Legislative Summary **LS-502E**

BILL C-38: THE CIVIL MARRIAGE ACT

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LEGISLATIVE HISTORY OF BILL C-38

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	1 February 2005
Second Reading:	4 May 2005
Committee Report:	16 June 2005
Report Stage:	27 June 2005
Third Reading:	28 June 2005

SENATE	
Bill Stage	**Date**
First Reading:	29 June 2005
Second Reading:	6 July 2005
Committee Report:	
Report Stage:	
Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-38: THE CIVIL MARRIAGE ACT*

Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, or the Civil Marriage Act, received first reading in the House of Commons on 1 February 2005. The bill will, for the first time, codify a definition of marriage in Canadian law, expanding on the traditional common-law understanding of civil marriage as an exclusively heterosexual institution. Bill C-38 defines civil marriage as "the lawful union of two persons to the exclusion of all others," thus extending civil marriage to conjugal couples of the same sex.

Second reading debate on Bill C-38 occurred between 16 February and 4 May 2005, when the bill was referred to a Legislative Committee. From 11 May through 14 June, this Committee heard fundamentally divided testimony on the merits of the legislation from witnesses representing various religious institutions and affiliated organizations or groups, advocacy groups for lesbians and gay men, spokespersons for traditional marriage, academics and legal experts. On 16 June, Bill C-38 was reported back to the House of Commons with one substantive government amendment and one opposition amendment to the bill's preamble.

Following a one-day debate, the legislation was adopted at report stage on 27 June with one additional substantive opposition amendment. Bill C-38 passed the House of Commons on 28 June by a vote of 158-133, 32 government members opposing.

BACKGROUND

A. Overview of Legislative Reforms to Date

Every jurisdiction in Canada prohibits discrimination based on sexual orientation in the provision of services, accommodation and employment.(1) The coming into effect in 1985

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) Alberta is the only jurisdiction in which this ban was effected by the courts rather than legislation: *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

of section 15 of the *Canadian Charter of Rights and Freedoms*, the equality rights provision, influenced legislative reform in this area. Section 15 has also been instrumental in the gradual development, since the early 1990s, of provincial and federal legislation to extend statutory entitlements of heterosexual conjugal couples to same-sex couples. From 1992 through 1999, B.C. legislation amended the definition of "spouse" in numerous statutes to include persons of the same sex living in "marriage-like" relationships. In 1999, Quebec legislators unanimously adopted omnibus legislation that amended the definition of *de facto* spouse [conjoint de fait] in the affected statutes to include same-sex couples.(2) The same year also saw the enactment of the first federal legislation to provide unambiguously for same-sex benefits, the *Public Sector Pension Investment Board Act* (Bill C-78), whose amendments to affected statutes included replacing opposite-sex "surviving spouse" benefits with gender-neutral "survivor" entitlements.

The pace of legislative reform accelerated significantly following the Supreme Court of Canada's decision in the Ontario case of *M.* v. *H.*, the first high court ruling to allow a section 15 Charter challenge to the legislated opposite-sex definition of "spouse."(3) Although the Court's decision was immediately concerned only with Ontario laws, its longer-term effects are apparent in virtually every jurisdiction.

Legislators in British Columbia, Saskatchewan, Manitoba, Ontario, Newfoundland and Labrador, and Nova Scotia have since enacted a wide but non-uniform range of legislative measures providing for various same-sex entitlements; initiatives in New Brunswick and the Northwest Territories were fewer and narrower in scope. In Nova Scotia and Manitoba, civil registration schemes for unmarried heterosexual and homosexual couples are also now in place. In Quebec, a civil union regime governed by the same rules as apply to solemnization of marriage, entailing the rights and obligations of marriage and subject to formal dissolution rules, mirrors marriage. In Alberta, the newly legislated status of "adult interdependent partner" for purposes of several family-related provincial statutes provides for

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(2) *Loi modifiant diverses dispositions législatives concernant les conjoints de fait* (Bill 32).

