DIOCESE OF QU'APPELLE

Marriage Law in Canada – An Outline

A paper prepared by the Chancellor of the Diocese of Qu'Appelle

in preparation for General Synod, July, 2016.

Disclaimer: This paper is not intended as legal advice on any specific case or situation, but is simply an outline of the Canadian civil law of marriage. If a particular situation comes up which potentially raises an issue under the civil law of marriage, the relevant Chancellor should be consulted for legal advice.

MARRIAGE LAW IN CANADA – AN OUTLINE

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I. INTRODUCTION

The Chancellors of the Anglican Church of Canada met in Toronto in early January 2016 in preparation for the upcoming meeting of General Synod in July 2016. One of the topics discussed at the meeting was the proposed Resolution to amend Canon XXI, "On Marriage in the Church", which will be considered at General Synod. Following that discussion, the Chancellor of Qu'Appelle undertook to provide a summary of the civil law of marriage in Canada, to assist the Chancellors in preparing for the General Synod. This paper is the result.[1]

This paper deals solely with the civil law of marriage in Canada. It does not touch on the canon law of the Anglican Church. The goal of this paper is simply descriptive: to outline the legal principles governing civil marriage in Canada, with a particular focus on the developments leading to the recognition of same-sex marriage across Canada. The paper also outlines the relevant constitutional and human rights laws and their application to individuals seeking to marry, and to individuals and organizations authorised to perform marriages.

As will be seen, marriage law in Canada is an area of divided jurisdiction. The Constitution gives the federal government jurisdiction over the substantive law of marriage, which includes the basic definition of marriage itself, while the provinces and

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territories have jurisdiction over the solemnization of marriage, namely the formal ceremonies by which a couple can be married.

As well, the Constitution of Canada and human rights codes protect the right to equality, which protects sexual orientation, and also freedom of religion, which protects religious belief and conscience. These rights must be balanced against each other. The right to equality has been held to include the right for same-sex couples to marry, while freedom of religion protects the right of religious officials to determine if the performance of same-sex marriage ceremonies is consistent with their own religious beliefs. These constitutional principles have been implemented by Parliament through the *Civil Marriage Act* of 2005, and by provincial human rights codes.

II. CONSTITUTIONAL FRAMEWORK

A. *Constitution Act, 1867*: Federal and Provincial Marriage Jurisdiction

The *Constitution Act, 1867* is the basic document of the Constitution of Canada.[2] It defines the legislative powers of the federal Parliament and the provincial Legislatures. The powers of the federal Parliament are set out in section 91 of the *Constitution Act, 1867*, while the powers of the provinces are set out in section 92 of the Act. The powers of each government are exclusive: if something is assigned to the federal Parliament, the provincial legislatures cannot enact laws on that subject, and if something is assigned to the provinces, then Parliament cannot pass laws on that subject.

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[2] *Constitution Act, 1867*. Enacted by the British Parliament, 30 & 31 Victoria (1867), c 3; reproduced in SC 1985, App II, No 5. Online: http://laws-lois.justice.gc.ca/eng/Const/index.html .

Section 91 defines the legislative powers of the federal Parliament. In particular, section 91(26) provides that Parliament has exclusive power to pass laws in relation to "Marriage and Divorce". If that were the only reference to marriage in the Constitution, then Parliament would have complete jurisdiction over the law of marriage. However, marriage is also mentioned in the list of provincial powers. Section 92(12) gives the provincial legislatures the power to enact laws relating to "The Solemnization of Marriage in the Province".[3]

The courts have held that these provisions mean that there is divided constitutional jurisdiction over marriage between the federal government and the provinces.[4] The federal power over "marriage and divorce" refers to the substantive law covering these two topics. Parliament, and only Parliament, has the power to enact laws determining the basic definition of marriage, including capacity to marry: Who can marry whom? What restrictions on marriage exist? The provinces, on the other hand, have been given exclusive power to enact laws determining the process by which marriages are solemnized: Who can perform marriages? What documents are required to get married? Is there a notice period, such as banns? If a party to the marriage is underage, what additional consents are required? What documents must be filed with the provincial government, attesting to the marriage?

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[3] Note that the legislative powers of the three territories are not mentioned in the *Constitution Act, 1867* since the territories are created by federal statutes, not by the Constitution. However, Parliament has given the territories the power to pass laws relating to "the solemnization of marriage", which is interpreted as being the same as the provincial power. See: *Northwest Territories Act*, being Part 1 of the *Northwest Territories Devolution Act*, RSC 2014, c 2, ss 18(1)(i) and 25; *Nunavut Act*, SC 1993, c 28, s 23(1)(o) and (2); *Yukon Act*, SC 2002, c 7, ss 18(1)(i), and 20. For the purposes of this paper, references to the provinces will include the territories, except where specifically noted otherwise.

[4] *Reference Re Marriage Laws* (1912), 46 SCR 132; appeal dismissed, [1912] UKPC 63, [1912] AC 880 (PC); *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79.

