

Commission on the Marriage Canon

September 29, 2014 submission

I see the pivotal issue before the commission as this: How can we officially accept having two persons of the same gender in a marital relationship?

The question appears more theological than legal or administrative in nature. But those dimensions are also key, and I will set out some thoughts as to just what they are and how they might practically be addressed. They represent the ideas of a retired public servant and a life-long Anglican.

Much follows if Synod Resolution C003 succeeds. Or does not.

Either way, this submission is made on the basis that our Church will remain in the business of conducting civilly-recognised marriages - however defined - for the foreseeable future.

A. Theological aspects

The pivotal question before us is indeed a hard one, unresolved after years of study. The expanded marital definition entered Canada's Civil law ten years ago. It embodies sexuality beyond that which is sanctioned as marriage between a man and a woman. As such, part of the Church holds it as scriptural sin. It cannot be blessed by the Church. Others look to a gospel which looks past the prohibitive and is relevant to the Church's pastoral mandate in present society.

Below are some views supportive of updating the Marriage Canon to cover couples of the same gender. The views are not altogether original. They are variously and sometimes exhaustively covered in other submissions by writers with greater knowledge and experience than one's own. Apologies go in advance for any misreading.

1. Biology

If homosexuals or transgendered individuals were born that way, there would be no more sin attached to that than to having brown eyes. Practitioners in the fields of medicine, psychology and sociology may not have collective proof of innateness enough to satisfy all enquirers. But clearly, innateness is a factor that was no more part

of the early Church's understanding than, say, the internet. A science component needs to weigh in to the Commission's reasoned balance of competing views when it reports out.

2. Biblical proscriptions

The context and purpose of scriptural prohibitions concerning so-called deviant persons and their behaviour are extensively set out in other submissions. They fall on both sides of the issue.

Michelle Bull, mover of General Synod's Resolution C003 to approve same-sex marriage, clearly sets out the difficulty of applying many proscriptions of the day to same-sex couples who are committed to living their lives in today's world.

3. Love, a central precept

We hear it at the Eucharist as the second Great Commandment : Thou shalt love thy neighbour as thyself. On this commandment together with the first, hang *all* (not just some) of the Law and the Prophets. The commandment, then, is addressed to all who would hear, just as Baptism is available for all (and a Canonical requirement for at least one person in a marriage).

In a more current rendition we hear in John 13 "*A new commandment I give you: Love one another. As I have loved you, so you must love one another. By this everyone will know that you are my disciples, if you love one another*".

To say that I should love all but my proscribed neighbours does disservice to the high and universal precept we affirm. Love is another part of scripture whose relevance needs weighting in the marriage discussion at hand.

4. Judgement about what God hath joined together

To begin, a civil and a church marriage have a key common component. It is the witnessed vows made by the consenting couple, and duly registered. At city hall, the proceedings are before an authorised public official. The church ceremony brings God into the picture. Witnesses including the officiant are present and the couple willingly make their covenant one with the other before God. The nuptials are registered.

One's view of all this is that God is doing the joining, as opposed to the church. I have a question as to how far it is appropriate for the church to make a judgement on who is acceptable to come and take marital vows. More broadly, judgement - like vengeance –

is the province of the Lord and applicable to all. The Lord can discriminate all the Lord wants: it's the earthly arbiter that could improve on this score.

5. Role of witness

A key task of the church is not itself to effect marriage, but to witness it. One senses a popular confusion here from too many 'I pronounce thee's in church and in the entertainment media. Where conferring does takes place is in the Eastern rite. The term 'witness' is certainly there in the marriage service. And the BAS now uses 'I declare'.

6. Nature and placement of blessings

Submissions to the Commission identify two types: blessings which offer thanks and praise; and those, discussed below, which call down God's favour or power, be it upon persons or things.

Once again it is God who joins together. One would stand incredulous if an almighty and all-wise God could not or would not sanctify what God has just joined - or who would cede that the church was better positioned to make exclusions. This line of thought places any special blessing of nuptials already with God, leaving the Church to call down God's favour for the newlyweds and to give other blessings. Rings for example are blessed, as outward and visible signs in the lesser sacrament of marriage.

I do not see Church blessings which go beyond the two basic types noted above. A blessing for example, that was a prerequisite or a part of a reception rite for same-sex couples, would seem out of bounds.

7, A relevant Church

We confront change at many levels, as church or individuals. Change has been substantial and /or rapid along almost any dimension one would name. These divisions are progressively transected by 24/7 technology, and are all too often accompanied by inequities and by gaps in communication.

How do we help, care, inspire? Our foundation of faith is key, but must intersect in some real way with our societies, and yes, their legal systems.

Some years ago we heard about the church militant. Today it's perhaps more about relevancy if our church is to be heard and be 'together for the love of the world'. Specifically, the Church's rules, protocols and practices need to be coherent especially surrounding the subject of marriage.

