the defence of expressing an opinion based on a belief in a religious text. However, the relevant sections of the *Code* affected by the proposed changes must be viewed in their entirety in order to understand the commentary that follows.

Sections 318 and 319 of the *Code* follow with the relevant sections shaded and the proposed amendments underlined for ease of reference.

Hate Propaganda

Section 318 - Advocating genocide

- (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- (2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
 - (a) killing members of the group; or
 - (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
- (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General
- (4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion (or) ethnic origin or sexual orientation.

Section 319 - Public incitement of hatred

- (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace 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.
- (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.
- (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, he expressed or attempted to establish by 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.
- (4) Not applicable
- (5) Not applicable
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section,

“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group” has the same meaning as in section 318;

“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 electromagnetically or otherwise, and gestures, signs or other visible representations.

Clearly, the “communicating” offence in subsection 319(1) will be resorted to with much greater frequency than the “promotes hatred” offence in subsection 319(2), as the latter is an unlikely charge to result from a religious or educational discussion about sexual orientation.

Media reports indicate that the proposed changes to the *Code* will exempt anyone expressing an anti-same sex perspective based on a religious text. The Bill’s author has repeatedly assured the public that religious leaders will continue to have this protection as a result of the exemption in subsection 319(3). However, even a cursory examination of subsection 319(3) clearly indicates that this protection only applies to someone charged with the “promotes hatred” offence under subsection 319(2), not in relation to the “communicating” offence under subsection 319(1). Further, the “promotes hatred” offence has an additional legal safeguard in subsection (6) which requires the consent of a Provincial Attorney General. In contrast, the “communicating” offence in subsection 319(1) requires only that a peace officer have reasonable and probable grounds or that a private citizen is able to convince a Justice of the Peace to commence the criminal process. What follows from these observations is that free speech, or “communicating” about sexual orientation within a church or religious organization will not be protected.

There is no legal or logical reason for the “promotes hatred” offence in subsection 319(2) to receive the benefit of five statutory defences, none of which are accorded to the “communicating” offence in subsection 319(1). The “promotes hatred” offence, which would require a vitriolic attack against an identifiable group, is a far less likely charge for a charity or religious organization to be accused of, and yet it has significant

additional defences beyond the traditional criminal defences related to an act and its intention. Alternatively, a person charged with the “communicating” offence in subsection 319(1) can be convicted even if his or her statements were made in good faith, were true, benefited the public, were stated to buttress an opinion on a religious subject or were made to remove hateful feelings toward an identifiable group. This dichotomy of defences appears to be intentional and an omission which will definitely affect the free flow of discussion about sexual orientation and related topics. It is clearly one of the more serious flaws in the proposed legislative amendments.

Another contextual inconsistency relates to the wording of the “communicating” offence, which indicates that a conviction could be based on the speculation that a breach of the peace might occur at some time – either in the present or at some time in the future. Concepts with such vagueness are unusual for a statute whose hallmarks are precision and specificity. Further, the “communicating” offence is worded in such a way that an offender need not intend to incite hatred which may simply be an unintended by-product of his or her statements. Again, the more serious “promotes hatred” offence has an extra protection, in that the statements must “wilfully” promote hatred. This would require the Crown to prove beyond a reasonable doubt that the speaker intended a certain result or knowingly desired, and promoted, a hateful course of action. Again, this statutory defence is absent for the “communicating” offence which will attract more investigative and judicial attention.

D. WHAT IS SEXUAL ORIENTATION

The media have focussed only on people identified by a same-sex orientation as the new identifiable group protected by Bill C-250. However, the term “sexual orientation” is not defined in the *Code* and its meaning cannot be garnered from its context or decided cases. Even recognized dictionaries do not provide a single definitive meaning and describe orientation variously as including a disposition, an inclination or a faculty to be coupled with actions. These broad descriptions could include polygamy, pedophilia and bestiality.

Depending on the meaning ascribed to sexual orientation, even the parents of a child who has been victimized by a child pornographer or a pedophile might be precluded from publicly criticizing the offender.

E. POSSIBLE RESULTS FROM BILL C-250

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 no reason to believe any parallel passages in the Koran the works of Buddha or any Hindu writings would not be similarly characterized. Bill C-250 will give activists the power to enter a religious service with a recording device and effect the arrest of a religious speaker who is speaking about the moral aspects of homosexuality. As a result, religious leaders will be unable to communicate what the Bible, the Torah, The Koran, and other religious writings teach about homosexuality.

