Court File No.: 29866

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF SECTION 53 OF

THE SUPREME COURT ACT, R.S.C. 1985, C. S-26

IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN ASPECTS OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES, AS SET OUT IN ORDER IN COUNCIL P.C. 2003-1055, DATED THE 16TH DAY OF JULY, 2003

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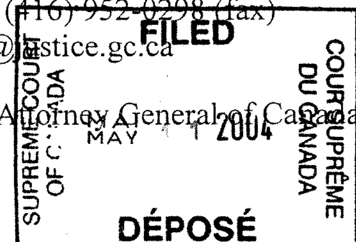

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Introduction

1. Absent clear direction from this Court, a decision to extend marriage to same-sex couples will threaten freedom of religion. Nothing is more fundamental to religious organizations than the right to define their religious ceremonies and determine who may participate therein. In many faiths marriage is a holy rite. In The Church of Jesus Christ of Latter-day Saints (the "Church of Jesus Christ" or "Church"), for example, marriage is a religious ceremony with eternal consequences. Under Church doctrine, marriages performed in the Church's Temples bind together a man and a woman for "time and for all eternity." The ceremony is deemed so sacred that it is available only to a man and a woman who live according to the highest Church standards of faithfulness, including strict adherence to traditional norms of sexual morality. Those allowed to witness a Temple marriage must likewise adhere to the same high standards. And the specifics of the ceremony are too sacred even to discuss outside the Temple. Though not as sacred as Temple Marriages, marriages performed by Church clergy outside Temples (typically in Church meetinghouses) are also deemed sacred and must be conducted pursuant to the Church's ecclesiastical guidelines, which forbid clergy to officiate at same-sex marriages.

2. Any attempt by government or private litigants to compel or pressure the Church, or any of its clergy, to perform or facilitate same-sex marriages would constitute the most profound violation of religious freedom. The same is true of many other religious organizations.

3. The Church takes no position in this factum on whether the *Charter* guarantees a right to same-sex marriage. Rather, this factum addresses the third question posed in the Order in Council. The Church argues herein that the *Charter*'s religious freedom protections should be construed to ensure that religious organizations themselves – and not just individual members of the clergy – have the right to authoritatively define their own marriage ceremonies and to refuse to perform, promote, or facilitate any marriage deemed contrary to their religious beliefs or traditions. The state should not be permitted to coerce or pressure religious organizations into performing or recognizing as valid for religious purposes marriages they deem inconsistent with their religious beliefs. Unless this Court sets forth such explicit protections under the *Charter*, it seems certain that religious organizations will eventually be the object of legal or regulatory actions seeking to compel or pressure them to violate their religious beliefs in regard to same-sex marriage.

Interest of the Church

4. The Church of Jesus Christ has a long and distinguished history in Canada. Only a few months after the Church was organized in upstate New York in April 1830, Church missionaries travelled north to preach in Canada. Today, there are 160,743 members living in Canada, including: 41,474 in Ontario; 8,798 in Quebec; 27,875 in British Columbia; 65,982 in Alberta; and 4,735 in Saskatchewan. Canadian Church members gather in over 469 Church congregations, each with its own local ecclesiastical leadership.[1]

5. The Church has 335 religious "meetinghouses" and six sacred Temples in locations across Canada. Religious officials of the Church annually perform about 600 Temple marriages and about 475 other Church marriages across Canada. These religious officials are registered to solemnize these marriages for civil law purposes in all the provinces except Quebec, where a separate civil marriage regime exists. In the Church's understanding, traditional marriage between a man and a woman lies at the core of the faith. Doctrinally, the Church supports the common-law definition of marriage.[2]

6. The Church has had extensive experience in numerous court cases in the United States of America involving issues of individual and institutional religious liberty, as well as cases involving same-sex marriage.[3]

The Position of the Church

7. This factum addresses the third question posed in the Order in Council.

8. As currently interpreted, the freedom of religion under s. 2(a) of the *Charter* may not be sufficiently strong to fully protect the right of religious officials and religious organizations to refuse to perform, promote, or facilitate same-sex marriages. The position of the Church is that, at a bare minimum, s. 2(a) of the *Charter* must be interpreted to provide clear protection to:

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[1] Affidavit of Ross H. McEachran dated November 24, 2003, Motion Record Tab 2, para. 5_ ("McEachran Affidavit").

[2] McEachran Affidavit, *Ibid.*, at para. 5, 6.

[3] McEachran Affidavit, *Ibid.*, at para. 48-52.

(a) Religious officials of the Church to refuse to solemnize any marriage that is contrary to Church doctrine as interpreted by the Church's presiding officials; and

(b) The right of the Church to deny access to Temples, meetinghouses and their associated facilities and grounds for the solemnization of same-sex marriages, for related celebrations or events, or for other activities the Church deems inconsistent with its doctrine or disruptive of its worship, ceremonies, or religious instruction.

