
**PUBLIC OFFICIALS AND FREEDOM OF RELIGION
THE MARRIAGE COMMISSIONERS REFERENCE**

*By Jennifer M. Leddy**

A. INTRODUCTION

On January 10, 2011 the Saskatchewan Court of Appeal (“the Court of Appeal”) released its decision in the *Marriage Commissioners Reference*¹. A Reference is the legal term for questions referred to the Court by the Provincial Government for hearing and consideration. The Saskatchewan Government appointed legal counsel to argue both sides of the questions, and there were also many intervenors. While decisions rendered on a Reference are advisory only and not binding on other Provinces, they are persuasive in framing future legislation.

The *Marriage Commissioners Reference* arose out of the Court of Appeal’s decision on November 5, 2004 and the federal *Civil Marriage Act* of 2005, which broadened the definition of marriage to include same-sex couples. Following the Court of Appeal decision, The Director of the Marriage Unit in the Ministry of Justice and Attorney General advised marriage commissioners that they would be required to perform marriages for same-sex couples. This resulted in some marriage commissioners resigning and others becoming involved in human rights and other civil proceedings. In an effort to accommodate the religious beliefs of marriage commissioners, the provincial government proposed two amendments to the *Marriage Act*: one a “grandfathering provision” that would not require a marriage commissioner appointed before November 5, 2004 to solemnize a marriage if to do so would be contrary to his or her religious beliefs, and the second which would apply to all marriage commissioners irrespective of their date of appointment.

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¹ *Marriage Commissioners Reference*, 2011 SKCA 3

The Court of Appeal unanimously held that both proposed amendments were inconsistent with the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) because they violated the equality rights of gay and lesbian individuals in a way that could not be justified within the meaning of section 1 of the *Charter*. There were, however, two sets of reasons given: the first by The Honourable Mr. Justice Richards, concurred in by the Honourable Chief Justice Klebuc and The Honourable Mr. Justice Ottenbreit (the “Richards Reasons”); and the second by The Honourable Madam Justice Smith, concurred in by The Honourable Mr Justice Vancise (the “Smith Reasons”).

The decision on the Reference was given on the factual basis that marriage commissioners are appointed by the government but are not government employees. In addition, the Director of the Marriage Unit does not assign marriage commissioners to perform ceremonies, generally leaving it up to the couples to contact the marriage commissioner in their area directly.

B. THE RICHARDS REASONS

Mr. Justice Richards first examined whether the purpose or effects of the proposed legislation infringed the equality rights of gay and lesbian individuals guaranteed by section 15 of the *Charter*. Secondly, he considered whether the marriage commissioners’ freedom of religion would be infringed under section 2 of the *Charter* if they were compelled to perform same-sex marriages. He then proceeded to balance these competing *Charter* rights under section 1 of the *Charter*, which permits reasonable limits on guaranteed rights and freedoms that can be demonstrably justified in a free and democratic society. He did not do a separate analysis for each of the two legislative options because in his view marriage commissioners, irrespective of the date of their appointment, have the same obligation to perform marriages in accordance with the prevailing legal definition of marriage. Thus, there is no meaningful difference between the two groups of marriage commissioners from the perspective of constitutional analysis. Mr. Justice Richards also noted that the two legislative proposals were broad enough to encompass any circumstances where solemnizing a marriage would be contrary to religious beliefs, but chose to focus on the circumstances of same-sex couples because that issue led to the Reference.

1. Equality rights guaranteed under S. 15 of the *Charter*

The first step was to determine whether the purpose or effects of the proposed amendments infringed the equality rights in section 15 (1) of the *Charter*, which reads as follows:

15.(1) Every individual is equal before and under the law, 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.

Mr. Justice Richards followed the recent cases² from the Supreme Court of Canada, which establish that the components of a successful equality rights claim are: 1) differential treatment based on one of the grounds listed in section 15 (1) or an analogous ground such as sexual orientation and, 2) discrimination involving factors such as prejudice, stereotyping, or disadvantage. Pre-existing disadvantage and the nature of the interest affected by the proposed legislation are also to be considered in determining whether there has been discrimination.