(3) [1999] 2 S.C.R. 3, affirming (1996), 142 D.L.R. (4th) 1, 31 O.R. (3d) 417 (Ont. C.A.). The case concerned a section of the province's *Family Law Act* that prevented same-sex partners from applying for spousal support upon relationship breakdown. In its 1995 decision in *Egan* v. *Canada* ([1995] 2 S.C.R. 513), the Supreme Court of Canada had unanimously found sexual orientation to be an analogous ground that triggers section 15 protection. A majority of the Court had ruled that the opposite-sex spousal definition in the *Old Age Security Act* discriminated on the basis of sexual orientation, in violation of section 15 of the Charter. However, a majority also found the discrimination justified under section 1 of the Charter and upheld the legislation's constitutionality.

rights and obligations of persons in a variety of non-married but not necessarily conjugal relationships involving interdependency.(4)

In the result, a patchwork of entitlements is in effect across the country.(5) In addition, some provincial schemes reserve the term "spouse" for married partners, some for married and unmarried opposite-sex couples, and some extend the meaning of spouse to include same-sex partners.

Federally, the *Modernization of Benefits and Obligations Act* (Bill C-23) enacted by Parliament in 2000 amended 68 statutes to effect equal application of federal laws to unmarried heterosexual and same-sex couples, and to extend to them some benefits and obligations previously limited to married couples. Although the then Minister of Justice emphasized that Bill C-23 did not affect the institution of marriage, critics urged the government to define marriage in the bill. Accordingly, the government inserted an interpretive amendment under which, "[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage,' that is, the lawful union of one man and one woman to the exclusion of all others."

B. Marriage and the Constitution

Judicial, political and legislative activity has clarified the legal rights of lesbians and gay men in Canada. In recent years, there have been increasing calls for extending the institution of marriage to same-sex couples on the basis of constitutional equality rights. These have now been sanctioned by the courts of **eight** provinces and one territory. The following paragraphs review fundamental constitutional principles of marriage law in Canada, as well as the relevant case law.

1. Division of Powers

The *Constitution Act, 1867* divides legislative jurisdiction over family law. Under the subsection 92(13) umbrella head of power, "Property and Civil Rights in the Province," the bulk of family-related matters falls under provincial authority. These matters include, among

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(4) Under the 2002 *Adult Interdependent Relationships Act*, a "relationship of interdependence" is one outside marriage involving two persons of the same or of the opposite sex, including non-minor relatives.

(5) For a more detailed discussion of these developments, see *Sexual Orientation and Legal Rights*, CIR 92-1E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised February 2005.

others, matrimonial property, spousal and child support other than under *Divorce Act* proceedings, adoption, succession and guardianship.(6)

Marriage itself is subject to more explicit constitutional treatment. Subsection 91(26) of the *Constitution Act, 1867* authorizes Parliament to legislate in relation to "Marriage and Divorce," while subsection 92(12) gives provincial legislatures the power to enact laws in respect of "The Solemnization of Marriage in the Province."

2. Capacity to Marry

It is, by now, well-settled law that Parliament has exclusive jurisdiction to regulate the legal *capacity* to enter into marriage, or matters of its *essential* validity. By the same token, the provinces enjoy exclusive competence over matters of *formal* validity.

There has always been a paucity of federal legislation relating to marriage. In the *Marriage (Prohibited Degrees) Act*(7) – the sole statute currently in effect under Parliament's section 91(26) authority over marriage – two substantive provisions codify prohibited degrees of "relatedness" or consanguinity. A third section specifies that the Act "contains all of the prohibitions in law against marriage by reason of the parties being related." Marriage itself is not defined.

Provincial and territorial "solemnization of marriage" statutes are concerned primarily with conditions precedent to marriage of a ceremonial nature such as the issuance of licences, the publication of banns, the qualifications of celebrants and similar "formal" rules. On occasion, the courts have sanctioned other provincial rules less clearly associated with the marriage ceremony, leading to some concern that, in the absence of national standards, requirements for entering into a valid marriage would become a matter of concurrent jurisdiction.(8) According to the more widely held view, although Parliament has not, in the past, fully "exercised its jurisdiction to set out explicit criteria regarding the capacity to marry … [a]ny attempt by the provinces to do so would likely be unconstitutional and of no force and effect."(9)

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(6) See Peter Hogg, *Constitutional Law of Canada*, 3rd. ed. (Supplemented), Carswell, Toronto, 1992, Vol. 1, chapters 21 and 26.