The explanation for this divided jurisdiction is that it ensures that there is a single definition of marriage that applies across the country, governed by federal law. However, the principles governing solemnization of marriage can vary locally. This was a particularly important point at the time of Confederation in 1867 when marriage solemnization was largely a matter for church ceremonies. There was a strong religious division between Quebec, which was largely Roman Catholic, and Ontario, which was primarily Protestant. Provincial jurisdiction over the solemnization of marriage meant that each province could decide for itself what solemnities were needed for a marriage ceremony, based on the religious composition of the province.[5]

In summary, the provinces cannot decide who can get married; that is an area of exclusive federal jurisdiction. On the other hand, Parliament cannot decide the procedural steps required for a marriage to be formed, including what officials can perform marriage ceremonies; that is an area of exclusive provincial jurisdiction.[6]

B. *Canadian Charter of Rights and Freedoms*: Religious and Equality Guarantees

The *Constitution Act, 1867* deals with the legislative powers of Parliament and the provinces. Another part of the Constitution deals with individual rights: the *Canadian Charter of Rights and Freedoms*, enacted in 1982 as part of the patriation of the Constitution.[7] Two sections of the Charter are relevant to the issue of same-sex marriage:

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[5] *Reference Re Marriage Laws*, note 4 above, pp 341-342 (per Davies J), citing a legal opinion given by the Law Officers of the Crown in England.

[6] For a more detailed review of the division of powers relating to marriage, see Hogg, *Constitutional Law of Canada* (5th ed, Supplemented), para 27.3.

[7] *Canadian Charter of Rights and Freedoms*, being part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982,* 1982, c 11 (UK). Reprinted RSC 1985, App II, No 44. Online: http://laws-lois.justice.gc.ca/eng/Const/page-15.html .

section 2(a) and section 15. Section 2(a) of the Charter protects fundamental freedoms including religion:

> **Fundamental freedoms**
> **2.** Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;

Section 15 of the Charter protects equality and prohibits governments from discriminating against individuals based on innate personal characteristics:

> **Equality before and under law and equal protection and benefit of law**
>
> **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.

There are three points to note about these provisions. First, the Charter applies only to governments, not to private parties.[8] It gives rights to individuals *vis-à-vis* governments, but it does not give a private individual any rights against another private individual. Second, the Supreme Court has held that there is no hierarchy of rights in the Charter. All the rights guaranteed by the Charter are of equal value. If there is an apparent conflict between Charter rights, they must be resolved based on the facts of each particular case, balancing the claims under each right.[9] Third and finally, the Supreme Court has held that section 15 is open-ended. Its key function is to guarantee equality. The personal characteristics enumerated in section 15(1) serve to illustrate the scope of the equality guarantee, but the equality guarantee is not limited to the enumerated grounds. Other significant personal characteristics, analogous to the enumerated ones,

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[8] *Charter*, s 32(1).

[9] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31, paras 31-32.

can be found to warrant the protection of the equality guarantee. It is on this basis that the Supreme Court held that sexual orientation is protected by section 15(1) even though it is not specifically enumerated. Sexual orientation is a personal characteristic, analogous to those enumerated in s 15(1), and receives the same constitutional protection.[10]

C. Human Rights Codes: Federal, Provincial and Territorial

All governments in Canada have enacted human rights legislation. Like the Charter, human rights laws give rights to individuals *vis-à-vis* governments. An individual who believes that a government has discriminated against them can file a complaint under the applicable human rights law. However, unlike the Charter, human rights laws also apply between private parties, such as consumers, businesses and other organizations. An individual who believes another private party has discriminated against them can file a complaint against that party under human rights law.

All of these human rights laws prohibit discrimination in the provision of services to the public, including a denial of service based on sexual orientation.[11] The courts have given a broad interpretation to the term "services to the public", potentially including marriage ceremonies.

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[10] *Egan v Canada*, [1995] 2 SCR 513.

[11] *Canadian Human Rights Act*, RSC 1985, c H-6, ss 3(1), 5; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 4; *Human Rights Code*, RSBC 1996, c 210, s 8; *The Human Rights Code*, CCSM c H175, s 13(1); *Human Rights Act*, RSNB 2011, c 171, s 5(1); *Human Rights Act, 2010*, SNL 2010, c H-13.1, ss 9(1), 11(1); *Human Rights Act*, SNWT 2002, c 18, ss 5(1), 11(1); *Human Rights Act*, RSNS, c 214, s 5(1)(a),(n); *Human Rights Act*, SNu 2003, c 12, ss 7(1), 12(1); *Human Rights Code*, RSO 1990, c H.19, s 1; *Human Rights Act*, RSPEI 1988, c H-12, ss 1(1)(d), 2(1); *Charter of Human Rights and Freedoms*, CQLR c C-12, ss 10, 12; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, ss 2(1)(m.01)(vi), 12(1); *Human Rights Act*, RSY 2002, c 116, ss 7(g), 9(a). Note that human rights laws also prohibit discrimination in other contexts, such as housing and education, but for the purposes of this paper, the primary focus is on services offered to the public.