PART I - THE FACTS

Background concerning the Church's governance and structure

9. The Church of Jesus Christ is organized hierarchically. Under Church doctrine, the President of the Church is sustained by Church members as a prophet, seer, and revelator. He leads and presides over the entire Church.[4]

10. The "First Presidency" is the Church's highest ecclesiastical council and is composed of the President of the Church and his two counsellors. The First Presidency establishes ecclesiastical policies and procedures for the whole Church; all ecclesiastical bodies and officers are subject to its jurisdiction. The First Presidency is assisted in directing the Church by the "Quorum of the Twelve Apostles" (the second highest ecclesiastical body) and other General Authorities.[5]

11. Local congregations are called "wards", each of which is presided over by a local bishop. Wards meet in local Church meetinghouses. Five to twelve wards constitute an ecclesiastical jurisdiction called a "stake", each of which is presided over by a local "stake president". Bishops and stake presidents must act in conformity with general Church policies and are subject to the authority and direction of the First Presidency.[6]

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[4] McEachran Affidavit, *Ibid.*, at para. 7.

[5] McEachran Affidavit, *Ibid.*, at para. 8-10.

[6] McEachran Affidavit, *Ibid.*, at para. 7-16.

Summary of relevant church doctrines and ecclesiastical policies

12. Under Church doctrine, God is a loving Heavenly Father who desires that every person overcome the harmful effects of sin and dwell with Him eternally. The Church teaches that through the atoning sacrifice of Jesus Christ all may be cleansed of sin and saved, but only on conditions of obedience to the laws and "ordinances" – certain essential rites and ceremonies – of the Gospel. The essential ordinances include baptism by immersion, the receipt of the gift of the Holy Ghost by the laying on of hands, and the higher ordinances of the Temple, including Temple Marriage. These ordinances can only be performed and administered in the manner prescribed by Church doctrine and by those acting with the requisite priesthood authority.[7]

13. Certain essential ordinances are so sacred that they can only be performed in Temples by those with special priesthood authority to officiate therein. Under Church doctrine, Temples are the most sacred places on the earth; each is regarded as the House of the Lord. The divine blessings that flow from Temple ordinances and worship are the highest spiritual privileges of Church membership.[8]

14. Only the most faithful members of the Church may enter Church Temples, and then only with a current "temple recommend". A temple recommend is a written certification of a person's good standing in the Church and of his or her personal worthiness as defined by compliance with the Church's standards of morality, conduct, and faithfulness.[9]

15. Although not as sacred as Temples, Church meetinghouses and their associated grounds are also dedicated to God as places of worship, religious instruction, and other Church-related activities. Each contains a chapel where members meet on Sunday to pray, partake of the sacrament in remembrance of Christ, sing hymns of praise to God, and hear the spoken word. Only activities that are in harmony with the doctrines and standards of the Church may occur in Church meetinghouses or on their grounds. Under Church policy, use of Church facilities for

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7 McEachran Affidavit, *Ibid.*, at para. 18-25.

8 McEachran Affidavit, *Ibid.*, at para. 26.

9 McEachran Affidavit, *Ibid.*, at para. 27-28.

commercial or political purposes is generally prohibited. No Church building or property may be used to promote or host activities that are contrary to the Church's moral teachings.[10]

16. The First Presidency and Quorum of the Twelve Apostles have authoritatively proclaimed that "marriage between a man and a woman is ordained of God" and "is essential to His eternal plan." This definition of marriage, requiring the union of members of the opposite sex, results from the centrality of the family "to the Creator's plan for the eternal destiny of His children."[11]

17. Under Church doctrine, the crowning blessings of the Temple pertain to marriage and the family. In the Temple, family relationships can be perpetuated beyond the grave into eternity. The Church teaches that, through the "sealing power" held by the President of the Church and others acting under his direction, a husband and a wife can be "sealed" (bound) together forever. Such Temple marriages (or "sealings") for "time and for all eternity" can only be performed in a Temple by one holding the sealing power. Without this sealing and continued faithfulness by the couple, a marriage cannot endure eternally and is of no effect after death.[12]

18. Only the most faithful members of the Church can be married in the Temple. The bride, groom, and all those invited to witness their Temple marriage must have current temple recommends from their ecclesiastical leaders. A Temple marriage is conducted in reverence and simplicity, and is so sacred to Church members that the details of the ceremony are not spoken of outside the Temple. Generally, the couple and a small number of guests will quietly gather in a temple sealing room. After brief words of welcome and counsel about the eternal importance of marriage and family, the officiator holding the sealing power seals the bride and groom together for time and eternity on condition of their faithfulness. In the course of the ceremony, the bride and groom make sacred promises to each other and to God and are promised special blessings in return.[13]

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[10] McEachran Affidavit, *Ibid.*, at para. 39, 46-47.