(7) S.C. 1990, c. 46 (R.S.C. 1985, c. M-2.1).

(8) Leslie Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage," *Ottawa Law Review*, Vol. 7, 1975, p. 396.

(9) Bruce Ryder, "Becoming Spouses: The Rights of Lesbian and Gay Couples," in *Family Law: Roles, Fairness and Equality*, Special Lectures of the Law Society of Upper Canada, Carswell, Toronto, 1993, p. 432.

C. Relevant Case Law

1. Prior to 2001

In the absence of a statutory definition of marriage, or of any statutory provisions barring same-sex marriage, the two leading cases in Canadian law to have considered the same-sex marriage issue over this period turned to British precedents.

a. *North* v. *Matheson*[10]

This pre-Charter case concerned an administrative refusal to register the Manitoba "marriage" of a same-sex couple. In upholding this decision, the judge considered, most notably, the 1866 British ruling in *Hyde* v. *Hyde and Woodmansee* on the lawfulness in Britain of a polygamous marriage, which defined the institution of marriage, "as understood in Christendom, … as the voluntary union for life of one man and one woman, to the exclusion of all others."[11] The *Hyde* decision is often cited as the source of the Canadian common-law requirement that a valid marriage be heterosexual.

Further authority was found in a 1970 British decision concerning the validity of a marriage between a man and a person who had undergone a male to female sex change. It observed that "sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognized as the union of man and woman. … [T]he characteristics which distinguish [marriage] from all other relationships can only be met by two persons of opposite sex."[12]

b. *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)*[13]

In this unsuccessful Charter challenge to the common-law rule restricting marriage to persons of the opposite sex, the majority ruling relied heavily on the *North* decision and its judicial antecedents.[14] It concluded that "under the common law of Canada applicable to

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(10) (1974), 24 R.F.L. 112 (Man. Co. Ct.).

(11) (1866), L.R. 1 P & D 130, p. 133, cited in *ibid.*, p. 116.

(12) *Corbett* v. *Corbett (otherwise Ashley)*, [1970] 2 All E.R. 33, p. 48 (P.D.A.), cited in *ibid*.

(13) (1993), 104 D.L.R. (4th) 214 (Ont. Ct. Gen. Div.).

(14) The majority also cited a 1992 Ontario ruling which, following *North*, declared null a marriage between two women, one of whom planned to undergo a sex change. In *C.(L.)* v. *C.(C.)* (1992), 10 O.R. (3d) 254, p. 256, the judge concluded that "[t]he law as it presently exists does not provide for marriages between members of the same sex." See *ibid.*, pp. 218-219.

Ontario a valid marriage can take place only between a man and a woman and that persons of the same sex do not have the capacity to marry one another."(15) Furthermore, the federal common law did not violate section 15 of the Charter. The question of whether same-sex unions "should receive the same benefits as parties to a marriage, without discrimination because of the nature of their unions, is another question."(16)

The dissenting judge took the position that precedents relied upon by the majority should not be applied, "given what has taken place since the Charter was passed, and given the body of law which has applied s. 15 of the Charter."(17) She disagreed that the federal common law restricts valid marriages to those between different-sex couples, observing that "the common law must grow to meet society's expanding needs,"(18) and that, if such a prohibition did exist, it was unlikely to survive Charter scrutiny.