Mr. Justice Richards had no difficulty in concluding that the purpose of the proposed legislation did not infringe the equality rights under section 15 (1) because the purpose is not to deny rights to same-sex couples, but to “accommodate the religious beliefs of marriage commissioners”. He determined, however, that the effects of the proposed amendments created a distinction, based on sexual orientation, because same-sex couples will be treated differently from other couples who apply to be married.

The argument that a same-sex couple refused by one marriage commissioner, could find another commissioner willing to marry them was not persuasive because it did not take into account: 1) the personal hurt experienced by same-sex couples who are refused, or the risk that there could be more than one refusal; 2) the fact that the proposed amendments do not provide for a minimum complement of commissioners who are available to marry same-sex couples, and 3) the likelihood that same-sex couples in small and isolated centres might have to travel should the marriage commissioner in their area decide to opt out of performing marriages for same-sex couples.

Mr. Justice Richards concluded that the distinction created by the proposed amendments was discriminatory within the meaning of section 15 (1) of the *Charter* because allowing marriage commissioners to refuse to marry same-sex couples would “perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions”.

² *R.v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R.483
Ermineskin Indian Band and Nation v.Canada, 2009 SCC 9,[1 S.C.R.] 222

2. Freedom of Religion guaranteed under section 2 (a) of the *Charter*

Before Mr. Justice Richards could analyse whether infringement of the equality rights of same-sex couples were justified under section 1, he had to consider the claims of the marriage commissioners to freedom of religion.

Mr. Justice Richards affirmed that the Supreme Court of Canada³ has defined freedom of religion under *The Charter* in very broad and generous terms. In *Big M Drug Mart*, Chief Dickson described the essence of freedom of religion as follows at pp. 336-37:

... The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Almost twenty years later, Mr. Justice Iacobucci defined the scope of freedom of religion in paragraph 56 of the *Amselem* case as follows:

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

The *Amselem* case also affirmed that for freedom of religion to be engaged under the *Charter*, it must be shown that the impugned measure interferes with the claimant's ability to act in accordance with his or her practices or beliefs in more than a trivial or substantial way.

³ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551

Given the Supreme Court of Canada jurisprudence, Mr. Justice Richards had no difficulty in finding that the freedom of religion of marriage commissioners would be infringed if they were compelled to perform same-sex marriages contrary to their religious beliefs, and that such infringement would not be merely trivial or insubstantial. In determining whether the infringement is trivial or insubstantial, he held that the question to be determined is not whether “core or peripheral freedoms are in issue” but the consequences of exercising their freedom of religion. The choice for marriage commissioners is to perform same-sex marriages or give up their appointment to perform marriages.

3. Can the proposed amendments be justified under Section 1 of the Charter?

Mr. Justice Richards followed the Supreme Court of Canada’s jurisprudence in holding that the broad definition of freedom of religion leads to balancing and reconciling competing rights under section 1 of the *Charter* rather than “placing internal limits on the scope of freedom of religion”⁴

Section 1 of the *Charter* reads as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The balancing of competing *Charter* rights, in this case the freedom of religion of marriage commissioners and the equality rights of gay and lesbian individuals, is to be done on the basis that there is no hierarchy of rights and that no right is more worthy of protection than another.

The analysis under section 1, known as the *Oakes test*⁵, requires assessing whether the objective of the challenged legislative measure is sufficiently important to justify overriding a *Charter* right or freedom, and whether the means used are proportional in the sense that 1) the specifics of the law are rationally connected to the objective; 2) the law impairs the right or freedom as minimally as possible; and 3) there is an overall proportionality between the deleterious effects of the law and its objective. Mr. Justice Richards found that the objective of the proposed amendments related to concerns that were pressing and substantial and that the proposed amendments satisfied the first element of the proportionality test but not the other two.