Human rights laws also protect religious belief. In fact, religious belief has been one of the original protected values in all human rights laws since legislatures began enacting them. They protect religious beliefs in two ways. First, a person cannot be denied services based on religious beliefs. Second, religious beliefs can be taken into account to protect activities of religious groups.

One final point is that the federal human rights law, the *Canadian Human Rights Act*, is of relatively limited application. It only applies to the federal government and to private businesses and organizations which are under federal regulation, such as banks, aviation, shipping, railways and telecommunications companies. Under the division of powers set out in the *Constitution Act, 1867* most private businesses and organizations are regulated under provincial law, meaning that provincial human rights laws will apply. This point will have significance later on in this paper, in the discussion whether a marriage officiant is required to perform a marriage ceremony for a same-sex couple.

III. LAWS GOVERNING MARRIAGE

A. Federal Law: Capacity to Marry

(1) Traditional Legal Definitions of Marriage

Although Parliament has the exclusive power to pass laws defining marriage, for most of Canada's history it has rarely used that power. Instead, in the common law provinces, the federal government largely relied on the common law definition of marriage derived from the English common law, as well as some English statutes which

were received as part of the law in Canada. For Quebec, Parliament relied on the definition of marriage in Quebec's civil law, which has its roots in French civil law.[12]

The definition of marriage used in the common law provinces was summarised in *Hyde v Hyde*, a decision of the English Court of Probate and Divorce:

> What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.[13]

Although *Hyde* did not apply directly in Canada, the Canadian courts relied on it as an authoritative statement of the common law on marriage. The *Hyde* definition was cited repeatedly in the various court cases on same-sex marriage in Canada.

(2) Federal Statute Law

Prior to 2000, Parliament had only enacted a few statutes under its marriage power, all relating to kindred and affinity issues.[14] In a series of acts passed in the latter part of the

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[12] From 1866 to 1991, the civil law in Quebec was set out by the *Civil Code of Lower Canada.* The Code provisions dealing with marriage did not expressly state that marriage was only between a man and a woman, but the courts held the requirement was implied by the Code and the civil law: *Hendricks v Québec (Procureur Général*), 2002 CanLII 23808, [2002] RJQ 2506 (QC SC), paras 89-94. When the National Assembly repealed the old *Civil Code* and replaced it with the *Civil Code of Québec*, SQ 1991, c 64, the new Code expressly dealt with this issue. Article 365, alinea 2 stated: "Marriage may be contracted only between a man and a woman expressing openly their free and enlightened consent." However, the Quebec Superior Court in *Hendricks* held that this provision was not within provincial legislative authority, in light of Parliament's exclusive power over the substantive law of marriage. Alinea 2 was subsequently repealed: SQ 2002, c 6, s 22.

[13] *Hyde v Hyde* (1866), LR 1 P & D 130 (Eng PD), at p. 133. The point in issue in *Hyde* was whether an adherent of the Church of Latter Day Saints who entered into a polygamous marriage in the United States could obtain a divorce in the English courts. The English court ruled that it lacked jurisdiction because polygamous marriage did not come within the common law definition of marriage.

[14] The "Table of Kindred and Affinity" found in the introduction to the Anglican marriage service summarised the English law of marriage which became part of the law of the common law provinces: *Book of Common Prayer* (Toronto: Anglican Book Centre, 1962), p 562.

19th century and into the early years of the 20th century, Parliament made piece-meal amendments to the law of marriage relating to an individual's ability to marry a sibling of the individual's deceased spouse. These piece-meal amendments changed the law on this point which Canada had inherited from England.[15] Then in 1990, Parliament enacted the *Marriage (Prohibited Degrees) Act*, defining prohibited degrees more generally.[16]

It was not until 2000 that Parliament enacted a statute relating to the actual definition of marriage: the *Modernization of Benefits and Obligations Act*. The purpose of this statute was to give couples living in common law relationships, whether same-sex or opposite sex, the same benefits and obligations as married couples had under federal laws (eg – Canada Pension Plan, income taxes). During debates in Parliament, concerns were raised that the bill might inadvertently change the definition of marriage to permit