This restriction is unfortunate inasmuch as disapproval of the sexual orientation of a person is not necessarily synonymous with inculcating hatred of that person, particularly if it is coupled with a sincere expression of compassion for that person. Further, the religious exemption provided for in section 319(3)(b) of the *Code* itself is subject to attack on the grounds that it is narrow and discriminating inasmuch as it does not allow the same protection to atheists or agnostics.

It is not difficult to envision, since there are numerous passages in the Bible and other religious writings that address sexual orientation, that those parts or even the Bible as a whole could be declared as hate literature. This result has been presaged by the finding of the Saskatchewan Queens Bench in *Owens v. Saskatchewan*. Given this judicial pronouncement, it is a grave error for the proponents of this legislation to publicly state that it in no way limits or threatens the freedom of religious texts. The judgements of several Canadian courts make it clear that the stated *Charter* freedoms of speech, conscience, opinion, expression and religion are not absolute and must yield when a minority's position is characterized as suffering from discrimination at the hands of the majority. It should be noted that academic instructors who might wish to discuss such topics as the causes of homosexuality, genetic (nature) or learned (nurture), are subject to the same parameters as the church, temple, or mosque.

F. CONCLUSION

It is evident that many Canadians are unaware of the serious flaws and omissions in Bill C-250. The present resistance to it stems from its lack of necessity, its potential for oppression of expressions of opinion and the use of criminal sanctions to repress sincerely held beliefs of many well meaning and conscientious Canadian citizens.

If there is no acceptance of its efficacy, then Bill C-250 will lack the public support that should accompany any such drastic sanction with potentially penal consequences. The result will undoubtedly be a diminished respect for all criminal law and for the administration of justice in Canada. Such a consequence must be avoided if the rule of law is to continue as one of the necessary strengths of our country and its culture.

In the meantime, if it passes the Senate and becomes law, churches and religious organizations may want to consider taking precaution 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. Inasmuch as the offence is directly related to intention and motive, silence is usually preferable at initial stages.

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**Same Sex Marriages - The Legal Context,
Including Human Rights Issues and What
Churches Can Do in Response**

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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
- See Charity Law Bulletin #31 at www.charitylaw.ca for more details
- 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

- The Legal Framework regarding same sex marriages
 - Case law developments
 - Proposed federal legislation
 - Impact of Bill C-250 (Hate Crimes) on same sex marriage issues
 - Impact of human rights legislation

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- What churches and religious charities can do in response
 - The importance of constitutional documents
 - Review of existing constitutional documents
 - Conducting a legal audit
 - Education of clergy concerning their legal rights

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C. THE LEGAL FRAMEWORK REGARDING SAME SEX MARRIAGE

1. Recent Case Law Developments Regarding Same Sex Marriage

- *Vriend v. Alberta* [1998] – 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

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- *M. v. H.* [1999] – Supreme Court of Canada
 - The opposite sex definition of “spouse” under the support provisions of the *Family Law Act* (Ontario) is unconstitutional
- *Hall (Litigation guardian of) v. Powers* [2002] – 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] 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
 - Neither the *Halpern* nor the *EGALE* cases have been appealed to the Supreme Court of Canada

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- *Catholic Civil Rights League v. Hendricks* [2004] Quebec Court of Appeal

Trial decision:

 - The statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the Charter
 - This finding was appealed to the Quebec Court of Appeal, but quashed
 - Same sex marriage still legal in Quebec
- 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. Proposed 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 earlier
- Proposed 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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- On January 27, 2004, the federal government amended the reference to the Supreme Court of Canada to include a question concerning the constitutionality of limiting marriage to persons of different sex
- 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.”