2. 2001-2005

Over this period, **11** of **12** provincial and territorial courts to have considered the Charter challenges of gay and lesbian couples have invalidated the traditional common-law opposite-sex definition of marriage and replaced it by a redefinition based on equality rights grounds under section 15 of the Charter. Only the British Columbia Supreme Court, in October 2001, dismissed a challenge to the province's refusal to issue marriage licences to same-sex couples. In May 2003, the British Columbia Court of Appeal overturned this ruling.(19)

In July 2002, three judges of the Ontario Superior Court of Justice (Divisional Court) dealing with a similar challenge found unanimously that the existing common-law rule defining marriage in opposite-sex terms represented an unjustified infringement of section 15 of the Charter. The ruling was unprecedented in Canada. In September 2002, the Cour supérieure du Québec became the second Canadian court to allow a same-sex marriage application.(20) It declared the opposite-sex language in section 5 of the 2001 *Federal Law-Civil Law*

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(15) *Ibid.*, p. 219.

(16) *Ibid.*, p. 223.

(17) *Ibid.*, p. 227.

(18) *Ibid.*, p. 234.

(19) *EGALE Canada Inc.* v. *Canada (Attorney General)* (2003), 38 R.F.L. (5th) 32 (B.C.C.A.), reversing (2001), 88 C.R.R. (2d) 322 (B.C.S.C.); supplementary reasons (2003), 42 R.F.L. (5th) 341 (B.C.C.A.).

(20) *Hendricks* c. *Québec (Procureur général)*, [2002] R.J.Q. 2506.

Harmonization Act, No. 1 contrary to section 15 and of no force and effect[21] and extended the declaration to the interpretive provision in the federal *Modernization of Benefits and Obligations Act* and to the *Code civil* provision that also characterized marriage as a heterosexual institution. Both courts suspended their declarations of invalidity for a two-year period.

In June 2003, the Ontario Court of Appeal's unanimous decision upheld the Divisional Court's conclusions.[22] In *per curiam* reasons, the Court asserted, in part:

- "Marriage" in subsection 91(26) has the "constitutional flexibility to meet … changing realities" without a constitutional amendment;

- It is not enough to say marriage "just is" heterosexual. It is the opposite-sex component that requires scrutiny, in order to determine whether its impact on same-sex couples is discriminatory;

- When compared to married couples, same-sex couples are not afforded equal treatment in matters of benefits and obligations owing, for example, to specific cohabitation requirements or the unevenness of benefits under provincial legislation and, of particular broader significance, exclusion from the fundamental institution of marriage and its corresponding benefits, whether economic or non-economic;

- The opposite-sex requirement does not represent minimal impairment of the rights of same-sex couples:

> Allowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. ... Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples.
>
> Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion … ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.

The Court invalidated the existing common-law definition of marriage and reformulated it to refer to the "voluntary union for life of two persons" with immediate effect in

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(21) The section affirmed that "[m]arriage requires the free and enlightened consent of a man and a woman to be the spouse of the other."

(22) *Halpern* v. *Canada (Attorney General)* (2003), 36 R.F.L. (5th) 127 (Ont. C.A.), affirming [2002] O.J. No. 2714 (Q.L.), (Ont. Sup. Ct. Justice (Div. Ct.)).

Ontario. In July 2003, the British Columbia Court of Appeal and, in March 2004, the Cour d'appel du Québec[23] also enabled same-sex couples to marry legally in their respective provinces immediately.

Lower courts in Yukon, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Labrador **and New Brunswick** have since followed suit.**[24]** The federal government has either not opposed or not intervened in the last four cases.

3. Parliamentary Committee Hearings

In 2002, the federal Department of Justice released a paper entitled *Marriage and Legal Recognition of Same-Sex Unions: A Discussion Paper*. The document was intended to enable focused debate by the then House of Commons Standing Committee on Justice and Human Rights, and others, around the question of how federal policy and legislation might address the same-sex marriage issue. Accordingly, the then Minister of Justice asked the Justice Committee to study the question of whether, in the context of Canada's constitutional framework and the traditional definition of marriage, Parliament should take steps to recognize same-sex unions, and if so, how. Following approximately three months of hearings on this issue, the Committee was in the process of preparing its report to the House when, on 10 June 2003, the Ontario Court of Appeal released its ruling giving immediate effect to same-sex marriage in Ontario. The Committee subsequently adopted a motion to support "the recent Ontario Court of Appeal decision which redefines the common-law definition of 'marriage' as 'the voluntary union for life of two persons, to the exclusion of all others,' while fully respecting freedom of religion, as guaranteed under the Charter of Rights." In light of these developments, the Committee report was not completed.