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[15] An English statute passed by the Henrician Parliament in the wake of "the King's great matter" provided that an individual could not marry within "the Leviticall degrees." This Act was consistent with King Henry VIII's view that he had not been lawfully married to Katherine of Aragon, the widow of his deceased brother: *An Act concerning Marriages, Precontract and Consanguinity*, 32 Hen VIII, c 38 (1540). In 1882, the Parliament of Canada passed *An Act concerning Marriage with a Deceased Wife's Sister*, SC 1882, c 42, which permitted a man to marry the sister of his deceased wife. Eight years later, Parliament extended this Act to permit a man to marry a daughter of his deceased wife's sister: *An Act to amend An Act concerning Marriage with a Deceased Wife's Sister*, SC 1890, c 36. In the statute revision of 1906, these two Acts were consolidated as the *Marriage Act*, RSC 1906, c 105. In 1923, in a burst of gender equality, Parliament amended the *Marriage Act* to permit a woman to marry her deceased husband's brother, or a son of a brother: *An Act to make lawful the marriage of a woman to her deceased husband's brother or such brother's son*, SC 1923, c 19. Finally, in 1932, Parliament further amended the law to permit marriage to a son or daughter, respectively, of either a brother or sister of the deceased spouse: *An Act to amend the Marriage and Divorce Act*, SC 1932, c 10. This Act continued in force as the *Marriage Act*, RSC 1985, c M-2, until it was repealed in 1991 by s 5 of the *Marriage (Prohibited Degrees) Act*, note 16 below. This issue aroused considerable social commentary in Victorian Britain: "Was there a single eminent Victorian who did not at some time or other announce his views on the 'deceased wife's sister'? She was the teething ring of all Victorian controversialists..." (Ferriday, *Lord Grimthorpe, 1816–1905* (London: John Murray Ltd., 1957) p. 9. The issue even found its way into one of the songs of the Queen of the Fairies in *Iolanthe*. For further details on this issue, see the Wikipedia article: "Deceased Wife's Sister's Marriage Act 1907": https://en.wikipedia.org/wiki/Deceased_Wife%27s_Sister%27s_Marriage_Act_1907.

[16] *Marriage (Prohibited Degrees) Act*, SC 1990, c 46.

same-sex marriage. An amendment was added to the bill to clarify that "for greater certainty" the Act did not change the definition of marriage.[17]

The next year, Parliament passed another statute which dealt with marriage: the *Federal Law–Civil Law Harmonization Act, No. 1*.[18] This statute updated a number of federal laws to ensure they operated harmoniously with the civil law of Quebec. Significantly, the Act defined marriage for Quebec in much the same language as art 365 of the *Civil Code*.[19]

It was against this statutory and common law framework of marriage that the issue of same-sex marriage played out in the courts in the early years of the 21st century.

B. Provincial and Territorial Laws: Solemnisation of Marriage

Unlike the federal Parliament, the provinces have regularly used their power to pass laws relating to the solemnization of marriage since Confederation.[20] These are the marriage laws most clergy will be familiar with, since it is these laws which set out the formal requirements for a valid marriage ceremony to be performed. Requirements typically include that the couple obtain a marriage licence from an official appointed by the province, for example forty-eight hours before the ceremony is to take place, or must publish a notice of the upcoming marriage several days in advance, such as banns. The

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[17] *Modernization of Benefits and Obligations Act*, SC 2000, c 12, s 1.1.

[18] *Federal Law–Civil Law Harmonization Act, No. 1*, SC 2001, c 4, s 5.

[19] *Civil Code of Québec*, note 12 above, art 365, alinea 2.

[20] *Marriage Act*, RSA 2000, c M-5; *Marriage Act*, RSBC 1996, c 282; *Marriage Act*, CCSM c M50; *Marriage Act*, RSNB 2011, c 188; *Marriage Act*, SNL 2009, c M-1.02; *Marriage Act*, RSNWT 1988, c M-4; *Solemnization of Marriage Act*, RSNS 1989, c 436; *Marriage Act*, RSNWT (Nu) 1988, c M-4; *Marriage Act*, RSO 1990, c M.3; *Marriage Act*, RSPEI 1988, c M-3; *Civil Code of Québec*, SQ 1991, c 64, Book Two – Title One – Chapter I: "Marriage and Solemnization of Marriage"; *The Marriage Act, 1995*, SS 1995, c M-4.1; *Marriage Act*, RSY 2002, c 146.

provincial acts empower members of the clergy to perform marriage ceremonies which will be valid for the purposes of civil law as well as canon law. A member of the clergy who officiates at a marriage ceremony is typically required to file documentation with the provincial office responsible for marriages. Following that, the couple can obtain a marriage certificate issued under the authority of the provincial law.

There are two important points about these provincial laws. First, even though most of them are entitled "*Marriage Act*", they are restricted to defining the formalities required for a valid marriage to be formed. The provincial laws do not, and can not, define who has capacity to marry, including same-sex marriage. Only Parliament can enact laws relating to capacity to marry. Second, since the officiant is acting under the authority of provincial law to perform the marriage ceremony, questions whether the officiant has discriminated in providing that service to members of the public will be determined under provincial human rights laws, not the *Canadian Human Rights Act*.