Here we have proceeded with change without waiting for conformity with other parts of the Communion, and open relations are maintained with other denominations and councils. The evangelical Lutheran Church is a direct participant in the Resolution C003 on marriage. The national bishop expressed her full and insightful support recently to the Marriage Commission, She concluded

“ We will respect the decisions of General Synod no matter what they are. I also want to say that I believe there is a reason we are in Full Communion: we are together for the love of the world and we are called to the mission of sharing God’s love with the world. While definitions of marriage are important they are not the sum total of God’s mission.”

B, The Legal Landscape

Divergences between our Church and Civil law look to be extensive and material. A half dozen comparisons of Canonical and Civil rules are set out below. They are based on the Church’s current rules as set out in Canon XXI On Marriage in the Church (the Canon). Civil law references here are to the Civil Marriage Act, Statutes of Canada 2005, Chapter 33 (the Act).

1 Difference in scope

The Canon applies essentially to couples of the opposite sex, with a form of blessing sometimes variously authorized at the diocesan level for committed couples of the same sex. These couples are already legally married under present civil law, and are not required to re-marry.

The Act at Section 2 reads:

“ Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”

By use of the gender-neutral term ‘persons’, the word ‘marriage’ was expanded to include couples of the same sex. The change followed extensive debate about equal access for couples, before and under the law, and which was already enjoyed by individuals under the constitution.¹

1 (see Constitution Act,1982, its Ch 1 Canadian Charter of Rights and Freedoms, at Sect 15, Equality Rights)

2. Who can marry

The Canon looks to be struggling mightily here. As agent of the state but with no clear assertion of conformity with the civil law, the Canon has to sidestep the Table of Kindred and Affinity and needs a notwithstanding clause to stay operational. The said Table has many more prohibitions than the civil code, which is itself narrowing,

Regulation 3 of the Canon:

3. *Impediments of Relationship*

- a) Notwithstanding the Table of Kindred and Affinity contained in *The Book of Common Prayer* (1962), when making the inquiries directed in section 2 the minister shall, with respect to impediments of relationship, be guided by the *Marriage (Prohibited Degrees) Act*, as it was in force on June 1, 2004, which prohibits marriages between persons who are related
- i) lineally by consanguinity or adoption,
 - ii) as brother and sister by consanguinity, whether by the whole blood or the half-blood, or
 - iii) as brother and sister by adoption.

The Canon then, currently prohibits marriage only between persons who are lineally related (as parents with their offspring), and between brothers and sisters, half-brothers and half-sisters, including by adoption.

Testimony on the 2005 marriage bill. said Canada lifted the ban on uncles with nieces, aunts with nephews and on cousins back in 1991². How far this has been reflected in the Canon would be useful to clarify.

² Exchange between Senator Milne and Justice expert , Ms L Hitch, from Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 19, p29: .First meeting Monday, July 11, 2005 with the Minister of Justice.

But there was more to come. Under the 2005 Prohibited Degrees Act (a 'consequential amendment' to the main Act on marriage) it appears that uncles and nephews can legally marry now, as can aunts and nieces. The legal text reads

2 (2) No person shall marry another person if they are related lineally, as brother or sister or half-brother or half-sister, including by adoption.

The message is that the Canon’s list is as at 2004, ten years and three Synods ago (where two are needed to change a Canon).The gap is extensive, and reflects a major policy shift toward gender-neutrality in civil law.

3. Age

The Canon prohibits “ the marriage of persons either of whom is under sixteen years of age” (Regulations, Section 4)

The Civil Marriage Act for its part makes no mention of age, which is variously governed outside federal jurisdiction.

4. Immunity of officiants

One’s view is that the Act has already taken particular care to hold officiants harmless. The preamble and text of the Civil Marriage Act read as follows in this matter

“WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;
“

“3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.”

3.1 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.

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.”

Under the division of powers, it is the provincial authorities who have legal jurisdiction over the solemnization (administration) of marriage. Action which would frustrate prevailing federal law (i. e. on the definition of marriage) however, would need to overcome the broad protection of religious freedom under charter rights.

In the end, additional Canonical protections would have to be placed into legislation to have effect. The church's political power to bring this about is questionable.

5. Other divergences

The civil code is silent on other matters important to the Church, such as age, duration or baptised status. But the church appears quite free to set its own rules where they are not inconsistent with the Act or provincial legislation, which as noted covers administrative matters. I think, in other words, that by observing the civil definition as a minimum, one can add other requirements as part of the religious rite. Irwin Cotler, Justice Minister of the day, explained it very well:

“ This bill addresses the civil aspects of marriage, because only that is within the purview of the law.

Religious marriage must be left to each religious group to define. The majority of religions will continue to define marriage as the union of one man and one woman. That is the belief of most religions.”²

2 Exchange between Senator Mitchel and Justice Minister Cotler, from Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 19, p56: meeting Monday, July 11, 2005.

From this, I conclude that, by observing the civil definition as a minimum, one can add other requirements that are part of the religious rite.

On this basis then, requirements for at least one party to be baptised can be specified by the Church. So can other matters found in the Prerequisites section of the Canon, such as age or marriage preparation.