4. Supreme Court of Canada Reference

In June 2003, then Prime Minister Chrétien announced that the federal government would not appeal Ontario and B.C. appellate decisions, and would discontinue the federal appeal in the Quebec case. In July, the government referred draft legislation to the Supreme Court of Canada in a constitutional reference. The draft bill proposed a definition under which "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of

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(23) *Ligue catholique pour les droits de l'homme* c. *Hendricks*, [2004] J.Q. No. 2593 (Q.L.).

(24) In July 2005, the Northwest Territories Supreme Court is also scheduled to consider whether to reformulate the territory's current opposite-sex definition of marriage.

all others." It addressed the issue of religious freedom, affirming that "nothing in this Act affects the freedom of officials of religious groups to refuse to conduct marriage ceremonies that are not in accordance with their religious beliefs."

The government requested that the Court consider whether: (1) the draft bill fell within Parliament's exclusive legislative authority; (2) the bill's extension of the capacity to marry to persons of the same sex was consistent with the Charter; and (3) the Charter's freedom of religion guarantee shielded religious officials from being forced to perform same-sex marriages contrary to their religious beliefs. In January 2004, the Minister of Justice, citing the importance of a full and informed debate, added a fourth question to the Supreme Court reference, asking whether the current opposite-sex requirement for civil marriage was consistent with the Charter. In making this announcement, the Minister expressed the government's continued support for principles of equality and religious freedom as set out in the draft legislation.

The Supreme Court of Canada heard arguments in the Reference on 6 and 7 October 2004, and issued its ruling on 9 December 2004.(25) It found, in part, that:

- The provision in the draft bill authorizing same-sex marriage was within Parliament's exclusive legislative authority over legal capacity for civil marriage under subsection 91(26) of the *Constitution Act, 1867*;(26)

- However, the declaratory clause relating to those who perform marriages, and therefore within the provincial constitutional authority over solemnization of marriage, was *ultra vires* Parliament;

- The provision authorizing same-sex marriage was consistent with the *Canadian Charter of Rights and Freedoms* and, in the circumstances giving rise to the draft bill, flowed from it;

- The religious freedom guarantee in subsection 2(*a*) of the Charter is sufficiently broad to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.

The Court declined to answer the fourth question concerning whether the opposite-sex requirement for marriage was consistent with the Charter. It found, in part, that the

(25) *Reference re Same-Sex Marriage*, 2004 SCC 79, 9 December 2004.

(26) The Court also found that "[t]he provinces are vested with competence in respect of non-marital same-sex relationships, just as they are vested with competence in respect of non-marital opposite-sex relationships (via the power in respect of property and civil rights under s. 92(13)). ... Civil unions are a relationship short of marriage and are, therefore, provincially regulated"; *Ibid.*, par. 33.

federal government intended to proceed with legislation irrespective of the Court's opinion, and that married same-sex couples relying on the finality of judicial decisions in jurisdictions where such marriages were now legal had acquired rights that deserved protection.

DESCRIPTION AND ANALYSIS

Bill C-38 consists of a lengthy preamble and 15 clauses, 11 of which represent consequential amendments to 8 federal statutes. The following paragraphs focus on the bill's primary subject matter. **Amendments adopted by the Legislative Committee are indicated in bold.**

A. Preamble

Bill C-38's substantive provisions are preceded by **an 11**-paragraph Preamble that will enter the annual statute book as an integral part of the legislation. In recent years, statutory preambles seem to be employed more frequently as a means of establishing a context and rationale for legislation and of underscoring parliamentary intent in enacting it. Preambles are considered interpretive rather than substantive, and may be relied upon by courts seeking to resolve ambiguity in the statute they introduce.