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- Section 2 does not establish a new right, it only recognizes what is assumed to be an existing right
- Changes to other federal statutes will also be made as a result of the new legislation
- Same sex marriage reference to be heard by the Supreme Court of Canada in early October 2004
- 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 Issues

- When considering the topic of same sex marriage, churches need to be aware of Bill C-250 (Hate Crimes) [See presentation by Bruce Long]

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- Statements opposing same sex marriage might in some situations be considered as a hate crime offence
- Bill C-250 was given Royal Assent on April 29, 2004

4. Impact of Human Rights Legislation

a) *The Human Rights Code*

- Part 1 of the *Human Rights Code* 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 *Human Rights Code* 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 *Human Rights Code* 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 charitable objects

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- **Section 11(1) of the *Human Rights Code*:**
Extends the prohibition of discrimination into areas that are not contemplated by Section I of the *Human Rights Code*, where the discrimination results in the exclusion of an “identifiable group” as set out in the *Human Rights Code*, except generally when the requirement, qualification or factor is reasonable and bona fide in the circumstances
- **Section 18 of the *Human Rights Code*:**
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

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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.
- **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

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(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

c) Recent key human rights decisions

- *Trinity Western University v. British Columbia College of Teachers* (2001), 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] – 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 *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 CHURCES 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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- 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] (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 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 applicable human rights legislation**
- **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
- 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

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- 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 by non-members and members alike
- 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”
- 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 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 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 proposed federal 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 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 in general

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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 could 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 may 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 to restrict use of church facilities to church programmes and /or members

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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 *Human Rights Code*
- 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

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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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SAME SEX MARRIAGE: WHAT CHURCHES AND RELIGIOUS ORGANIZATIONS CAN DO IN RESPONSE

By Terrance S. Carter, B.A. LL.B., and Esther S.J. Oh, B.A., LL.B

A. INTRODUCTION

This *Charity Law Bulletin* (“*Bulletin*”) provides a brief overview of recent developments in the law with respect to the proposed federal legislation regarding same sex marriage, as well as a brief summary of relevant human rights legislation and related cases. This *Bulletin* also outlines steps that churches and religious organizations may want to consider in responding to the issue of same sex marriage. To this end, this *Bulletin* provides general comments concerning the importance of specific constitutional documents for churches and religious organizations, as well as recommendations concerning proposed policies and other constitutional documents in order to determine whether those documents comply with applicable human rights legislation. Finally, this *Bulletin* outlines the importance of educating clergy and religious organizations concerning their legal rights on this issue.

For ease of reference, the term “churches” in this *Bulletin* refers to all forms of religious organizations, including temples, mosques, synagogues, etc., unless otherwise indicated. In addition, the term “constitutional documents” is used in this *Bulletin* to refer to organizational documents for churches and religious organizations.

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It should be noted that the law involving same sex marriage is highly complex and rapidly changing. The comments that follow, therefore, are of a tentative nature only and are subject to change as the law continues to evolve. In particular, readers should note that the recommendations contained in this *Bulletin* are being made pending the introduction of proposed federal legislation and a reference regarding same sex marriage that is before the Supreme Court of Canada. While the proposed federal legislation provides religious officials with an exemption from solemnizing same sex marriages, it does not recognize the rights of religious organizations to refrain from solemnizing same sex marriages. As such, recommendations in this *Bulletin* that are aimed at enabling religious organizations to take advantage of the exemption from having to perform same sex marriages (which are based on the assumption that the *Halpern* case described below applies), may not be available if the proposed federal legislation is enacted. This issue is discussed further in this *Bulletin*.

It is also important that churches and religious organizations obtain legal advice before implementing any of the suggestions in this *Bulletin*. The comments contained in this *Bulletin* are of a summary nature and are not intended to provide legal advice that can be relied upon.

B. THE DEVELOPMENT OF THE LAW ON SAME SEX MARRIAGE

1. Case Law Developments Regarding Same Sex Marriage

The following is a brief summary of recent cases that are relevant to a discussion involving same sex marriage:

a) Cases Relevant to the General Rights of Same Sex Couples

In *Vriend v. Alberta* [1998] 1 S.C.R. 493 (S.C.C.)(QL), the plaintiff attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation. However, the plaintiff was unable to file a complaint because the *Individual Rights Protections Act* (Alberta) (“IRPA”) did not include sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada ruled that the exclusion of “sexual orientation” as a protected ground of discrimination under the Alberta *IRPA* was unconstitutional.

In *M. v. H.* [1999] 2 S.C.R. 3 (S.C.C.)(QL), the plaintiff, who had been formerly involved in a same sex common law relationship, made a claim for spousal support under section 29 of the *Family Law Act* (Ontario). The Supreme Court of Canada ruled that the opposite sex definition of “spouse” under the support provisions of the *Family Law Act* (Ontario) was unconstitutional.