IV. DEVELOPMENT OF SAME-SEX MARRIAGE IN CANADA

A. Three Stages: Lower Courts, Supreme Court, and Parliament

The law concerning same-sex marriage in Canada shifted dramatically in the space of only three years, from 2002 to 2005. This legal development had three stages. First, there was a series of court cases across the country, particularly in Ontario, British Columbia and Quebec, which held that same-sex marriage was constitutionally required under the equality clause of the Charter. Second, the federal government decided not to

appeal those cases but instead referred several questions relating to the constitutional issues around same-sex marriage directly to the Supreme Court of Canada. And third, Parliament in 2005 passed the *Civil Marriage Act*, which provided that same-sex marriage was legally permitted across Canada as a matter of civil law, while recognising that religious groups were free to refuse to perform marriages which were contrary to their religious beliefs.[21]

B. Same-Sex Marriage Cases in the Lower Courts, 2001 – 2003

The three main cases in the lower courts were started in Ontario, British Columbia and Quebec. The cases were brought by same-sex couples asserting that they had a right to marry, the same as opposite-sex couples. They relied in each case on the equality guarantee, set out in section 15 of the Charter. The cases were brought against the Attorney General of Canada, alleging that the definition of marriage in federal law (whether statutory or common law) discriminated on the basis of sexual orientation, and thereby denied them the equal benefit and protection of the law, contrary to section 15. The cases also named the provincial Attorneys General as parties, because officials acting under the authority of provincial laws had refused to issue marriage licences or to register same-sex marriages, based on the definition of marriage in federal law.

The challengers had mixed success in the trial courts. The first case, in British Columbia in 2001, upheld the common law definition of marriage and dismissed the application.[22] The court not only rejected the equality argument, but held that

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[21] *Civil Marriage Act*, SC 2005, c 33.

[22] *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365, [2001] 11 WWR 685 (BC SC).

Parliament's constitutional jurisdiction over marriage only authorised opposite-sex marriage. The implication was that even if Parliament wanted to implement same-sex marriage, it was constitutionally barred from doing so.[23]

However, the next year, the trial courts in Ontario[24] and Quebec[25] held that the traditional definition of marriage was unconstitutional because it discriminated against same-sex couples, who had the same right to marry as opposite-sex couples. Both the Ontario and Quebec courts stayed the application of their decisions for two years to give the federal government time to determine what legislative changes should be implemented in response to the decisions. The deadline was July 12, 2004.[26]

The British Columbia and Ontario cases went on appeal. On May 1, 2003, the British Columbia Court of Appeal allowed the appeal brought by the same-sex couples and held that same-sex marriage was constitutionally required. The Court of Appeal also rejected the trial court's position that the federal Parliament could not expand marriage to include same-sex marriages. Like the Ontario and Quebec trial courts, the British Columbia Court of Appeal stayed the decision to give the federal government time to decide how to proceed. The Court of Appeal chose the same date the Ontario trial court had chosen, July 12, 2004.[27]

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[23] *Ibid*, paras. 10-11.

[24] *Halpern v Canada (Attorney General)*, 2002 CanLII 42749 and 2002 CanLII 49633, 215 DLR (4th) 223 (ON SCDC).

[25] *Hendricks v Québec (Procureur Général*), note 12 above.

[26] *Halpern v Canada (Attorney General)*, note 22 above.

[27] *Barbeau v. British Columbia (Attorney General),* 2003 BCCA 251, 225 DLR (4th) 472, [2003] 7 WWR 22 (BC CA), paras. 70-71; 158-161.

At the same time, the federal Attorney General appealed the decision in the Ontario case. A month after the decision of the British Columbia Court of Appeal, the Ontario Court of Appeal unanimously held that the common law definition of marriage infringed the Charter's equality guarantee.[28] However, in a major shift, the Ontario Court of Appeal held that the declaration should not be suspended, unlike the Ontario trial court and the British Columbia Court of Appeal.[29]

The effect of the Ontario Court of Appeal decision was that same-sex marriage became available immediately in Ontario, Canada's largest province, as of June 10, 2003. Then, just a week after the decision, on June 17, 2003 Prime Minister Chrétien announced that the federal government would not appeal the decisions of the Ontario and British Columbia courts. Instead, the federal government would refer a set of questions relating to same-sex marriage to the Supreme Court of Canada.[30]

The decision of the Ontario Court of Appeal and the announcement by the Prime Minister changed the legal dynamic on same-sex marriage across Canada. The first sign of the change was that the same-sex parties in the British Columbia litigation went back to the British Columbia Court of Appeal. They asked that the suspension of the declaration be lifted as it no longer served any purpose, in light of the developments in Ontario and the Prime Minister's announcement that there would not be any appeal. Counsel for the Attorney General of Canada confirmed that there would not be an appeal

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[28] *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403, 65 OR (3d) 161; 225 DLR (4th) 529 (ON CA), para 108, 142.

[29] *Ibid*, paras 143-154.