The preamble to Bill C-38 includes statements of principle and fact,

- asserting Parliament's commitment to uphold the Constitution and equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* (Charter) (par. 1);
- noting the scope of judicial rulings across the country to have legalized same-sex marriage on Charter equality grounds, and the reliance of same-sex married couples on those rulings (par. 2-3);
- asserting that only equal access to civil marriage, as distinct from civil union, respects same-sex couples' Charter equality rights (par. 4);
- noting that Parliament's constitutional jurisdiction does not extend to creating an institution other than marriage for same-sex couples (par. 5);
- affirming the Charter's section 2 freedom of conscience and religion guarantee (par. 6);

- asserting that the bill is without effect on that guarantee, with particular reference to the freedom of members of religious groups to hold their beliefs and that of officials to refuse to perform marriages that conflict with their beliefs (par. 7);

- **stating that the public expression of differing views on marriage is compatible with the public interest (new par. 8);**

- noting that Parliament's commitment to equality precludes use of the Charter's section 33 notwithstanding clause to deny same-sex couples access to civil marriage (par. **9**);

- affirming Parliament's responsibility to support the fundamental institution of marriage (par. **10**); and

- asserting that in light of Charter values, access to civil marriage for same-sex couples should be legislated (par. **11**).

B. Civil Marriage (Clause 2)

Bill C-38's key provision defines civil marriage as "the lawful union of two persons to the exclusion of all others." It is worth stressing that Bill C-38 is concerned exclusively with civil marriage, and does not affect gender-neutral survivor or common-law partner entitlements in federal legislation.

The terms of clause 2 are identical to those of the draft provision considered by the Supreme Court of Canada (the Court) in the December 2004 Reference decision, and reflect the substance of reformulations of the traditional common-law definition effected in provincial court rulings outlined above. The following paragraphs set out the Court's views on this provision.

1. Parliament's Jurisdiction Over Marriage

In the Reference case, the Court noted, first, historic rulings recognizing that "s. 91(26) confers on Parliament legislative competence in respect of the capacity to marry, whereas s. 92(12) confers authority on the provinces in respect of the performance of marriage once that capacity has been recognized" (par. 18). The Court determined that the clause in question, "in pith and substance, ... pertains to legal capacity for civil marriage. *Prima facie*, therefore, it falls within a subject matter allocated exclusively to Parliament (s. 91(26))" (par. 19). It further noted that "[l]egislative competence over same-sex marriage must be vested

in either Parliament or the legislatures. Neither s. 92(12) nor s. 92(13) can accommodate this matter. Given that a legislative void is precluded, s. 91(26) most aptly subsumes it" (par. 34).

2. Charter Compliance

The Court also concluded that the draft provision, the predecessor to clause 2, complies with the Charter. It observed that the provision represents a direct response to the findings of provincial courts, and "embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the [draft legislation] ... , points unequivocally to a purpose which, far from violating the *Charter*, flows from it" (par. 43).

3. Effect of Legislative Recognition of Same-sex Marriage

The Court considered arguments that legislating same-sex marriage discriminates against religious groups opposed to it and/or would result in a collision of equality rights with freedom of religion guarantees. It found, on the first point, that the draft legislation reflected in clause 2 "withholds no benefits, nor does it impose burdens on a differential basis. It therefore fails to meet the threshold requirements of … s. 15(1) analysis" (par. 45). In the Court's view, "[t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another" (par. 46).

On the second point, the Court declined to deal with an alleged collision of rights in the abstract, in the absence of a factual context. It did not rule out the possibility that such a collision could occur should legislation recognizing same-sex marriage become law, adding that "[c]onflicts of rights do not imply conflict with the *Charter*; rather, the resolution of such conflicts generally occurs within the ambit of the *Charter* itself" (par. 52). The Court noted that:

> The protection of freedom of religion afforded by s. 2(*a*) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist. (par. 53)

In the result, the Court concluded that the "potential for collision of rights raised by [the clause 2 predecessor provision] has not been shown on this reference to violate the *Charter*. It has not

been shown that impermissible conflicts – conflicts incapable of resolution under s. 2(*a*) – will arise" (par. 54).