⁴ *B.(R.) v. Children’s Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315

⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103

a) The Objective of the Proposed Amendments

For Mr. Justice Richards, the objective of the proposed amendments is to accommodate the religious beliefs of marriage commissioners by exempting them from performing marriages that are contrary to their religious beliefs. In his view, the objective is sufficiently pressing and substantial to pass the first part of the *Oakes test* because:

It seems clear enough that a law aimed at preserving or accommodating a constitutionally guaranteed right or freedom must normally be taken to satisfy this aspect of the *Oakes test* even if the effect of the law in question is to impinge on other *Charter* interests. Otherwise, at this opening stage of the inquiry, a court would be forced to somewhat blindly choose one right or freedom over another. Here, for example, we effectively would be obliged to endorse s. 2(a) interests in priority to those arising under s.15(1), or *vice versa*, without the benefit of a full assessment of all the factors relevant to the best reconciliation of those rights and freedoms. (para 77)

b) Proportionality – Rational Connection

Mr. Justice Richards readily concluded that allowing marriage commissioners to opt out of performing marriages that would be contrary to their religious beliefs was rationally connected to the objective of accommodating those beliefs.

c) Proportionality – Minimal Impairment

This element of the proportionality test does not mean that the means chosen will fail if another less restrictive alternative is possible, but the means chosen must fall within a range of reasonable alternatives. The Court itself raised the possibility of a “single entry system”, whereby instead of contacting marriage commissioners directly couples seeking to marry would contact the Director of the Marriage Unit or some other office. The religious beliefs of commissioners could be accommodated “behind the scenes” by providing the applicant couple with a list of marriage commissioners who would be available. There would, therefore, be no risk of the couple approaching a commissioner and being refused services because of their sexual orientation.

The solicitor appointed by the provincial government to argue in favour of the proposed amendments accepted that the “single entry system” would be a less restrictive means of achieving the objectives of the proposed amendments, and the other participants in the hearing did not suggest that such an approach would be impractical. Mr. Justice Richards, therefore, held that the

proposed amendments did not satisfy the minimal impairment test of proportionality. He underlined, however, that whether a “single entry point” system would survive a constitutional challenge would depend on its specific features, which were not before the Court.

d) Proportionality between Deleterious Effects and Objective

The third element of the proportionality test involves assessing whether “the positive effects of the law warrant its negative impact on guaranteed rights and freedoms”.

Mr. Justice Richards found that the benefits of the proposed amendments were to allow marriage commissioners to opt out of performing marriages that were contrary to their religious beliefs. He noted however that the religious beliefs that the proposed amendments accommodate “do not lie at the heart of” s.2 (a) of the *Charter*.

However, in considering the benefits of the *Options*, it is also important to note that the freedom of religion interests they accommodate do not lie at the heart of s. 2(a) of the *Charter*. In other words, the *Options* are concerned only with the ability of marriage commissioners to act on their beliefs in the world at large. They do not in any way concern the freedom of commissioners to hold the religious beliefs they choose or to worship as they wish. This reality means the benefits flowing from the *Options* are less significant than they might appear on the surface. (para.93)

Mr. Justice Richards identified three deleterious effects of the proposed amendments: 1) it would continue discrimination against same-sex couples who had so recently won the right to marry; 2) it would have a harmful personal impact on the couples who are denied services; and 3) it would undermine the basic principle that government services must be provided on an impartial basis.

The third deleterious effect was clearly the most important for Mr. Justice Richards.

In our tradition, the apparatus of the state serves everyone equally without providing better, poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender. The proud tradition of individual public officeholders is very much imbued with this notion. Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office’s intersection with the public so as to make it conform with their personal religious or other beliefs. (para.97)

Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available

according to the personal religious beliefs of commissioners is highly problematic. It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis. (para. 98)

C. THE SMITH REASONS

Madame Justice Smith came to the same ultimate conclusion as Mr. Justice Richards but for different reasons, particularly with respect to the analysis under section 1 of the *Charter*.

1. The Legislative Objective

Madame Justice Smith found that the legislative objective is to not to accommodate the religious beliefs of marriage commissioners but rather to “permit marriage commissioners to refuse to perform same-sex marriage ceremonies when to do so conflicts with their religious beliefs”. In her view, it is a mistake to characterize the objective as accommodating the religious beliefs of marriage commissioners “if it is assumed that this necessarily takes us to a conflict of equally protected *Charter* rights”. Moreover, the legislative objective must be precisely stated and the societal harm that it is designed to address examined before assuming the importance of the objective.

