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**Same Sex Marriages: Part I - The Legal Context, Including
the Reference to the Supreme Court of Canada**

(Power Point Presentation)

By Mervyn F. White, B.A., LL.B.

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Affiliated with **Fasken Martineau DuMoulin LLP**

Main Office Location

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

www.carters.ca

National Meeting Locations

Toronto (416) 675-3766
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A. Introductory Comments

- The purpose of Part I and Part II of the presentation on Same Sex Marriage 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 Church Law Bulletins #1, #7 and #8 at www.churchlaw.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 continues to unfold

2

B. Overview of Topics in Part I

- Relevant Provisions From Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*
- Recent Case Law Developments Regarding Same Sex Marriage
- Supreme Court of Canada’s Reference Re: Same Sex Marriage and Federal Legislation (Bill C-38)
- Recent Key Human Rights Decisions Impacting Same Sex Marriage and Freedom of Religion

3

C. Relevant Provisions from the Ontario *Human Rights Code* and the *Charter of Rights and Freedom*

Impact of Human Rights Legislation

a) The *Human Rights Code* (Ontario)

- Part 1 of the *Human Rights Code* enumerates areas in which individuals have the right to be treated “equally” and without discrimination

4

• **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

5

• **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

6

• **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

7

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

8

c) Canadian Charter of Rights and Freedoms (Charter)

- **The relevant provisions of the Charter are as follows:**
 2. Everyone has the following fundamental freedoms:
 a) freedom of conscience and religion;
 b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 c) freedom of peaceful assembly; and
 d) freedom of association.

9

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

10

D. 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

11

- *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

12

- 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 were appealed to the Supreme Court of Canada

13

- *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

14

- *Dunbar v. Yukon* [2004] Y.J. No. 61 delivered July 14, 2004
 - Attorney General conceded that the opposite sex requirement for marriage is unconstitutional as not consistent with the equality rights guarantee set out in s.15(1) of the Charter and is not justifiable.
 - Court re-formulated 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 have found that opposite sex requirement for marriage is unconstitutional, including Manitoba, Nova Scotia, Saskatchewan, Newfoundland/Labrador

15

E. Supreme Court of Canada’s Reference Re: Same Sex Marriage and Federal Legislation (Bill C-38)

- Background
 - 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

16

- 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
- 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

17

- The actual wording of the proposed 2003 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."
- SCC reference decision rendered December 9, 2004

18

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

19

– Section 2 of the proposed legislation on the protection of religious freedom goes beyond federal jurisdiction into matters that are provincial jurisdiction

– Religious freedom is already protected by the Charter, but if additional protections are desired, they would have to be done by the Provinces and Territories

– The Court declined to answer the question on whether the opposite-sex requirement for marriage is constitutional, as they felt it was unnecessary in light of the unique combination of factors at play

– For more information refer to Church Law Bulletin No.7 at www.churchlaw.ca

• **New Proposed Federal Legislation (Bill C-38)**
Civil Marriage Act

– Received second reading on May 4, 2005 and is now being considered by a legislative committee after having been debated extensively in parliament

– Very similar to previous proposed Act that was referred to SCC with some exceptions:

§ Very extensive preamble explaining purpose of legislation

§ Changed wording of exemption to: “It is recognized that officials of religious groups are free to refuse to perform same sex marriages that are not in accordance with the religious beliefs.”

§ Department of Justice admits that this clause might not pass constitutional review and that “most specific situations involving religious freedom are not within federal jurisdiction, but would fall within provincial or territorial human rights legislation”

F. Recent Key Human Rights Decisions Impacting Same Sex Marriage and Freedom of Religion

- *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.”

23

- *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”

24

- Outstanding complaint made against Knights of Columbus (K of C) in B.C.
 - Same sex couple brought human rights complaint against Knights of Columbus in B.C. for their refusal to rent their hall to them for the purposes of a same sex wedding reception

25

– Barbara Findlay, the lawyer representing the same-sex couple in the Knights of Columbus case, argued that:

“The religious freedom of the Roman Catholic Church to refuse to marry same-sex couples could not be equated to religious freedom of a lay organization of Catholics to refuse to rent premises for the celebration of a same-sex marriage—not if the premises were generally offered to the public.” *Barbara Findlay*

26

– Whereas the lawyer for the Knights of Columbus submitted that,

“If it’s lawful to say no to a same-sex marriage, it’s lawful to say no to celebrating the event. To celebrate an event against your religious belief is the same as conducting the event yourself.” *Michael Valpy*

27

– Human Rights Tribunals in B.C. will therefore have to decide:

- § Whether the freedom of religion extends far enough to protect the religious freedom of members of a “lay organization”
- § Whether it extends to religious groups who are offering a service to the public
- § Whether the “celebration” of a marriage should be distinguished from the solemnization of a marriage

28

- **Marriage commissioners who are opposed to same-sex marriage on religious grounds:**
 - **Complaints have been filed in Manitoba and Saskatchewan by marriage commissioners who have been told that they must perform same-sex marriages or resign**
 - **New legislation in Ontario *Spousal Relationships Statute Law Amendment Act, 2005* will provide some relief for religious marriage commissioners and is discussed in more detail in Part II of the presentation**

29

- **Camp Arnes in Manitoba**
 - **Human rights complaint lodged by homosexual choir against Mennonite camp, Camp Arnes, for refusing to allow the use of its facilities**
 - **No decision has yet been made by Manitoba Human Rights Commission**
 - **The use of facilities is addressed in more detail by in Part II of the presentation**

30

- **Human Rights Complaint Against Catholic Bishop Fred Henry in Calgary**
 - **Two complainants alleging that letter written by Bishop Henry to parishioners urging them to oppose same-sex marriage legislation discriminates against homosexuals**
 - **Letter compared homosexuality to adultery, prostitution and pornography**
 - **Urged government to use its “coercive power” to proscribe or curtail such activities in the interests of the common good**

31

- **Kempling Appeal in B.C.**
 - **Teacher was suspended for letters written to the editor which opposed same-sex marriage**
 - **B.C. court upheld Teacher College’s right to suspend teacher – now under appeal**
 - **Appellants arguing that teacher’s freedom of speech and freedom of conscience and religion is being infringed**
 - **Can any professional be suspended for statements made in public?**

32

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