[11] McEachran Affidavit, *Ibid.*, at para. 29.

[12] McEachran Affidavit, *Ibid.*, at para. 30-32.

[13] McEachran Affidavit, *Ibid.*, at para. 33-37.

19. Under Church doctrine, all marriages would ideally be performed in the Temple. However, when personal or other circumstances do not permit a Temple marriage, bishops and stake presidents are authorized to solemnize "civil" Church marriages. Such marriages are "civil" in the sense that they do not purport to endure for eternity and are not performed in the Temple by virtue of the sacred sealing power. Nevertheless, they are still considered sacred and religious, are performed by the power and authority of the priesthood, and are recognized by the law of the land. Most civil Church marriages are performed in Church meetinghouses. The ceremony involves an exchange of marital vows; a pronouncement that the couple are "husband and wife, legally and lawfully wedded for the period of your mortal lives"; and an invocation of God's blessing upon their union and posterity.[14]

20. The Church's teachings with respect to homosexuality and same-sex marriage must be understood in the broader context of its teachings concerning marriage and sexuality. Under Church doctrine, sexual relations are proper only between a man and a woman who have been lawfully married. All other sexual relations, whether heterosexual or homosexual, are deemed contrary to God's will, and those who engage in them cannot obtain a temple recommend. The Church accordingly opposes the redefinition of marriage to include same-sex couples.[15]

21. Nevertheless, the First Presidency has strongly affirmed the importance of treating homosexuals with tolerance and love: "[O]ur opposition to attempts to legalize same-gender marriage should never be interpreted as justification for intolerance or abuse of those who profess homosexual tendencies . . . . We love them as sons and daughters of God" and hope "that tolerance and brotherly love can replace fear and hatred among all people, regardless of sexual orientation or other differences."[16]

The legal authority of Church officials to solemnize marriages in Canada

22. Religious officials of the Church are registered to solemnize marriages under provincial legislation across Canada. The format is typical and is illustrated by s. 20 of the *Marriage Act*

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[14] McEachran Affidavit, *Ibid.*, at para. 38-42.

[15] McEachran Affidavit, *Ibid.*, at para. 43.

[16] McEachran Affidavit, *Ibid.*, at para. 45.

(Ontario)[17]. The Minister of Consumer and Business Services may, upon application, register any person as being authorized to solemnize marriage if it appears to the Minister that the person has been ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is, by the rules of that religious body, deemed ordained or appointed.[18]

23. Religious officials of the Church in Ontario and elsewhere[19] are registered under the *Marriage Act* and legislation of other provinces as persons authorized to solemnize marriage.[20] Certain statutory duties are imposed on persons who are registered to solemnize marriage. Examples include the duty to enter in the church register marriage particulars authenticated by the signatures of the person solemnizing the marriage, the parties and witnesses; the duty to provide a marriage certificate or record of solemnization if such are requested by the parties at the time of the marriage, and; the duty to forward certain forms, prescribed by regulation, to the Registrar General within two days following the marriage.

Interest of the Church in respect of the third question

24. The Church is concerned that advocates of same-sex marriage who are members or former members of the Church could attempt to use the proposed change in the definition of marriage to force the Church or its ecclesiastical officers (a) to perform or recognize as valid for religious purposes such marriages, (b) to modify or suppress the Church's public religious teachings regarding marriage and sexuality, (c) to permit activities or events related to same-sex marriage in its religious buildings or on its religious properties, or (d) to allow same-sex couples to participate in religious meetings, ceremonies, or activities where the Church would deem it disruptive.

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[17] R.S.O. 1990, C. M.3 ("*Ontario Marriage Act*").

[18] *Ibid.*, at s. 20(3). See also British Columbia's *Marriage Act*, s. 2; Alberta's *Marriage Act*, s. 4; Saskatchewan's *Marriage Act*, s. 5, Manitoba's *Marriage Act*, s. 3; New Brunswick's *Marriage Act*, s. 4; Nova Scotia's *Solemnization of Marriage Act*, s. 5; PEI's *Marriage Act*, s. 4; Newfoundland's *Solemnization of Marriage Act*, s. 4; Yukon's *Marriage Act*, s. 2; Northwest Territories' *Marriage Acts*, s. 2.

[19] McEachran Affidavit, *Ibid.*, at paras. 1 and 6 .