C. Religious Marriage (Clause 3)

Clause 3 recognizes that officials of religious denominations may refuse to perform marriages that are at odds with their religious beliefs. It is worth noting that the Court's reference decision considered a differently worded provision of the draft legislation under which "[n]othing in this Act affects" religious officials' freedom not to officiate at same-sex marriages. The Court found that provision *ultra vires* Parliament's constitutional authority, in that it related to those who may perform marriages, a matter over which provincial legislatures have exclusive competence under subsection 92(12) of the Constitution.(27) A revised version of that provision's terms is set out in the preamble's seventh paragraph where, as noted, it serves to provide context and rationale for the legislation.

Ultimately, the Court observed, "it would be for the Provinces, in the exercise of their power over the solemnization of marriage, to legislate in a way that protects the rights of religious officials while providing for solemnization of same-sex marriage" (par. 55). In this regard, the Court added, "[i]t should also be noted that human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*" (par. 55). In the Court's view, "it ... 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*" (par. 58).

There may be questions as to whether the *recognition* language set out at clause 3 is sufficiently distinct from that of the more *declaratory* language of the former draft provision to pass constitutional muster. The matter may not arise, in the absence of a legal challenge to the provision.

D. Freedom of Conscience and Religion (new clause 3.1)

The Legislative Committee heard from a number of witnesses opposing Bill C-38 that a primary concern from their perspective related to the bill's inadequate

(27) The Court rejected the suggestion that the draft provision simply declared Parliament's intent that the bill not be interpreted as interfering with provincial jurisdiction, finding that "only the provinces may legislate exemptions to existing solemnization requirements, as any such exemption necessarily relates to the solemnization of marriage under s. 92(12)" (par. 37).

protection of religious freedom, and of expressive freedom based on religious belief, for both religious institutions and officials as well as individuals. The absence of parliamentary authority to remedy this perceived failing owing to the constitutional division of powers was seen by these witnesses as particularly problematic. Acknowledging that the solemnization of marriage and other practical contexts in which the guarantee of freedom of religion is engaged largely fall under provincial jurisdiction, some were of the view that the bill could and should enhance the level of protection available in respect of areas of federal jurisdiction. To address this perceived deficiency, the government proposed, and the Committee adopted, a new provision under which,

> **For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.**

E. Certainty Clause (Clause 4)

This self-explanatory provision stipulates, for greater certainty, that a marriage is not voidable *on the sole basis* that the spouses are of the same sex. It is understood that same-sex marriages will be voidable on the same grounds as apply to heterosexual marriages.

F. Consequential Amendments (Clauses 5-15)

Clauses 8, 9 and 15 set out the most obviously consequential amendments to legislation directly affected by Bill C-38. Clause 8 replaces the opposite-sex definition of "spouse" in the *Divorce Act* with a gender-neutral reference to "two persons" who are married. Clause 9 effects a similar replacement to opposite-sex language in section 5 of the *Federal Law and Civil Law of the Province of Quebec Act* concerning consent to marry. Clause 15 repeals the interpretive provision in the *Modernization of Benefits and Obligations Act* which refers to the opposite-sex common-law definition of marriage.

Bill C-38 makes identical amendments to the definition of "personal body corporate" in both the *Canada Business Corporations Act* and the *Canada Cooperatives Act* (clauses 5 and 6). The amendments make provision for control by individuals connected by a "legal parent-child relationship," as opposed to the existing requirement for connection by blood relationship or adoption. Connection by way of "common-law partnership" is also added, together with its gender-neutral definition, as effected in other federal statutes by the 2000 *Modernization of Benefits and Obligations Act.*

Clause 7 repeals a section of the *Civilian War-related Benefits Act* that refers to pension payments to a "husband" or "wife" in a pensioner couple. The provision in question applies to World War II volunteer air raid precaution workers.

