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LEGISLATIVE SUMMARY

Bill C-32:
An Act to Amend the Civil Marriage Act

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Legislative Summary of Bill C-32

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

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LEGISLATIVE SUMMARY OF BILL C-32: AN ACT TO AMEND THE CIVIL MARRIAGE ACT

1 BACKGROUND

Bill C-32, An Act to amend the Civil Marriage Act (short title: the Civil Marriage of Non-residents Act), was introduced in the House of Commons on 17 February 2012 by the Honourable John Baird, for the Minister of Justice and Attorney General of Canada, the Honourable Rob Nicholson. According to the news release that accompanied the introduction of Bill C-32, the bill will amend the *Civil Marriage Act* to "make all marriages of non-resident couples that were performed in Canada valid under Canadian law, and … allow these couples to end their marriages if they cannot get a divorce where they live."[1]

1.1 THE *CIVIL MARRIAGE ACT*

The *Civil Marriage Act*[2] was enacted in 2005, to legislatively extend the legal capacity to marry for civil purposes to same-sex couples across the country, after courts in most provinces and one territory had invalidated the opposite-sex requirement for civil marriage.[3]

Prior to introducing the Act, the federal government referred its proposed legislation to the Supreme Court of Canada for an opinion on questions relating to the constitutional division of powers between the federal and provincial governments with respect to marriage,[4] and to the equality and religious freedom provisions of the *Canadian Charter of Rights and Freedoms*.[5] The Supreme Court found that it was within Parliament's legislative jurisdiction to extend legal capacity for civil marriage to same-sex couples, and that the government's purpose in doing so would not violate the Charter, but rather would flow from it.[6]

According to a 2005 Department of Justice Canada backgrounder, the bill that created the *Civil Marriage Act* was "based on the proposed legislation referred to the Supreme Court of Canada in the marriage Reference" and included consequential amendments to eight other federal statutes "to provide equal treatment for same-sex couples to marry civilly and to divorce in Canada."[7] Through one of these consequential amendments, the definition of "spouse" in the *Divorce Act*[8] was amended to mean "either of two persons who are married to each other," rather than "either of a man or woman who are married to each other."[9] This amendment was intended to "ensure that the protections of the [*Divorce Act*] apply equally to both opposite-sex and same-sex married couples."[10]

1.2 VALIDITY OUTSIDE OF CANADA OF SAME-SEX MARRIAGES PERFORMED IN CANADA

Even before the Act was introduced, it was recognized that problems might arise when there was a foreign element to the marriage.

For example, a discussion paper prepared by the Department of Justice Canada in November 2002 noted that same-sex Canadian marriages "would likely be valid only within Canada, as there is currently no legal mechanism for recognition of same-sex marriages outside our borders."[11] In other words, even Canadian citizens who were recognized as legally married at home might not be recognized as legally married elsewhere.

The issue of foreign recognition of same-sex marriages performed in Canada also began to arise with respect to non-resident couples, at least as early as 2006 when the Family Division of the High Court of Justice in London, England, considered whether the British Columbia marriage of a lesbian couple from England would be recognized in England. Sir Mark Potter, President of the Family Division, noted that while the form of marriage[12] is generally governed by the law of the place where the marriage is celebrated, the capacity of the parties to marry is generally governed by the law of the place where the parties live.[13] Because of "the ordinary application of the rules of private international law," the women's capacity to marry was governed by the law of England, and, "[i]n the case where a person of English domicile purports to marry in another jurisdiction, but the parties lack capacity to marry in English law, the marriage is not recognised in England."[14]

An article published in the *Lawyers Weekly* discussing the implications of this decision suggested that non-resident same-sex couples should determine beforehand whether their Canadian marriages would be valid in their home jurisdictions, since wedding officiants cannot be expected to be experts in private international law. The question of whether such marriages would be valid even within Canada was also raised in this article.[15]

1.3 Validity Within Canada of Marriages Performed in Canada for Non-resident Same-Sex Couples

The issue that gave rise to Bill C-32 is the validity *in Canada* of the marriages of non-resident same-sex couples. This issue was raised in the context of a non-resident lesbian couple who married in Canada in 2005 and later attempted to obtain a divorce in Canada.