[30] "Timeline | Same-sex rights in Canada", CBC, January 12, 2012: http://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516 .

and consented to that application. The British Columbia Court of Appeal granted the application and set aside the suspension. Same-sex marriage became available in British Columbia on July 8, 2003, the day of that decision.[31]

With that, proponents of same-sex marriage began to apply to the courts in the other provinces and territories of Canada to obtain recognition of same-sex marriage. Over the next two years, provincial and territorial trial courts repeatedly ruled that same-sex marriage was constitutionally required.[32] By the time the *Civil Marriage Act* was passed in 2005, same-sex marriage was available in all jurisdictions except Alberta, Prince Edward Island, the Northwest Territories and Nunavut.

C. *Reference re Same-Sex Marriage*: Supreme Court of Canada, 2004

(1) The Reference Questions

As mentioned, a week after the decision of the Ontario Court of Appeal, Prime Minister Chrétien announced that the federal government would refer legal questions relating to the issue of same-sex marriage to the Supreme Court of Canada.[33] A month

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[31] *Barbeau v. British Columbia*, 2003 BCCA 406 (CanLII), 15 BCLR (4th) 226 (BC CA). The federal Attorney General initially appealed the trial decision in the Quebec case as well, but abandoned the appeal after the Prime Minister's announcement. A group opposed to same-sex marriage then tried to continue the appeal, but the Quebec Court of Appeal held that they lacked standing and upheld the trial decision, in light of the decisions of the British Columbia and Ontario Courts of Appeal: *Catholic Civil Rights League v Hendricks*, [2004] RJQ 851, 238 DLR (4th) 577 (QC CA).

[32] *Dunbar v Yukon*, 2004 YKSC 54, 122 CRR (2d) 149 (YU SC); *Vogel v Canada (AG)* (2004), [2005] 5 WWR 154 (MB QB); *Boutilier v Nova Scotia (AG)*, [2004] NSJ No 357 (QL) (NS SC); *NW v Canada (AG)*, 2004 SKQB 434, 246 DLR (4th) 345 (SK QB); *Pottle v Canada (AG)*, [2004] NJ No 470 (QL) (NL SC(TD)); *Harrison v Canada (AG)*, 2005 NBQB 232, 290 NBR (2d) 70 (NB QB).

[33] Under the *Supreme Court Act*, RSC 1985, c S-26, s 53 the federal Cabinet can refer legal questions to the Supreme Court for the Court's opinion. While the Court's response to a reference is technically advisory, in practice the response is treated like any other decision of the Court, and will be followed as an authoritative statement of the law. See Hogg, *Constitutional Law of Canada*, note 6 above, para 8.6.

later, on July 16, 2003, the terms of the reference were announced in an Order-in-Council passed by the federal Cabinet.[34]

The Reference took the form of a draft statute followed by three questions asking about the constitutionality of the draft statute, if it were enacted by Parliament. The draft statute set out two legal propositions:

> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> 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.

The three questions posed to the Court were:

> 1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
>
> 2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
>
> 3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

The striking point about these questions is that they did not ask if same-sex marriage was constitutionally required. In other words, the federal government was accepting the basic conclusion of the Ontario and British Columbia Courts of Appeal, and the Quebec trial court. Rather, the federal government was asking if the draft bill was

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[34] Order in Council PC 2003−1055, July 16, 2003.

within Parliament's legislative authority and was consistent with the Charter, a somewhat different question.[35]

However, after Prime Minister Chrétien retired, the new government of Prime Minister Martin added a fourth question to the Reference:

> 4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?[36]

That fourth question squarely asked if the previous laws restricting marriage to opposite-sex couples were constitutional.

(2) The Supreme Court Decision

(a) Question 1: Parliament's Authority

The Court gave its unanimous decision shortly before Christmas, 2004. On the first question, the Court gave a divided answer. To the extent that the bill proposed to change the definition of marriage to include same-sex marriages, it came within federal jurisdiction. Parliament could legalise same-sex marriage.[37] This answer rejected the

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[35] In an interview after his retirement, Jean Chrétien stated that he had been completely surprised by the decisions of the courts that same-sex marriage was constitutionally required under the equality provision, but that he accepted that basic ruling from the courts: "Gay rulings stunned Chrétien," *Toronto Star*, 2012, https://www.thestar.com/news/2007/04/15/gay_rulings_stunned_chrtien.html . That statement explains why the reference questions did not originally ask if same-sex marriage was constitutionally required: the Reference was not meant to be an appeal from those lower court decisions.

[36] Order-in-Council PC 2004-28, January 26, 2004.

[37] *Reference re Same-Sex Marriage*, note 4 above, paras 16-19.

opinion of the British Columbia trial court, which had held that the federal jurisdiction over marriage was limited to opposite-sex marriage.[38]

However, the Court also held that the part of the bill which would protect religious officials from performing same-sex marriages was not within federal jurisdiction. The Court held that since the provinces have exclusive jurisdiction over the solemnization of marriage, including who can perform marriage ceremonies, only the provinces can pass laws which protect the right of clergy to refuse to perform marriages which are contrary to their religious beliefs.[39] It is important to recognise that the Court was not saying that the conscience rights of clergy were unprotected by law. Rather, the Court was ruling on the division of constitutional authority between the federal government and the provinces. Parliament could not enact such protections, which would be outside federal legislative authority, but the provinces could enact such legal protections, for example in their human rights laws.