[20] See also British Columbia's *Marriage Act*, s. 7; Saskatchewan's *Marriage Act*, s. 3, Manitoba's *Marriage Act*, s. 2; Ontario's *Marriage Act*, s. 20(1); New Brunswick's *Marriage Act*, s. 2(1); Yukon's *Marriage Act*, s. 7; Northwest Territories' *Marriage Act*, s. 7.

PART II - THE ISSUES

25. The following argument addresses an issue under the third reference question: What must be done by this Honourable Court to ensure that s. 2(a) of the *Charter* adequately protects:

(a) The right of religious officials and organizations to refuse to solemnize or recognize as valid for religious purposes any marriage that is contrary to their religious doctrines as interpreted by the religious organization's presiding officials;

(b) The right of religious organizations to deny access to places of worship and their associated facilities and grounds for the solemnization of same-sex marriages, for related celebrations or events, or for other activities the Church deems inconsistent with its doctrine or disruptive of its worship, ceremonies, or religious instruction; and

(c) The right of religious organizations to determine whether and to what extent same-sex couples may participate in their meetings, ceremonies, and activities.

PART III - ARGUMENT

26. The common-law definition of marriage as the "voluntary union for life of one man and one woman, to the exclusion of all others" has thus far shielded religious groups from the legal obligation to solemnize or recognize same-sex "marriages". The proposed definitional change allowing same-sex couples to marry will remove that shield from religious groups. As currently interpreted, s. 2(a) of the *Charter* is not a satisfactory replacement.

27. A number of fault lines in Canadian jurisprudence will make it difficult for religious organizations that oppose same-sex marriage to receive full protections for religious freedom based on s. 2(a) of the *Charter*. Despite the apparently broad definition of religious freedom in the *Charter*, these lines of Canadian judicial reasoning would appear to lend support to a same-sex couple seeking to compel a religious official or organization to solemnize or recognize as valid for religious purposes a same-sex marriage in violation of the doctrines of the religion, or to require the use of the organization's property for events related to such a marriage.

Specifically, we are concerned (1) that religious officials may be compelled by principles of administrative law to solemnize or recognize marriages that are contrary to the teachings of their respective religions; (2) that the conduct v. belief distinction may be used to reject religious freedom claims by religious officials in respect of the solemnization or recognition of same-sex marriages; (3) that provincial human rights legislation may be used to compel access to the services and properties of religious organizations and to force religious officials to solemnize or recognize same-sex marriages or to allow same-sex couples to participate in religious meetings, ceremonies, or activities; and (4) that courts will not defer to the pronouncements of religious organizations on the nature of their own permitted beliefs and practices.

28. Since it is not clear that, as currently interpreted, s. 2(a) of the *Charter* provides the protection assumed by the third question, nor the protection that religious groups need if same-sex marriages are legalized, this Honourable Court should take the opportunity in this reference to clarify the law so that s. 2(a) of the *Charter* is understood to provide the minimal protections noted in paragraph 25.

29. In setting forth its arguments for stronger religious freedom protections under s. 2(a), the Church has drawn from American case law interpreting the First Amendment to the United States Constitution. In so doing, the Church recognizes that this Court has expressed concern about the use of American case law in interpreting s. 2(a), given the different language of the First Amendment and the different historical background.[21] However, this Court has also recognized: "What unites enunciated freedoms in the American First Amendment, s. 2(a) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation".[22] The Court in *Big M.* did not hesitate to make active use of the American cases.

30. Naturally, there are differences between American and Canadian constitutional law, but there are also important similarities. Although Canadian courts have not been as reticent as U.S. courts about intervening in ecclesiastical disputes, nevertheless "it is well settled that, unless

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[21] *R. v. Big M.Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 339-340.

[22] *Big M.*, supra, page 346.

some property or civil right is affected thereby, the civil Courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order".[23] And despite a somewhat greater willingness by Canadian courts to review and interpret doctrinal matters when resolving disputes involving religious groups[24], both court systems respect the basic principle that religious organizations must have the freedom to establish their own doctrines, ceremonies, and polities.

31. The proposed marriage legislation will likely raise novel religious freedom issues that the Canadian courts have not previously been required to address. Indeed, in the same-sex marriage context, issues of religious doctrine and religious ceremony, the role of clergy, and the freedom to decide the use of religious property press closer to the core of religious freedom than has been typical of Canadian cases. The time is therefore ripe to consider whether an express and sharply enhanced rule of deference to religious organizations in matters of doctrine, ceremony, polity, membership and participation, and ecclesiastical governance should be recognized by this Court as a necessary corollary to freedom of religion under s. 2(a) of the *Charter*.