According to publicly available court documents, one of the women resides in Florida, while the other resides in London, England, and neither was able to obtain a divorce in her home jurisdiction because their marriage was not recognized as valid in either. The women applied jointly for a divorce in Canada, challenging the one-year residency requirement under the *Divorce Act* as being constitutionally invalid with respect to them. According to their arguments, while resident same-sex couples could get divorced in Canada and non-resident opposite-sex couples could get divorced in their home jurisdictions, they as a non-resident same-sex couple could not get divorced anywhere in the world because of the one-year residency requirement. This, they argued, was discriminatory, and so they should be granted a constitutional exemption.[16]

In response, the Attorney General of Canada defended the *Divorce Act*'s one-year residency requirement, but also argued that, because of the principles of private international law, the women could not get divorced because they were not legally married, even in Canada:

> In order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (the *lex loci celebrationis*) with regard to the formal requirements, and the requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.
>
> In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile – Florida and the United Kingdom. As a result, their marriage is not legally valid under Canadian law.
>
> Not being legally married to each other, the Joint Applicants are not "spouses" within the meaning of the *Divorce Act*, and the Court has no jurisdiction to grant them a divorce as it is not legally possible to end a marriage that was void *ab initio* [from the outset].[17]

Although experts are reported to have said that this argument is consistent with "well-established principles of private international law,"[18] it was perceived as a change in Canada's policy towards same-sex couples, with potential legal implications for other non-resident same-sex couples who had married in Canada.[19]

2 DESCRIPTION AND ANALYSIS

Bill C-32 contains five clauses. The following description highlights selected aspects of the bill; it does not review every aspect.

2.1 MARRIAGE (CLAUSES 2 AND 3)

Currently, the *Civil Marriage Act* relates only to marriage. Since Bill C-32 amends the Act to also relate to the dissolution of marriage for non-resident spouses, the bill divides the Act into two parts. Clause 2 adds the heading "Marriage" to what will now be Part 1 of the Act, the provisions relating to marriage.

Clause 3 adds section 5 to the Act. Under proposed subsection 5(1), a marriage performed in Canada that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not have the capacity to enter into that marriage based on the law of their domicile(s). As noted above, the spouses' capacity to marry would ordinarily depend on the law of their home jurisdictions, but this clause would essentially supplant that aspect of private international law as long as the spouses have capacity to marry in Canada. It would only affect the validity of the marriage *for the purposes of Canadian law*, however; in the spouses' home jurisdictions, the marriage may still not be recognized as valid.[20]

Subsection 5(2) states that subsection 5(1)

> applies retroactively to a marriage that would have been valid under the law that was applicable in the province where the marriage was performed but for the lack of capacity of either or both of the spouses to enter into it under the law of their respective state of domicile.

This appears to be intended to ensure that the same-sex marriages of non-residents that have already been performed in Canada are considered valid for the purposes of Canadian law.

Clause 3 also adds subsection 5(3), which relates to court orders that have already been made, in Canada or elsewhere, declaring a marriage to be null and void or granting a divorce. Under subsection 5(3), these orders will be treated as having dissolved the marriage, for the purposes of Canadian law, as of the day on which the order takes effect.

2.2 Dissolution of Marriage for Non-resident Spouses (Clause 4)

Clause 4 of the bill creates Part 2 of the Act: "Dissolution of Marriage for Non-Resident Spouses." As noted in the bill's summary, this

> establishes a new divorce process that allows a Canadian court to grant a divorce to non-resident spouses who reside in a state where a divorce cannot be granted to them because that state does not recognize the validity of their marriage.

2.2.1 When a Court May Grant a Divorce Under the Act

Proposed subsection 7(1) of the Act establishes three conditions that must be met before a divorce may be granted under the Act:

> (*a*) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application;
>
> (*b*) neither spouse resides in Canada at the time the application is made; and
>
> (*c*) each of the spouses is residing – and for at least one year immediately before the application is made, has resided – in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.

"Breakdown of the marriage" can only be established by separation for one year under proposed paragraph 7(1)(*a*) of the Act, which is narrower than under section 8 of the *Divorce Act*, where it can also be established by adultery or cruelty.[21]

The second condition (proposed paragraph 7(1)(*b*)) suggests that, if one of the spouses is residing in Canada, an application for divorce should instead be made under the *Divorce Act*.