(b) Question 2: Same-Sex Marriage and the Charter

The second question asked whether enacting same-sex marriage was consistent with the Charter rights of other individuals. The Court held that it was. Parliament's decision to expand the law of marriage to include same-sex couples did not infringe the equality rights of other individuals under s 15: "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another."[40] Similarly, the Court rejected the argument that creating same-sex marriage infringed the

[38] *Ibid*, paras 21-30.

[39] *Ibid*, paras 36-37.

[40] *Ibid*, paras 45, 46.

freedom of religion of individuals who opposed same-sex marriage on religious grounds.[41] Nor did the creation of same-sex marriage favour the equality rights of same-sex couples over the religious rights of other individuals. If any such conflicts arose in the future, they would have to be resolved based on the actual facts of the case, and without creating a hierarchy of Charter rights.[42]

(c) Question 3: Religious Rights of Clergy

The third question asked about the religious rights of clergy. The Court gave a very clear answer to this question:

> The right to freedom of religion enshrined in s. 2(a) of the Charter encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice: *Big M Drug Mart, supra*, at pp. 336-37. The performance of religious rites is a fundamental aspect of religious practice.
>
> It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the Charter.[43]

This is a very clear statement from the Court that the Charter will protect the right of clergy to decide for themselves whether to perform same-sex marriage ceremonies, based on their own religious beliefs and consciences.

Although the question posed to the Court did not directly raise the issue of sacred spaces, the Court addressed that issue as well:

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[41] *Ibid*, para 48.

[42] *Ibid*, paras 50-53.

[43] *Ibid*, paras 57-58 (emphasis added).

> The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.[44]

Taken together, these passages establish that the Charter's guarantee of freedom of religion will protect the right of clergy to decide for themselves whether to perform same-sex marriages, as well as protecting their control over sacred spaces.

(d) Question 4: Is Same-Sex Marriage Required?

The final question posed to the Court asked if the previous laws restricting marriage to opposite-sex couples were constitutional. As mentioned above, this question had been added to the Reference by the Martin government. Unlike the first three questions, which related to the implementation of same-sex marriage pursuant to the lower court decisions, this question essentially asked if the lower courts were correct in their conclusion. If answered, it would effectively have turned the Reference into an appeal from the lower courts.

The Supreme Court left this question unanswered. It is well-established that the Court has discretion to decline to answer a question posed by the federal government on a reference.[45] The Court stated that it was appropriate to exercise that discretion with respect to the fourth question. It noted that the federal government had said it would implement same-sex marriage in any event of the Court's ruling on this question. There was therefore no point in the Court giving its opinion on this issue. The Court also noted

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[44] *Ibid*, para 59.

[45] Hogg, *Constitutional Law of Canada*, note 6 above, para 8.6(d).

that if it did answer the question, it could potentially cast into doubt the lower court decisions, which the federal government had declined to appeal. That would not be fair to the parties to those cases, who had relied upon them as authority to marry:

> The parties in *EGALE*, *Halpern* and *Hendricks* have made this intensely personal decision [to marry]. They have done so relying upon the finality of the judgments concerning them. We are told that thousands of couples have now followed suit. There is no compelling basis for jeopardizing acquired rights, which would be a potential outcome of answering Question 4.[46]

That ended the involvement of the courts in this issue. The matter now moved to Parliament.

D. *Civil Marriage Act* (2005)

On February 1, 2005, the federal government introduced Bill C-38 of 2005, *An Act respecting certain aspects of legal capacity for marriage for civil purposes*, into the House of Commons. The key provisions of the Bill were sections 2 and 3;

> ***Marriage — certain aspects of capacity***
> **2.** Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> ***Religious officials***
> **3.** It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Section 2 was the same definition which the federal government had proposed in the Supreme Court Reference. Section 3 was changed, reflecting the Court's opinion that Parliament could not legislate with respect to the rights of clergy who perform marriage ceremonies. Instead, the new version "recognized" the right of religious officials to refuse to perform marriage ceremonies. Although section 3 does not mention the source

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[46] *Reference re Same-Sex Marriage*, note 4 above, para 67.

of that right, it is clearly a reference to the Supreme Court's conclusion that the Charter protects the rights of clergy to follow their consciences.[47]

While the Bill was under consideration in the House of Commons, one amendment was made adding an additional provision. Concerns were expressed during the debate in the Commons that religious groups which declined to perform same-sex marriage ceremonies might find their rights under federal law affected, such as their status as charitable organizations under the *Income Tax Act*. In response to this concern, the Government agreed to add section 3.1 to the Bill, which states that no-one shall be deprived of any benefit under federal law for exercising their Charter rights of freedom of religion and conscience in relation to same-sex marriage.