32. It is respectfully submitted that the American experience may offer some assistance to this Honourable Court in considering the appropriate standard of review when addressing government or civil court intrusions into the ecclesiastical affairs of religious organizations.[25]

There is a need for a zone of ecclesiastical autonomy

33. If the shelter provided by the common law definition of marriage is removed, a form of protected "ecclesiastical sphere" or zone of ecclesiastical autonomy should be recognized in order to adequately protect freedom of religion under the proposed new marriage regime. American jurisprudence is useful in explaining these concepts.

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[23] *Ukrainian Greek Orthodox Church of Canada v. Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress,* [1940], S.C.R. 586 at page 591, cited with approval in *Lakeside Colony of Hutterian Brethren v. Hofer*, (1992) 97 D.L.R. (4th) 17 at page 20 under the title "The Standard of Review". The use of the term "civil right" was meant by the Supreme Court to denote a contract or tort claim.

[24] *Lakeside Colony of Hutterian Brethren,* supra, and see M.H. Oglivie, Religious Institutions and the Law in Canada (2d) – 2003 (page 217-221 and pp. 301-315). Canadian courts have sought to ensure that ecclesiastical law in the form of canon law, articles of incorporation, by-laws, manuals or similar constating documents have been properly followed and that the basic rules of natural justice have been observed.

[25] See *supra* note 23.

34. Because religious rights cases have typically involved claims by individuals, Canadian courts have tended to adopt an individual-rights approach to questions of religious freedom under the *Charter*. Nevertheless, religious freedom has a vital institutional dimension as well. This Court has not had occasion to consider the extent to which the *Charter* affords protection to religious organizations as institutions, nor the extent to which decisions made by a religious organization on religious grounds are reviewable by civil courts. For many decades, however, the courts of the United States have had to address these issues in many different contexts.

35. A significant body of First Amendment case law affirms and protects the institutional autonomy of religious organizations against certain types of state intrusion. The general rule is that the state may not interfere in matters that are fundamentally ecclesiastical in nature. The development of this law, summarized below, is instructive because it underscores that religious liberty requires that religious organizations possess a zone of autonomy within which to govern their religious affairs. Absent such autonomy, meaningful religious liberty cannot exist.

The autonomy of religious organizations to govern their spiritual and ecclesiastical affairs is essential to religious liberty and has long been upheld by the United States Supreme Court and lower American courts

36. The First Amendment to the United States Constitution states that there shall be "no law respecting an establishment of religion or prohibiting the free exercise thereof."[26] Three interrelated branches of religious liberty jurisprudence have grown from this constitutional trunk: Establishment Clause jurisprudence, Free Exercise Clause jurisprudence, and Church Autonomy jurisprudence.[27]

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[26] U.S. Const. amend. I.

[27] Some courts and commentators have recognized the Church Autonomy principle as a Free Exercise value. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 107 (1952). Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labour Relations and the Right to Church Autonomy," 81 Colum. L. Rev. 1373 (1981); others as a non-establishment value, *Meek v. Pittenger*, 421 U.S. 349 (1975); and others as a value derived from both the Free Exercise and Establishment Clauses, *Presbyterian Church of the U.S. v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

37. With respect to Church Autonomy jurisprudence, the First Amendment recognizes two spheres of competence or jurisdiction – one belonging to churches and the other to government.[28] The religion clauses of the First Amendment preserve these two spheres by safeguarding the autonomy of religious organizations from government entanglement or interference in matters that are inherently religious, and by protecting the state from control of its important functions by a religious establishment.[29]

38. As the United States Court of Appeals for the District of Columbia Circuit has stated, a "long line of Supreme Court cases [has] affirmed the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[30] In short, "[c]ourts [in the United States] have held that churches have autonomy in making decisions regarding their own internal affairs. This church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."[31]

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[28] U.S. jurisprudence typically uses the term "church" in its generic sense to refer to any religious organization, whether or not Christian. In this part of the factum the American usage of the term "church" is employed.

[29] *See Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (religion clauses of First Amendment designed "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other") (In *Lynch*, the Supreme Court held that notwithstanding the religious significance of a nativity scene in a city-sponsored Christmas display, the city did not violate the principle of separation of church.); *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948) ("both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere") (In *McCollum*, the Supreme Court held that the First Amendment precludes the state from allowing religious teachers, employed by private religious groups, to engage in religious teaching during official classroom time in its secular public school system.).

[30] *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 462 (D.C.Cir. 1996) (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)) (In *EEOC*, the Court of Appeals (D.C. Circuit) held that church autonomy principles barred a sex discrimination claim by a Catholic nun against a Catholic university because her position was the functional equivalent of a minister. "The Supreme Court has recognized that government action may burden the free exercise of religion, in violation of the First Amendment, . . . by encroaching on the ability of a church to manage its internal affairs."); *see Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 672 (1970) (The Supreme Court has "chart[ed] a course that preserved the autonomy and freedom of religious bodies".) (In *Walz*, the Supreme Court held that the First Amendment permits state property tax exemptions for property owned by religious organization and used exclusively for religious purposes; no improper government subsidy of religion.).