Bill C-38 amends provisions of the *Income Tax Act* to replace existing references to "natural parent" with "legal parent." It also removes the reference to an individual "of the opposite sex" from a provision related to the extended meaning of "spouse" and "former spouse" (clauses 10-12). **By unanimous consent, a further amendment to the tax law was adopted at report stage in the House of Commons. This Bill C-38 amendment to the legislation's registered charities provisions is intended to respond to critics' concerns that the charitable status of religious institutions or organizations opposed to same-sex marriage on religious grounds was at risk of revocation owing to that opposition. Under new clause 11.1, amending section 149.1 of the *Income Tax Act,***

> **(6.2.1) For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms.**

Finally, the bill makes technical amendments to the drafting of subsection 2(2) and 3(2) of the *Marriage (Prohibited Degrees) Act* to prohibit marriage between closely related persons of the same sex (clauses 13 and 14).

COMMENTARY

As anticipated, reaction to Bill C-38 since its introduction has been mixed, both within and outside Parliament.

Groups advocating for the traditional family have described the bill as an experiment that threatens the family unit. Many religious organizations remain highly critical of the bill's purpose and effects. These opponents have argued primarily that it offers inadequate protection of clergy and others, such as civil marriage commissioners, who do not wish to recognize or officiate at same-sex marriages. They have pointed to provincial jurisdiction over solemnization of marriage, as confirmed in the Supreme Court of Canada Reference decision, as evidence that federal guarantees in this area lack substance. Advocacy groups for gay and lesbian rights and human rights organizations, on the other hand, have welcomed the bill as landmark equality rights legislation that will end exclusion of and discrimination against gay and lesbian conjugal couples. Spokespersons of some religious organizations have also expressed support for the legislation.

At the political level, the federal Conservative Party of Canada initially expressed its intention to amend the bill to restore the traditional common-law definition of marriage and establish a parallel regime for gay and lesbian couples.(28) In their view, such a scheme would withstand Charter scrutiny,(29) despite recent broad legal opinion to the contrary.(30) Provincial response to Bill C-38 emanated largely from Alberta, where the Premier, although acknowledging legal obstacles, reportedly expressed the government's political determination to defend the traditional definition of marriage, and its intention to weigh options toward that end.

Op-ed comment has also offered a range of views. On the one hand, the criticisms of some religious groups and politicians were said to be deliberately misleading in light of the Supreme Court of Canada's clear message that the Charter's guarantee of freedom of religion prevails. The position of the Conservative opposition was criticized as less than

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(28) "Statement by Stephen Harper on the introduction of Liberal same-sex marriage legislation," 1 February 2005, accessible on-line *via* the Web site of the Conservative Party of Canada, at http://www.conservative.ca/english/index.asp.

(29) Cristin Schmitz, *et al.*, "Same-Sex Bill Fuels Fierce Debate," *Calgary Herald*, 2 February 2005, p. A1.

(30) "Open Letter to The Hon. Stephen Harper from Law Professors Regarding Same-Sex Marriage," accessible on-line *via* the University of Toronto Faculty of Law Web site, at http://www.law.utoronto.ca/samesexletter.html.

forthcoming, among other things, about the use of the notwithstanding clause in legislation to restore the opposite-sex definition of marriage, and the constitutionality of its civil union proposal for gays and lesbians.

On the other hand, the government was said to be less than truthful because, despite its present stance on religious freedom, a future Parliament or court could remove a religious group's right to refuse to perform same-sex marriage. There was a suggestion that Bill C-38 will eventually pit the rights of religious freedom and freedom of speech against minority rights. According to another view, enactment of the legislation will not end the gay marriage debate in Alberta. The failure of the Supreme Court of Canada's Reference ruling to determine whether the opposite-sex definition of marriage is consistent with the Charter was said to represent a missed opportunity to mitigate legal uncertainty and introduce order into the debate.

Finally, more recent editorial opinion seems to take the position that the issue of same-sex marriage and Bill C-38 have been sufficiently debated: the legislation should be put to a final vote to allow Parliament to address other matters.