Some marriage contracts too could be changed in future to be of pre-specified duration without diverging from civil marriage law, though expiry of such a contract is not grounds in divorce law.

Definitional matters such as these remain to be applied for same-sex couples.

C, Where next ?

Given approval to revise the Canon, a number implementational changes can be suggested.

1. New title

One beginning step might be to alter the Canon's title. Sometimes, new vocabulary helps decouple from past dialogue. More directly, it can allow new or future situations to be defined into a given topic or link to a related one. A new description for the Canon on Marriage in the Church might read: Canon on Matrimony [{in the Anglican Church} of Canada].

2. Updated definition of marriage

We might choose simply to use the term 'marriage' as it is defined in the Civil Marriage Act and carry on.

Or, we could use our capacity to define religious marriage (see section B 5 above) and put our term 'matrimony' and a new term, 'espousal', to work. We could declare that the Canonical term 'matrimony' is equivalent to the Act's word 'marriage'. Then we go on to say for purposes of Canon law that 'matrimony' between persons of the opposite gender is 'marriage', and matrimony between persons of the same gender is an 'espousal'. An espousal would not be what the Act calls an 'institution other than marriage' which evokes a separate-but-equal problem. Rather, 'espousal' is part and parcel of the umbrella term 'matrimony' and passes constitutional muster by its equivalence to the civil term.

This approach would be faithful to the one-man one-woman understanding of marriage. At the same time, some might see it as too complicated and/or too late now that the expanded meaning of marriage has had ten years to gain traction.

Another instance fitting under the broader term 'matrimony' relates to the inclusion of trans individuals. Where the civil Act refers to 'same-sex', we may wish to 'same-gender', This would be in line with legislation now before the Senate to cover gender identity in the Canadian Human Rights Act.

3. Statement on Civil law

Since procedures to solemnize marriage fall under provincial jurisdiction, it is well and

good to have these well enumerated in the Canon's regulations.³ As agents of the state, however, it seems remarkable that the Canon has no statement about conforming with federal law - under whose jurisdiction the definition of marriage falls.

³ See Prerequisites, section 5.

Requirements of Civil Law

The minister shall ensure that all the requirements of the civil law of the province or other jurisdiction in which the marriage is to be solemnized have been met, in particular that all prerequisite notices, medical certificates, and consents of parents, guardians, or others, have been respectively given, completed, and obtained. and

See also Solemnization of Matrimony, section 15 (b) on the maintenance of civil registers

“The minister shall also record in such other register or form as may be required by the civil law

the particulars prescribed by that law, and shall duly report the same to the appropriate authority”.

These duties all belong to the minister. Responsibility, however, goes far beyond the parish incumbent once recognition of the federal definition is factored in.

It is suggested that a statement be made “to ensure that **all** requirements of the civil law” in Canada are met. It should, I believe, appear up front, i.e. *before* the Regulations - perhaps up around Section 5 of the existing Preface. Reference there to the law is in terms of the church seeking its place among “many different systems of law... in the societies in which believers dwell”.

4. The Table of Kindred and Affinity

The Act's list of who can't marry whom is so reduced from that in the Table of Kindred and Affinity, and so behind in implementation, that a notwithstanding clause of some kind will remain necessary if only to get us to 2019. Unless some non-canonical operating policy lets us waive the two-synod rule for Canonical change, approvals at next General Synod in 2016 can't take effect for another three years. And if Synod 2016 doesn't come to a viable resolution....

One option in future might be to remove it altogether as a qualification to marry. It would be a part of doctrinal evolution in the church, having itself been modified in the past.

5. Blessings

Again on the basis that Resolution C003 is approved, the opportunity will arise to clarify, and Canonically express, the nature and role of blessings in matrimony. At the parish level, couples

waiting for the Church's definition to change should be able, like anyone else, to receive a blessing for a faithful life together. A letter of blessing to that effect might be a welcome symbol of recognition. An authorized prayer which is phrased to 'grant' (as opposed to 'bless') that same life together somehow doesn't seem materially different.

If the civil definition of marriage looks like a step too far, one might have to think about it as rendering unto Caesar, pay our intellectual tax, and be grateful for the scope which the Act gives on the non-civil part of the marriage definition.

Some have suggested getting out of the business altogether. In that case, who legalizes our parishoners' union if the Church is no longer agent of the state? Probably City Hall, if we want to take God out of it.

6. Pastoral outreach

Action on the many challenges identified in this submission is aimed at strengthening the rules, protocols and practices governing marriage. In doing so it improves the relevancy of our mission and helps focus our pastoral ministry to and for all. One form outreach for today's demographic may be blessings on the 'home' of any committed couple 'living apart together'.

That sounds familiar: how can we bless what is sinful? Maybe by blessing what is good about it and leaving the rest to higher authority. This isn't as glib as it sounds: the Church has good offices to offer from counseling to Confession. But not enough of them. Here, the largely unmobilised laity of the church could help and perhaps help more effectively with the great many personal issues which surround marriage. Even simply being around can be a micro-ministry of its own. [The *ministry of who we are* - sermon anyone?]

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