[31] *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002) (citing *Kedroff, supra*) (*Bryce* involved a suit by a former youth minister who was dismissed for sexual conduct inconsistent with church law. The ex-minister and her lesbian partner sued for violation of civil rights and sexual harassment. The Court of Appeals (10th Circuit) held that the claims were barred by the First Amendment church autonomy doctrine because they pertained to a church's internal ecclesiastical affairs.).

Genesis of the church autonomy doctrine – Federal common law

39. Under English common law in the 19th Century, civil courts were empowered "to inquire and decide... what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard."[32] In the seminal case of *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the United States Supreme Court rejected that rule – an outgrowth of the British government's official relationship with the established church – as inconsistent with religious liberty and the separation of church and state. The Court held that in hierarchical churches property disputes turning on religious questions should be decided by a rule of judicial deference:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the [civil] tribunals must accept such decisions as final and as binding on them, in their application to the case before them.[33]

40. More broadly, the Court established a principle of judicial non-intervention in ecclesiastical matters, reasoning:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to seek any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association is unquestioned . . . . It is of the essence of these religious unions, and of their right to establish tribunals

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32 *Watson v. Jones,*, 80 U.S. (13 Wall.) 679 (1871) (*Watson* involved an intra-church property dispute, rooted in a doctrinal disagreement, between competing factions of a Presbyterian Church. The precise issue was whether the governing body of the church had the power to prescribe qualifications for local church offices and, by extension, determine which faction of a local church was rightfully entitled to the disputed church property. In holding that the governing body of the church had such power, the court enunciated a broad doctrine of judicial deference to the internal decision-making body of a church.); *see* William W. Bassett, *Religious Organizations and the Law* § 7:23 (2003) (prominent religion law treatise by Professor Bassett of the University of San Francisco Law School, discussing rule of deference and *Watson*).

33 *Ibid.* at 727.

> for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance . . .[34]

41. *Watson* recognized that the state must respect church autonomy in a political regime committed to the free exercise of religion. It also acknowledged the limits of judicial competence in religious matters:

> It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so.[35]

42. The rule of judicial deference first elaborated in *Watson* has been applied in hundreds of subsequent cases; *Watson* itself has been cited approvingly almost 1,000 times by federal and state courts throughout the United States. The facts and circumstances of these cases differ, but the central proposition for which *Watson* now stands is that government may not interfere with the inherently religious affairs of churches; disputes regarding such matters must be resolved by the appropriate religious authority, not the civil courts.

The United States Supreme Court recognizes church autonomy as a First Amendment doctrine barring judicial interference with ecclesiastical matters

43. Following Supreme Court decisions holding that the First Amendment applied not just to the federal government but also to the states, the Church Autonomy Doctrine was given full constitutional stature under the First Amendment. In 1952, the Supreme Court in *Kedroff v. St. Nicholas Cathedral*[36], struck down a New York statute that interfered in the ecclesiastical affairs of the Russian Orthodox Church by effectively shifting the right to appoint an archbishop, and thus the right to occupy and control a cathedral in New York, from authorities at the central church in Moscow to authorities in the United States.[37]

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[34] *Ibid.* at 728-29.

[35] *Ibid.*, at 729.

[36] 344 U.S. 94 (1952) (In *Kedroff*, the Supreme Court ruled that a New York corporations statute violated the First Amendment because it infringed on the ecclesiastical authority of the Patriarch of Moscow to appoint a Russian Orthodox bishop and, hence, to determine control over cathedral property.).

[37] *Ibid.*, at 106-07.

44. Relying on *Watson*, the Court held that the state's intrusion into the autonomy of the church violated the First Amendment. "Legislation that regulates church administration, the operation of the churches, [or] the appointment of clergy... prohibits the free exercise of religion."[38] The Court held that such issues are "strictly a matter of ecclesiastical government" and thus of no concern to the state.[39] State intrusion into the ecclesiastical affairs of a church "violates [the] rule of separation between church and state"[40] and contravenes "the philosophy of ecclesiastical control of church administration and polity."[41] The Court expressly reaffirmed *Watson* on constitutional grounds:

> The opinion [in *Watson*] radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.[42]

45. In *Serbian Eastern Orthodox Diocese v. Milivojevich*,[43] the Supreme Court held that the guarantee of church autonomy "applies with equal force to church disputes over church polity and church administration."[44] Quoting *Watson*, the Court reiterated that under the First Amendment "civil courts exercise no jurisdiction" over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[45] Because churches have a zone of autonomy, disgruntled church members cannot invoke the power of civil courts to overturn ecclesiastical decisions pertaining to religious matters:

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[38] *Ibid.*, at 107-08; *see Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (In *Kreshik*, a follow-on case under essentially the same facts as *Kedroff*, the Supreme Court extended its holding in *Kedroff* to bar judicial – in addition to legislative – interference with church autonomy.).

