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**CHURCH LEADERSHIP & THE LAW  
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**Same Sex Marriages: Part II - What Churches Can Do  
in Response to Recent Legal Developments  
with Regards to Same Sex Marriage**

(Power Point Presentation)

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**By Terrance S. Carter, 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

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**A. Overview of Topics in Part II**

- New Same Sex Related Legislation in Ontario
- What Churches and Religious Charities Can Do in Response
- Summary Comments

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**B. New Same Sex Related Legislation in Ontario**

- See Church Law Bulletin #8 at [www.churchlaw.ca](http://www.churchlaw.ca)
- New Act in Ontario entitled *Spousal Relationships Statute Law Amendment Act, 2005* took effect on March 9, 2005
- Ontario is the only province so far to provide explicit exemption in its *Human Rights Code* for religious officials and organizations with respect to same-sex marriage

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- This Act adds the following additional exemption to the Ontario *Human Rights Code*:  
 s.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 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. [emphasis added]

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(3) In this section,  
 “sacred place” includes a place of worship and any ancillary or accessory facilities

- The new Act also provides a similar exemption under section 7(a) of the *Marriage Act* for religious officials who are commissioners and who are opposed to same sex marriage
- A “person registered under the *Marriage Act*” is defined in s.20(3) of the *Marriage Act* as follows:  
 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 to which he or she belongs as entitled to solemnize marriage according to its rites and usages;

(c) that the religious body to which the person belongs 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; provided that in the case of a person who is in Ontario temporarily and who, if resident in Ontario, might be registered under this section, the Minister may register him or her as authorized to solemnize marriage during a period to be fixed by the Minister. R.S.O. 1990, c. M.3, s. 20 (3).  
 [emphasis added]

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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 Youth for Christ or 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” 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,  
 “not only property used for religious ceremonies, but also property used by religious organizations in connection with their faiths...[and] is intended to include 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 that are 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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**C. 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*
- 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 *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 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 the 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 that 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 proposed 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 draft federal legislation recognizes the rights of officials of religious groups to refuse to perform same sex marriages contrary to their religious beliefs, but does not recognize a similar freedom for religious groups as contemplated by *Halpern*

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• 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 and the need to document future rights

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**D. SUMMARY COMMENTS**

- In summary, in light of the 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
- 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

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- Prepare an appropriate facility use policy to prohibit the use of church facilities for same sex marriage as contemptible by section 18.1 of the *Human Rights Code* and to restrict use of church facilities to church programmes and /or members
- Policy statements should be drafted using neutral wording where possible and avoid negative or pejorative wording or wording that refers to an identifiable group

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- 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
- See Church Law Bulletin #1 and #8 at [www.churchlaw.ca](http://www.churchlaw.ca) for more details

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