In *Hall (Litigation guardian of) v. Powers* [2002] O.J. No. 1803 (QL), the Ontario Superior Court ruled that a grade 12 Catholic high school student was permitted to bring his boyfriend to his high school prom. Notwithstanding the formal position of the Catholic Church in the Church’s Catechism that “...homosexuality is contrary to natural law and can under no circumstances be approved...”, the Court in *Hall* relied upon the Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of Teachers* (2001), 199 D.L.R. (4th) 1 (S.C.C.) for the principle that “the freedom to hold beliefs is broader than the freedom to act on them.” As the court stated, “At the heart of the *Trinity Western (supra)* decision lies a distinction between holding a discriminatory view and actively discriminating against someone”.

b) Cases Relevant to the Specific Issue of Same Sex Marriage

A number of recent cases have challenged the constitutional validity of the opposite-sex requirement of marriage, including the B.C. case of *Equality for Gays And Lesbians Everywhere (EGALE) v. Canada* [2003] B.C.J. No. 994 (B.C.C.A.)(QL), and the Ontario case *Halpern v. Canada (Attorney General)* [2003] O.J. No. 2268 (O.C.A.)(QL).

In the *EGALE* and *Halpern* cases, the respective Courts of Appeal ruled that the then existing common law definition of marriage as the “union of one man and one woman” was unconstitutional.

In the *Halpern* decision, the Ontario Court of Appeal reformulated the common law definition of marriage to read as “the voluntary union for life of two persons to the exclusion of all others.”

In the Quebec case of *Hendricks v. Quebec (Attorney General)* [2002] J.Q. No. 3816 (QL), the Quebec Superior Court found that the statutory opposite-sex requirement for marriage in Quebec violates s. 15(1) of the Charter. This case is currently being appealed to the Quebec Court of Appeal.

c) Application of the *Canadian Charter of Rights and Freedoms*

Section 15 of the *Canadian Charter of Rights and Freedoms* (“Charter”) does not specifically guarantee equality based on an individual’s “sexual orientation”. However, the courts in the above-mentioned cases have generally found that “sexual orientation” is an analogous ground to those protected in section 15 and by implication is therefore protected by the *Charter*.

2. Proposed Federal Legislation

In the summer of 2003, the federal government confirmed that it would not appeal the decisions in the B.C, Ontario and Quebec cases referenced above.

Later 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 proposed legislation. It is not expected that this reference will be heard until early in 2004.

The proposed federal legislation entitled *Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes* begins with a preamble that reads as follows:

“marriage is a fundamental institution in Canadian society”; and

“access to marriage for civil purposes should be extended to couples of the same sex”
in accordance with the Charter.

The specific wording of the proposed legislation 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”

Changes to other federal statutes will need to be made as a result of this proposed legislation, assuming that it is passed in its present form.

3. Impact of Bill C-250 (Hate Crimes) on Same Sex Marriage Issues

When considering how to address the topic of same sex marriage, churches will need to be aware of Bill C-250, which had proposed amendments to the Criminal Code provisions regarding hate propaganda, since statements opposing same sex marriage might in some situations be considered as hate crime offences.

Although Bill C-250 recently died on the order paper in the Senate, it might still be relevant to a discussion of same sex marriage issues, since there is a distinct possibility that Bill C-250 may in some form be re-introduced by Parliament in the future. For further details and background information regarding Bill C-250, please see the seminar materials from a presentation by Bruce Long found at: <http://www.carters.ca/pub/seminar/chrchlaw/2003/index.html>.

4. Brief Overview of the Ontario *Human Rights Code*

When responding to the issue of same sex marriage, churches and religious organizations need to be aware of the application of human rights legislation. The following is provided as a brief overview of applicable human rights legislation and relevant case law.

a) Statutory Law

i) The Ontario *Human Rights Code*

Statements made against same sex marriage may in some situations violate the Ontario *Human Rights Code* (“HRC”). In this regard, Part I of the *HRC* enumerates the contexts within which individuals are guaranteed the right to be treated equally and without discrimination. The applicable provisions are:

Section 1 which states as follows, regarding the provision of services:

1. 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. *[emphasis added]*

Section 5 which 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. *[emphasis added]*

Section 24 of the *HRC*, however, permits discrimination in the context of employment where the following limited conditions apply:

- ♦ the nature of the employment results in the discriminatory qualification.
- ♦ the qualification is a reasonable and bona fide qualification for the employment.