[39] *Kedroff*, 344 U.S. at 115.

[40] *Ibid.*, at 110.

[41] *Ibid.*, at 117.

[42] *Ibid.*, at 116.

[43] 426 U.S. 696 (1976) (*Milivojevich* involved the question whether the Bishop of the American-Canadian Diocese of the Serbian Orthodox Church had been properly removed from office by the Holy Synod and Holy Assembly of the Church in Belgrade. The Supreme Court rejected the lower court's inquiry into the legality, under church law, of actions taken by the authorities in Belgrade.).

[44] *Ibid.*, at 710.

[45] *Ibid.*, at 713-14 (quoting *Watson*, 80 U.S.679.

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.[46]

46. "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government ...."[47]

47. Since *Watson*, a key element of the Church Autonomy Doctrine has been that civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine"[48] because it unconstitutionally "inject[s] the civil courts into substantive ecclesiastical matters."[49] In adjudicating civil disputes between churches and their members or former members (intra-church property disputes, for example), civil courts cannot engage in the "consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[50]

Respect for the autonomy of churches requires that matters of religious ritual and ceremony lie beyond the jurisdiction of civil courts

48. Nowhere is the autonomy of religious organizations more imperative than in the definition and performance of religious rituals, sacraments, and ceremonies; as with the defining and teaching of religious doctrines and the selection of clergy, such matters implicate the very core of a religion. Accordingly, under the First Amendment, a church's liturgy is exclusively an ecclesiastical matter with which civil courts cannot interfere. This basic principle of religious

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[46] *Ibid.*, at 714-15.

[47] *Ibid.*, at 724.

[48] *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (The case involved a dispute between local churches and the general church over ownership of religious property. The Supreme Court reversed the lower court's ruling – which was based on the court's interpretation of whether the general church had departed from the established faith – and remanded for further proceedings on the ground that the First Amendment forbids a civil court from awarding church property based on the court's own interpretation and weighting of religious doctrine.).

[49] *Ibid.*, at 450-51 (emphasis omitted).

[50] *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (*Jones* involved a dispute over ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The Supreme Court held *inter alia* that if state law provides that the identity of a local church is to be determined according to the "laws and regulations" of the general church, then the First Amendment requires that state courts defer to the church's authoritative ecclesiastical body in such questions rather than engage in the interpretation of church doctrine.)

liberty is so well established that few cases addressing it exist because the state so rarely attempts to interfere.

49. For present purposes, perhaps the most relevant application of the foregoing principles occurred in *State v. Barclay*[51]. In that case a criminal complaint was filed against an ordained minister charging him with three counts of denial of civil rights for refusal to personally officiate at interracial marriage ceremonies in his chapel. The minister successfully raised a freedom of religion defense, claiming that personally performing such ceremonies violated his religious beliefs. (The minister believed that the Bible forbids mixing the races.)

50. The court noted that the minister's "capacity to perform weddings in Kansas is derived wholly from his status as an ordained clergyman, and [thus] when he is officiating at a wedding, he is performing a religious sacrament."[52] The regulation of religious sacraments is wholly beyond the control of the government. The court reasoned:

> Through criminal charges the State is attempting to punish an ordained minister (and deter him and other ministers from future like conduct) for refusing to perform the marriage sacrament for particular couples when said refusal was based upon the minister's sincere personal religious beliefs. It is not the function of the courts to determine what is or is not the correct interpretation of the biblical passages relied upon for such beliefs. *The parties have not cited, nor has our research revealed, a single case from any jurisdiction within the United States where criminal prosecution of a minister has been attempted under even remotely comparable circumstances. Refusal of a minister personally to perform a marriage is not a life-threatening situation which might compel a court's intervention in what is otherwise a "hands off" constitutionally protected area.*[53]

Government interference with core religious matters inhibits the free development of religious belief and thought

51. An important reason why American courts avoid interference in matters of religious doctrine, polity, ecclesiastical policy, or liturgy is that such interference can profoundly inhibit the free development of religious beliefs and thought. The United States Supreme Court in

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[51] 708 P.2d 972 (Kansas 1985).

[52] *Ibid.*, at 976.