The Bill passed the House of Commons on June 28, 2005 by a vote of 158 to 133 and went to the Senate. It passed the Senate on July 19, 2005 by a vote of 47 to 21 (with three abstentions), and received Royal Assent on July 20, 2005, coming into force that same day.[48]

V. RIGHTS OF INDIVIDUALS SEEKING TO BE MARRIED AND OF OFFICIANTS

When same-sex marriage was implemented, some religious groups expressed concerns that clergy who declined to perform same-sex marriage ceremonies could be subject to complaints under provincial human rights laws. In fact, this has not occurred

[47] Note that s 3 is not restricted to same-sex marriages, but recognizes the general right of religious officials to refuse to perform any marriage which is not in accordance with their religious beliefs.

[48] By an odd coincidence, Chief Justice McLachlin, who had sat on the *Reference re Same-sex Marriage*, gave Royal Assent to the Bill as Deputy on behalf of Governor-General Clarkson, who was in hospital.

in the decade since the *Civil Marriage Act* was enacted. There are no reported cases of human rights complaints against clergy for exercising their right of conscience and declining to perform same-sex marriage ceremonies.

This lack of complaints against clergy is not surprising, in light of the answer given by the Supreme Court of Canada to the second question in the Reference. The Charter protects clergy from government compulsion to perform marriage ceremonies which would be contrary to their religious beliefs. That constitutional protection means that human rights laws cannot be used to compel clergy to perform same-sex marriage ceremonies. Rather, human rights laws protect both the right of same-sex couples to be married, and the right of clergy to determine if a proposed marriage is consistent with their religious beliefs. As mentioned earlier, all provincial and territorial human rights codes protect freedom of religion, which in turn is backed up by the Charter. One province, Ontario, has gone further and added a provision to the Ontario *Human Rights Code* which expressly protects clergy from a discrimination complaint in relation to marriage.[49]

There has been one human rights case relating to the use of a church hall. In 2005, a chapter of the Knights of Columbus in British Columbia was found liable under

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[49] *Human Rights Code* (Ontario), note 11 above, s 18.1:

> **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* [i.e. – religious officials] 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.

British Columbia human rights law for not renting their hall to a same-sex couple for a marriage reception. However, the facts of the case were somewhat unusual, in that the representative of the Knights of Columbus and the couple had signed a contract for the use of the hall. The Knights of Columbus did not appreciate that it was for a same-sex marriage reception, and when they found out that purpose, they cancelled the contract. The British Columbia Human Rights Tribunal found that as a general principle the Knights of Columbus could refuse to rent the hall for a purpose which was inconsistent with their religious beliefs.[50] However, on the facts of this particular case, they were liable for the way they cancelled the contract.[51]

The courts have also drawn a clear distinction between the situation of clergy, who have a right to refuse protected by the Charter, and civil marriage commissioners, who are appointed by provincial governments to perform civil marriage ceremonies. The Charter requires that governments provide a means for same-sex couples to be married in civil ceremonies, without any religious requirement. Since marriage commissioners are appointed by governments to fulfill this duty, they cannot refuse to perform a same-sex ceremony based on personal religious beliefs.[52] As well, it would be contrary to the Charter if a provincial government authorised civil marriage commissioners to refuse to perform a marriage ceremony based on their own personal religious beliefs, in light of the

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[50] *Smith v Knights of Columbus*, 2005 BCHRT 544, para 113.

[51] *Ibid*, para 120.

[52] *Nichols v. M.J.*, 2009 SKQB 299, 339 Sask R 35 (SK QB).

government's duty to ensure couples can marry without discrimination by government officials.[53]

VII. CLOSING

Marriage law in Canada is a matter of divided jurisdiction between the federal Parliament and provincial Legislatures. Parliament determines the substantive legal definition of marriage. It has exercised that power by expanding marriage to include same-sex marriage in the *Civil Marriage Act*. The provinces have jurisdiction over the solemnisation of marriage, which does not include the definition of marriage. Their laws on marriage solemnisation are the ones which most clergy will be familiar with, since it is the provincial law which authorises clergy to perform marriage with legal effect.

The Charter protects the right of a same-sex couple to be married, as a matter of equality. The Charter also protects the right of clergy to decide for themselves if performing same-sex marriage ceremonies is consistent with their own religious beliefs.

In the decade since the Supreme Court gave its decision in *Reference re Same-Sex Marriage* and Parliament enacted the *Civil Marriage Act*, there have not been any reported cases of a human rights complaint against a religious official in respect of same-sex marriage. The Charter and provincial human rights codes protect both the equality rights of same-sex couples, and the religious rights of clergy.

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[53] *Reference re Marriage Commissioners Appointed Under The Marriage Act*, 2011 SKCA 3, 366 Sask R 48 (SK CA).