An example of a bona fide requirement under Section 24 of the *HRC* would be where a minister is required to subscribe to the church’s statement of faith and charitable objects as a condition of his or her employment.

Section 11(1) of the *HRC* extends the prohibition of discrimination into areas that are not contemplated by Part I of the *HRC* where the discrimination results in the exclusion of an

“identifiable group” as set out in the *HRC*. A general exception to section 11(1) may apply when the requirement, qualification or factor is reasonable and bona fide in the circumstances.

ii) *The Canadian Human Rights Act*

Some religious organizations may also be subject to federal human rights legislation. Section 3 of the *Canadian Human Rights Act* lists the following as prohibitive grounds of discrimination:

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.

These prohibited grounds are different in certain respects from those contained in the Ontario *HRC*. Unlike the provincial *HRC*, the *Canadian Human Rights Act* does not prohibit discrimination based upon “same sex partnership status”.

As well, section 5 of the *Canadian Human Rights Act* provides for the following in relation to the provision of goods and services:

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.

b) *Related Case Law*

The following is a brief summary of excerpts from key cases involving the Charter and various human rights legislation relevant to same sex marriage:

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

In its decision in *Trinity Western*, the Supreme Court of Canada held as follows:

“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.”

- ii) *Ontario (Human Rights Commission) v. Brillinger [2002] O.J. No. 2375 (QL) Ont. Sup. Ct.*

In the *Brillinger* case, a Christian who owned a printing shop had refused to print certain materials on the basis of his religious beliefs, since he believed that he could not assist in the distribution of information intended to spread the acceptance of homosexual lifestyles. However, he had not refused to serve homosexual customers.

In finding the owner in violation of the Ontario *HRC*, the court relied upon the *Trinity Western* case and upheld the “*right to be free from discrimination based on sexual orientation in obtaining commercial services*”.

C. WHAT CHURCHES AND RELIGIOUS ORGANIZATIONS CAN DO IN RESPONSE

1. The Importance of Organizational Documents

a) Explanation of The Legal Nature of Religious Organizations

Most churches and religious organizations operate simultaneously in two distinct realms: the first being the church law realm, which is generally governed by the church’s understanding of scripture, and the second being the civil law realm, which involves the application of the relevant statutory law and relevant cases to churches. Although church law and civil law are separate in many respects, they also overlap. When overlap occurs, church law will generally not be permitted to violate civil law.

Within the church law context, the identity of a church is generally derived from scripture, i.e. a literal understanding of the New Testament by evangelical Christians or a reliance upon the Canon Code by Roman Catholics.

Within the civil law context, the legal nature of a church is characterized as a voluntary association of persons who come together for a collective purpose as reflected in the church’s constitutional documents.

Where individuals have voluntarily decided to associate together in order to fulfill the religious objectives of a church, the courts have generally recognized the existence of and the right of a church to fulfill its religious objectives.

However, churches must ensure that their identity that is derived from the church law context is adequately articulated within the civil law context so that it can be protected at civil law. The primary means through which a church articulates its church law identity in the civil law context is

generally through its constitution. The need for a clear articulation of a church's identity and beliefs in its constitution is particularly important in the context of same sex marriages.

b) The Need for Churches and Religious Organizations to Articulate Their Identity and Beliefs Through a Constitution

Within a civil law context, since a church legally is nothing more than what the individuals who comprise it determine it to be, it is essential for churches to clearly articulate what their identity and beliefs are, and where relevant, to relate those beliefs to the understanding of scripture followed by the church.

If a church or religious organization fails to articulate what it is and what it believes, then by default the courts will be called upon to determine the church's beliefs and identity based upon the materials that are available for review by the court. If this occurs, the church may then be left more vulnerable to challenge under proposed federal legislation dealing with same sex marriage and human rights legislation than if it had carefully articulated its identity and its beliefs in its constitution.

For unincorporated churches, a constitution is generally a single internal organizational document that is not issued or specifically sanctioned by any government. For incorporated churches, a constitution usually consists of a collective of the following documents:

- The letters patent issued by the Federal or a Provincial government, which is generally analogous to the birth certificate of the church;
- The general operating by-laws of the church, which sets out the structure of the church; and
- Policy statements, implemented from time to time to document the practical position of the church on a particular issue.

As indicated earlier, for the purposes of this *Bulletin*, when the term "constitution" is used, the term means the constitution of a church or religious organization, whether it is incorporated or unincorporated.