The third condition (proposed paragraph 7(1)(*c*)) suggests that, if either spouse resides in a jurisdiction where a divorce can be obtained, an application for divorce

should instead be made in that jurisdiction, since a court in that jurisdiction would be a more appropriate forum than a Canadian court to hear the divorce, given the fact of residency there.

2.2.2 How the Spouses Can Apply for a Divorce Under the Act

Proposed subsection 7(2) of the Act states that the application may be made by both spouses jointly, or by one of the spouses with the other spouse's consent, or, in the absence of that consent, with an order from a court located in the state where one of the spouses resides, declaring that the non-consenting spouse:

> (*a*) is incapable of making decisions about his or her civil status because of a mental disability;
>
> (*b*) is unreasonably withholding consent; or
>
> (*c*) cannot be found.

Under proposed subsection 7(3) of the Act, however, if the spouse is found in connection with the service of the application, then that spouse's consent is required. This is again unlike section 8 of the *Divorce Act*, which permits a court of competent jurisdiction to grant a divorce "on application by either or both spouses."

Proposed section 8 of the Act states, for greater certainty, that "the *Divorce Act* does not apply to a divorce granted under this Act." The marginal note, "No corollary relief," suggests that the purpose of this provision is to preclude divorce applications under the *Civil Marriage Act* from involving issues such as custody, child support, and spousal support.

2.2.3 When a Divorce Under the Act Takes Effect

Under proposed section 9, a divorce under the Act takes effect on the day on which the judgment granting the divorce is rendered.

This differs from the *Divorce Act*, under which divorces generally take effect on the 31st day after the day on which the judgment granting the divorce is rendered, in recognition of the fact that those parties have 30 days to appeal (sections 12 and 21).

Proposed section 9 also requires the court to issue a certificate of divorce on request. Proposed section 10 states that, on taking effect, a divorce granted under this Act has legal effect throughout Canada. Proposed section 11 states that, on taking effect, a divorce granted under this Act dissolves the marriage of the spouses. These provisions are nearly identical to corresponding provisions in sections 12, 13, and 14 of the *Divorce Act*.

2.2.4 Additional Provisions

Clause 4 of the bill creates additional sections of the Act, relating to such issues as which courts may hear an application for a divorce under the Act, and who may make rules and regulations to govern the process.

In particular, proposed section 6 of the Act indicates which court in each province and territory would have the jurisdiction to hear an application for a divorce under the Act. The courts that are listed are the same as those that would have jurisdiction to hear and determine a divorce proceeding under the *Divorce Act*.[22]

Proposed section 12 allows a "competent authority" in respect of a court in a province to make rules regulating the practice and procedure in that court. This is similar to section 25 of the *Divorce Act*. Proposed section 13 permits the Governor in Council to make regulations for carrying out the purposes and provisions of the part of the Act relating to divorces, including regulations that would provide for uniformity in the rules made under section 12; regulations that are made to provide for uniformity in the rules prevail over those rules. This is similar to section 26 of the *Divorce Act*.

3 COMMENTARY

Generally, reaction to the bill as a whole has been that the fair thing to do is to let same-sex non-resident spouses get divorced in Canada if they got married in Canada.[23]

There has, however, been criticism of aspects of the bill that create a separate divorce procedure from that available under the *Divorce Act*. In particular, commentators have suggested that it is problematic, when the divorce application is not made jointly or on consent, to require an order from a court in a jurisdiction that does not recognize same-sex marriage, particularly if the foreign jurisdiction is hostile to same-sex couples.[24]

NOTES

1. Department of Justice Canada, "Government Introduces Amendments to the *Civil Marriage Act*," News release, 17 February 2012.
2. *Civil Marriage Act*, S.C. 2005, c. 33.
3. Note that civil marriage is distinguished from religious marriage. For more information on the history of the Act, see Mary C. Hurley, *Bill C-38: The Civil Marriage Act*, Publication no. LS 502-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 14 September 2005.
4. Under section 91(26) of the *Constitution Act, 1867*, the federal government has legislative jurisdiction over "Marriage and Divorce." Under section 92(12), the provinces have legislative authority over "The Solemnization of Marriage in the Province."

5. One of the questions referred to the Supreme Court specifically referred to the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms*, while the question relating to whether the proposed legislation was consistent with the Charter was primarily interpreted in relation to equality rights under section 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Although not specifically enumerated in section 15, sexual orientation has been held to be an "analogous" ground deserving of protection (*Egan* v. *Canada*, [1995] 2 S.C.R. 513).

6. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

7. Department of Justice Canada, "Background: Civil Marriage Act," February 2005.

8. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

9. The definition of "spouse" in the *Divorce Act* – "either of a man or a woman who are married to each other" – had been found to be unconstitutional in *M.M.* v. *J.H.* (2004), 73 O.R. (3d) 337 (Sup. Ct. J.). The words "a man and a woman" were severed and the words "two persons" were read in instead.

10. Department of Justice Canada (2005).

11. Department of Justice Canada, *Marriage and Legal Recognition of Same-sex Unions: A Discussion Paper*, November 2002.

12. "Formal validity" relates to the formalities surrounding the marriage ceremony, including whether a religious ceremony is necessary or sufficient, and whether parental consent is required. See Janet Walker and Jean-Gabriel Castel, *Canadian Conflict of Laws*, 6th ed., LexisNexis Canada Inc., 2005, para. 16.2.

13. Questions of "essential validity" include whether the parties consent to the marriage, and whether the parties are permitted to marry one another. See Walker and Castel (2005), para. 16.3.

14. *Wilkinson* v. *Kitzinger*, [2006] EWHC 2022 (Fam). The decisions cited as authority for these principles in this case and in Walker and Castel (2005) date as far back as the 1850s (in particular *Brook* v. *Brook* (1858), 3 Sm. & G. 481, affirmed 9 H.L. Cas 193 and *Mette* v. *Mette* (1859), 1 Sw & Tr 416).

15. Jeffrey Talpis, "Same-sex Canadian marriages are not necessarily recognized abroad," *The Lawyers Weekly*, 22 September 2006.

16. Application for Divorce of V.M. and L.W., as made available in Janyce McGregor, "Same-sex divorce options explored by Harper government," *CBC News*, 12 January 2012.

17. Answer of the Attorney General of Canada to the Application for Divorce of V.M. and L.W., as made available in McGregor (2012).

18. Cristin Schmitz, "Feds fading in face of furor," *The Lawyers Weekly*, 27 January 2012. See also Brenda Cossman, "The Canadian Non-Resident Marriage Controversy," Mark S. Bonham Centre for Sexual Diversity Studies, University of Toronto, 17 January 2012; Georgialee Lang, "Media Misunderstands Same-Sex Divorce Issue," 14 January 2012; "Same-sex divorce case legally straightforward, politically exploited," Double Hearsay LLP, 12 January 2012.

19. There do not appear to be recent, comprehensive and authoritative statistics with respect to non-resident same-sex marriages across the country. Statistics collected after same-sex marriage became legal in British Columbia in 2003, however, indicate that there were 774 same-sex marriages in British Columbia that year, and that "[m]ore than half (55.9%) of the people who entered into a same-sex marriage in British Columbia were not residents of Canada" (Statistics Canada, "Marriages," *The Daily*, 17 January 2007). As well, it has been reported that "[m]ore than 5,000 of the approximately 15,000 same-sex marriages that have taken place … involved couples from the United States or other countries" (Kirk Makin, "Despite legal about-face, Harper has 'no intention' of reopening gay marriage," *The Globe and Mail*, 12 January 2012).

20. Some jurisdictions may recognize Canadian same-sex marriages for other purposes, however, such as with respect to certain benefits. See, for example, Tu Thanh Ha, "Dan Savage: 'I had been divorced overnight'," *The Globe and Mail*, 12 January 2012.

21. It appears that recent statistics have not been collected with respect to the reason for marital breakdown under the *Divorce Act*. Statistics published with respect to 2004 and 2005, however, suggest that "separation for at least one year" is the reason for marital breakdown in approximately 95% of cases (Statistics Canada, Table 101-6516, "Divorces, by reason for marital breakdown, Canada, provinces and territories, annual (number) [Terminated]," CANSIM [database], accessed 9 March 2012.)

22. "Court" is defined in section 2 of the *Divorce Act*.

23. See, for example, "Equal rights to the bitter end," *The Toronto Sun*, 20 February 2012.

24. See Tamara Baluja, "Bill to close loophole in same-sex marriages creates 'double standard'," *The Globe and Mail*, 17 February 2012; and Henderson Heinrichs Lawyers, "Divorce in Canada for Foreign Residents," *Vancouver Divorce Law Blog*, 17 February 2012.