

CONFIDENTIAL: SOLICITOR-CLIENT PRIVILEGE

May 21, 2021

The Presbyterian Church in Canada

ATTN: Rev. Stephen Kendall, Principal Clerk
50 Wynford Drive, Toronto
ON M3C 1J7

Dear Rev. Kendall,

RE: BRIEF MEMO ON REMITS B & C

OVERVIEW:

In January of 2021, the Assembly Council of the Presbyterian Church in Canada (“PCC”) recommended that its Executive retain independent counsel to address matters contained in Remits B and C.

Remits B and C purport to establish two parallel definitions of marriage and would provide a basis for the recognition of both same-sex marriages and the ordination of LGBTQI persons (married or single) as Ministers or Ruling Elders in the PCC.

The Remits also provide “liberty of conscience and action” on marriage and ordinations, which means that individual ministers, congregations, and PCC members are free to adhere to the traditional definition of marriage and to decline participation in the ordination of LGBTQI Ministers or Ruling Elders.

The full adoption of the Remits presents a range of potential risks. In particular, risks include:

- individual Ministers who may decline to officiate a same-sex marriage;
- congregations who may decline to host same-sex marriages; and
- associated risks for the PCC as a religious body.

While the elimination of all potential risks would be impossible, there is a range of mitigating factors which may be sourced:

- in legislation;
- in jurisprudence from across Canada; and
- in the Canadian constitution.

Indeed, these mitigating factors greatly minimize the potential risks posed by the full adoption of the Remits.

POTENTIAL RISKS:

The potential risks can be divided into two broad categories:

1. The risk of private action (including a discrimination claim made against an individual Minister or congregation who declines to officiate a same-sex marriage).
2. The risk that the decision-making process of individual congregations and the PCC itself will be exposed to an application for judicial review.

MITIGATING FACTORS:

I. LEGISLATION & JURISPRUDENCE

At both the federal and provincial level, marriage legislation recognizes and affirms the right of religious officials and religious groups to refuse to perform marriages not in accordance with their religious beliefs.ⁱ Courts of Appeal in British Columbia, Manitoba, Saskatchewan, Ontario, and the Supreme Court of Canada have consistently stated that the equality rights of same-sex couples do not displace the rights of religious groups to refuse to solemnize same-sex marriages which do not accord with their religious beliefs.ⁱⁱ

While contemporary human rights legislation in Canada protects members of the LGBTQI community against discrimination, accommodation is also provided for religious belief. In Ontario, religious officials are expressly permitted to:

- refuse to preside over (or assist in the solemnization of) a marriage in a sacred place, and
- refuse to allow a sacred place to be used for a marriage event,
- if this goes against their religious beliefs or “the doctrines, rites, usages or customs of the religious body to which the person belongs.”ⁱⁱⁱ

The Human Rights Tribunal of Ontario has determined the *Human Rights Code* should not be used to challenge a religion's belief system or teachings.^{iv} The Human Rights Tribunal has also found the *Human Rights Code* is not engaged where a religious official exercises rights at the core of their right to freedom of religion and purely connected with a religious role.^v

II. CONSTITUTIONAL PROTECTION

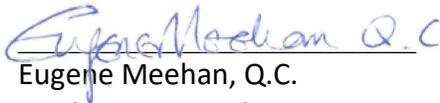
Religious officials have a constitutionally protected right to decide who may be married in accordance with the rites, practices, and beliefs of their religion.^{vi} The Supreme Court of Canada has determined that state compulsion on religious officials to perform same-sex marriages (where contrary to their religious beliefs) violates the guarantee of freedom of religion under s. 2(a) of the *Charter*.^{vii} The Supreme Court of Canada has affirmed that “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.”^{viii} All of this strongly indicates that a Canadian court is unlikely to weigh in on the interpretation of Remits B and C, a matter of PCC doctrine.

III. JUDICIAL REVIEW

There is a limited role for courts to review the conduct and decisions of religious organizations, especially where a significant right or interest is in question.^{ix} This process is called “judicial review”. In Canada, courts have consistently held that questions of religious doctrine are not “justiciable” (which is to say, matters not within their authority to decide).^x

On May 21, 2021, the Supreme Court of Canada released a decision on this subject.^{xi} The Court confirmed that becoming a member of a religious organization, without more, does not create legally enforceable rights.^{xii} The Court also indicated that while a contract of employment between a minister and their church *may* be enforceable by a secular court, there is a difference between religious or spiritual obligations and those which can be enforced by judges.^{xiii} For the Supreme Court of Canada, even where property or employment is at stake, the intervention of a secular court is less likely in the religious context.^{xiv}

Yours truly,



Eugene Meehan, Q.C.

Marie-France Major

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Supreme Advocacy LLP

ⁱ *Civil Marriage Act*, SC 2005, c 33, s. 3; *Marriage Act*, SNWT 2017, c 2, s. 28; *Marriage Act*, RSPEI 1988, c M-3, s. 11.1; *Civil Code of Québec*, CQLR c CCQ-1991, Article 367; *Marriage Act*, RSO 1990, c M.3, s. 20.4.

ⁱⁱ *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133; *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at paras. 12, 120.

ⁱⁱⁱ *Human Rights Code*, RSO 1990, c H.19, s. 18.1.

^{iv} *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII) at para. 35.

^v *Tesseris v. Greek Orthodox Church of Canada*, 2011 HRTO 775 (CanLII) at paras. 1, 9; see also *Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 (ON SCDC) at para. 58.

^{vi} *Halpern v. Canada (Attorney General)*, 2003 CanLII 26403 (ON CA) at para. 57; *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at paras. 57-59; *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII) at para. 133; *Kisilowsky v Manitoba*, 2018 MBCA 10 (CanLII) at para. 5; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 (CanLII) at paras. 12, 120.

^{vii} *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) at para. 58.

^{viii} *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50.

^{ix} See, for example, *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII); *Street v. B.C. School Sports*, 2005 BCSC 958; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

^x *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (CanLII), [2018] 1 SCR 750 at para. 37; *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC) at p. 175; *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728 (CanLII) at para. 19.

^{xi} *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22.

^{xii} *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 51.

^{xiii} *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 41.

^{xiv} *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 49.