With respect to recent developments in the law, it would be opportune for unincorporated churches that are considering incorporation to do so sooner as opposed to later, since their incorporation documents and accompanying policy statements could be drafted to reflect their theological position on marriage in general terms and specifically with respect to same sex marriages, where applicable.

2. Possible Options Regarding Specific Constitutional Documents

In response to developments in the law and in particular with regard to the proposed federal legislation regarding same sex marriage, churches may want to consider taking the following steps to review and/or amend their constitutional documentation. However, it should be noted that given the complex and evolving nature of the law, none of the steps listed below on their own necessarily ensure compliance with applicable case law, human rights legislation or the proposed federal legislation, since the circumstances of each church would need to be individually considered with the assistance of legal counsel.

a) Statement of Faith

Churches should ensure that their beliefs are clearly articulated in a statement of faith or similar doctrinal statement reflecting their particular interpretation of scripture, since an understanding of scripture is often subject to differing interpretations. A more literal and/or orthodox interpretation will generally be more consistent with a position that is not in support of same-sex marriage. As such, where a church does not wish to support same sex marriage, the church's statement of faith will likely need to reflect the church's theological belief in a more literal and/or orthodox interpretation of scripture.

General scriptural passages, such as those contained in the Apostle's Creed, can be inserted in a statement of faith. However, scriptural passages that might be construed as promoting hatred against an identifiable group may leave a church open to civil liability. According to the decision of *Owens v. Saskatchewan (Human Rights Commission)* [2002] S.J. No. 732 (QL), certain scriptural references, such as Leviticus 18:22, Leviticus 20:13 and 1 Corinthians 6:9-10, may in some situations be found to be promoting hatred.

For federally incorporated churches, the church's statement of faith could be inserted in its letters patent. In Ontario, a provincially incorporated church, however, can only have its statement of faith included in its general operating by-law instead of its letters patent.

b) Charitable Objects

The charitable objects of a church are contained in its letters patent and should clearly indicate a religious purpose with references, to scriptural mandates where possible, such as "propagating the Gospel of Jesus Christ".

The charitable objects of a church should also include upholding the church's statement of faith, where applicable.

c) General Operating By-law

The general operating by-law of a church should define “membership”. The definition may contain conditions for church membership, which could include:

- adherence to the church’s constitution and statement of faith;
- agreeing to be subject to the authority of the church;
- a requirement to sign a membership statement by which a member would agree to comply with the church constitution and its statement of faith; and
- individuals leading or participating in church programs, as well as key employees, could collectively be required to be members of the church.

The by-law could also contain a provision authorizing the directors to establish and implement operating policies for the church, together with an effective discipline procedure to enforce church policies where applicable.

d) Policy Statements

Policy statements can be of assistance in articulating a practical manifestation of the church’s beliefs. In this regard, a church should state that its policy statements are to be applied in accordance with its statement of faith.

As indicated in section (c) above, the authority of a church to adopt policy statements would be derived from the church’s general operating by-law, which may require membership approval for the policy statement prior to its adoption. However, policy statements must be prepared in a manner that is consistent with applicable human rights legislation.

Some examples of policy statements that a church might adopt with regard to same sex marriage are as follows:

- A policy on marriage could include the following provisions:
 - ♦ If the church does not wish to support same sex marriage based upon a literal and/or orthodox interpretation of scripture, then the policy could contain a statement recognizing marriage as a holy sacrament or institution of the church and defining marriage as being between one man and one woman.
 - ♦ The clergy for a church could be required to subscribe to the church’s constitution, including its statement of faith as discussed below.

- ♦ A statement could be included indicating that marriage is to be solemnized only by clergy of the local church or by other clergy approved by the church who subscribe to the statement of faith and constitution of the church.
- ♦ The church could confirm that clergy retain the right to decide whether or not they wish to proceed with solemnizing a marriage if doing so would be contrary to his or her religious beliefs.
- A policy on the use of the church facilities could include the following provisions:
 - ♦ Restricting the use of church facilities to church programs and/or use by members but only for purposes that are consistent with the statement of faith and constitution of the church.
 - ♦ The drafting of a facility use policy would have to be consistent with the requirements of human rights legislation and could not exclude an “identifiable group” contrary to applicable human rights legislation as explained above.