[53] *Ibid.*

Presbyterian Church v. Mary Elizabeth Blue Hull Church.[54] warned that when a civil court intervenes in religious matters "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern."[55]

52. American courts have adopted blanket rules of non-interference in ecclesiastical matters in part because a rule of case-by-case inquiry into the religious interests at stake can itself distort the internal development of a church's doctrine and polity. In *Corporation of the Presiding Bishop v. Amos*,[56] Justice William Brennan – perhaps the Court's most celebrated progressive in matters of civil and constitutional rights – explained the risk that government intrusion poses to a religious community's process of self-definition:

> [T]his process of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. *As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.* A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity. . . . .
>
> Concern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce.[57]

53. To summarize the American approach, the First Amendment would preclude government from compelling individual ministers or religious organizations to perform or in any way participate in or to facilitate same-sex marriages including, for example, permitting the use of Church property for events related thereto. The terms, conditions, and protocols governing (a)

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[54] 393 U.S. 440 (1969).

[55] *Ibid.* at 449.

[56] 483 U.S. 327 (1987) (*Amos* addressed the constitutionality under the First Amendment of a blanket statutory exemption from anti-discrimination laws for religious organizations. The Supreme Court held the exemption was appropriate as an effort to accommodate religious freedom and avoid state entanglement in ecclesiastical affairs.).

[57] *Ibid.* at 343-45 (Brennan, J., concurring).

the performance of a religious marriage ceremony, (b) the permissible use of Church property deemed to be religiously significant, and (c) the religious recognition and privileges granted to same-sex couples are ecclesiastical matters that are beyond the purview of state regulation. It is respectfully submitted that similar protection should be accorded to religious organizations under s.2(a) of the *Canadian Charter of Rights and Freedom.* The Church's doctrine and practices respecting marriage, and especially Temple Marriage and the sacred nature of Temple space, present a particularly compelling example of why such protections are essential to religious freedom.

Conclusions

54. The right of clergy and religious denominations to perform marriages according to the dictates of their own religious doctrines and traditions is fundamental to religious freedom. That is especially the case with respect to The Church of Jesus Christ of Latter-day Saints given its doctrines regarding marriage. It is reasonable to predict that the legalization of same-sex marriage will produce demands that such marriages be solemnized for civil purposes on an equal basis with traditional marriages by those, including clergy, who have legal authority to do so. It is also reasonable to predict that the next step in the progression would be an effort to revoke that authority where clergy or religious organizations oppose same-sex marriage on religious grounds. It is also to be expected that ancillary demands will be made that property deemed sacred by religious organizations but held open to the public be made available for events associated with same-sex marriages, and that religious organizations permit the participation of married same-sex couples in their meetings, ceremonies, or activities on an equal basis with married opposite-sex couples.

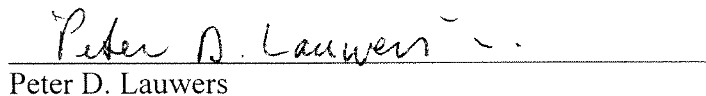
55. For the reasons set out above, the Church respectfully submits that religious freedom protections under s. 2(a) of the *Canadian Charter of Rights and Freedoms* should be construed to ensure that there is a zone of ecclesiastical autonomy. This zone of ecclesiastical autonomy must ensure that religious organizations themselves – and not just individual members of the clergy – have the right to authoritatively define marriage ceremonies within their respective polities and to refuse to perform, condone, promote, recognize, or facilitate any marriage deemed contrary to

their religious beliefs or traditions. This zone must extend to any property owned by the religious organization.

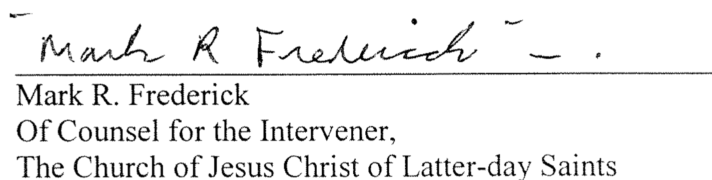
56. If s. 2(a) of the *Charter* is to provide meaningful protections for religious freedom, it must be interpreted to provide an absolute exemption from civil or criminal penalties for religious officials who decline to solemnize or recognize as valid for religious purposes same-sex marriages, including protection against the revocation of the authority of clergy or a religious organization to solemnize marriages for civil purposes. It must also grant religious organizations the autonomy to determine whether and on what terms same-sex couples may participate in their meetings, ceremonies, and activities. The Church respectfully submits that these protections are essential to meaningful religious freedom under the *Charter*, and to a positive answer to the third question in this Reference.

DATE: May 10, 2004

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Peter D. Lauwers



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The Church of Jesus Christ of Latter-day Saints

PART IV – TABLE OF AUTHORITIES

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3. *Alberta Marriage Act,* s. 4.
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5. *Manitoba Marriage Act,* s. 3.
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