Churches are cautioned to draft their policy statements utilizing neutral wording where possible and avoid negative or pejorative wording, as well as wording that distinguishes an “identifiable group”. Churches are also cautioned from implementing conduct or lifestyle statements if to do so would result in distinguishing an identifiable group contrary to applicable human rights legislation.

Churches must ensure that their policy statements are enforced in a consistent manner; otherwise, either or both of the following may occur:

- A church may be found to have waived its ability to enforce policies in the future because they have neglected to do so in the past.
- A church may become vulnerable to allegations of discrimination where the church inconsistently enforces its policies. For example, where a church neglects to enforce provisions contained in a conduct statement with regard to one activity, i.e. prohibition on drinking, but enforces prohibitions on another matter, i.e. adultery.

In this regard, a church should adopt a procedure for church discipline in its by-law reflecting approved principles of natural justice. For further details in this regard, please see an article on church discipline at <http://www.carters.ca/pub/article/church/1995/discplin.pdf> entitled "A Legal Analysis of Church Discipline in Canada and Church Discipline Update".

3. Review of Existing Constitutional Documents

If the church has an existing constitution and is drafting additional clauses for inclusion dealing with same sex marriage, the constitutional documents should be reviewed by a lawyer in order to determine whether the documents are consistent with recent developments in the law. In addition, the church could determine whether it has a statement of faith in its constitutional documents and/or appropriate policy statements.

4. Conducting a Legal Audit

Given the severity of liabilities for non-compliance with changes in the law, churches should consider conducting a legal audit of all of their policies and constitutional documents, as well as their liturgies and teaching materials.

The purpose of a legal audit would be to do the following:

- ◆ Review whether the church's existing constitutional documents may be inconsistent with applicable legal requirements under human rights legislation, as well as proposed federal legislation on same sex marriage; and
- ◆ Review whether such documents reflect possible discrimination or the promotion of hatred against an identifiable group.

5. Education of clergy concerning their legal rights

As well, it would be prudent for both local churches and/or denominational organizations to educate clergy of their legal rights in relation to the carrying out of their ministerial duties and in relation to the operations of the church as a whole.

Churches should be aware that while the proposed federal legislation recognizes the rights of officials of religious groups to refuse to perform marriages contrary to their religious beliefs, the proposed legislation does not recognize a similar freedom for religious groups as contemplated by the *Halpern* case described above. It is therefore important that local churches and/or religious denominations be aware of the need to educate clergy regarding the rights of clergy, as well as the rights of the church in general.

D. CONCLUSION

In summary, given the recent developments in the law and proposed federal legislation concerning same sex marriages, churches and religious organizations may want to consider some or all of the following in conjunction with advice from legal counsel:

- ◆ Where applicable, a church may want to articulate its adherence to a literal and/or orthodox interpretation of scripture.
- ◆ This adherence could be reflected in the constitutional documentation of a church, including its charitable objects, and should, where applicable, encompass a clear religious purpose to uphold the statement of faith of the church.
- ◆ A church should avoid scriptural references in its statement of faith if 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 leading church ministries or programs, as well as key employees, should also be required to be members.
- ◆ Policy statements may be of assistance to a church in articulating a practical manifestation of the beliefs of the church.
- ◆ If the church does not wish to support same sex marriage as a result of a literal and/or orthodox interpretation of scripture, a policy statement on marriage could contain a statement recognizing marriage as a holy sacrament or institution of the church and defining marriage as being between one man and one woman in accordance with the church's statement of faith.
- ◆ Policy statements should be drafted using neutral wording and avoiding negative or pejorative wording or wording that distinguishes an identifiable group contrary to applicable human rights legislation.

- ◆ A policy on marriage and/or facility use policy could be prepared, where applicable, but with the assistance of legal counsel in order to ensure that the church is in compliance with applicable human rights legislation with respect to same sex marriage.
- ◆ Churches are cautioned against implementing policies on conduct or lifestyle that may be construed as discrimination against an identifiable group contrary to applicable human rights legislation.
- ◆ Churches should ensure that their policy statements are enforced in a consistent manner.
- ◆ Consideration should be given to conducting a legal audit of all existing and proposed policies and constitutional documents in order to determine 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 those of the local church.

In light of the recent developments in the law, churches and religious organizations will need to carefully re-evaluate their constitution, as well as their operating policies, in order to give consideration to the potential impact of proposed same sex marriage legislation, and to avoid being found in breach of the existing human rights legislation and proposed federal legislation on same sex marriage.

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