Under the scheme of the *Marriage Act*, performance of marriage by a commissioner is offered as an alternative for those who do not wish to have a religious ceremony. Given the non-religious nature of civil marriage, Madame Justice Smith found it particularly important to ask in what way could being asked to perform a same-sex marriage offend religious freedom of the commissioner. Unlike Mr. Justice Richards, she then went on to examine the religious beliefs of the participants in the hearing in order to determine the significance of the social harm being addressed and the extent to which religious freedom is infringed.

She summarized the religious objections to performing same-sex marriages as: 1) there is only one institution of marriage, whether it is performed in a civil or religious ceremony and same-sex marriage is contrary to their religious understanding of marriage, and 2) to officiate at a same-sex marriage would suggest approval of sinful behaviour of which they disapprove on religious grounds. Madame Justice Smith dismissed the first objection as invalid because it does not recognize the legal right of same-sex couples to marry, and because the *Marriage Act* provides for both religious and non-religious marriages, with the religious marriages being performed by clergy according to their beliefs and rites.

Nor did Madame Justice Smith accept the second objection that performing a same-sex marriage implies approval of the lifestyle. Yet, she found that refusing to marry a same-sex couple would clearly express disapproval, which would cause harm to the individuals refused and perpetuate historical stereotyping of gays and lesbians. A further concern about the second objection was that the same argument could be made by anyone refusing services to same-sex couples, from those selling marriage licences to those providing accommodation to the public. In making this point, Madame Justice Smith noted that:

The evidence before us clearly establishes that religious disapproval of same-sex relationships is hardly restricted to marriage commissioners. Indeed, it is fair to say that religious belief is at the root of much if not most of the historical discrimination against gays and lesbians. It is fair to ask, then, why it is particularly important to accommodate marriage commissioners' religious beliefs in this respect. (para.145)

In drawing a distinction between the right to hold religious beliefs and engage in particular rites and practices, and the right to act on those beliefs, Madame Justice Smith relied on the *Trinity Western*⁶ case which held that the university students could hold certain religiously based views about same-sex conduct but could not actually discriminate against gays or lesbians in the classroom. She held that the right to act on beliefs diminishes when one moves away from the “fundamental core” of religious rites and practices and when acting on religious beliefs harms others. Since performance of a same-sex civil marriage is not a religious rite or practice, and since the marriage commissioners simply disapprove of same-sex behaviour in others as distinct from being compelled to engage in behaviour they object to, she concluded that it could be argued that the freedom of religion of the marriage commissioners is only interfered with in a trivial or insubstantial way, which would not even engage the right to freedom of religion under section 2 of the *Charter*.

Even if the right of marriage commissioners to be exempt from performing same-sex marriages could fall within the section 2 protection of freedom of religion, Madame Justice Smith would not find the legislative objective sufficiently pressing and substantial under section 1 within the meaning of the *Oakes test*. She held that:

While accommodation of the religious beliefs of employees or other officials can be a legitimate legislative goal, it is my view that, given the jurisprudence I have

⁶ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31; [2001] 1 S.C.R. 772

discussed that would strictly limit s. 2(a) protection of the right to act on religious beliefs (as opposed to the right to hold such beliefs), when to do so would infringe the rights of others, the legislative objective in this case cannot be found to be of sufficient importance to permit the infringement of the *Charter* rights of others. (para.152)

2. Proportionality – the Rational Connection

While Madame Justice Smith conceded that this element of the proportionality test was met, she did point out that the objective is only accomplished by undermining the distinction between civil and religious marriage.

3. Proportionality – Minimal Impairment

Madame Justice Smith had nothing to add to the analysis of Mr. Justice Richards.

4. Proportionality between Effects and Objective

Madame Justice Smith agreed that the fact the proposed amendments would allow a public official to discriminate are contrary to “fundamental principles of equality in a democratic society.” Moreover, the proposed amendments could not stand, given the doubtful value of the objective and the “devastating discriminatory effects of the legislation”.

D. COMMENTARY

- 1) The majority Richards Reasons did not hold that the religious beliefs of the marriage commissioners could not be accommodated but only that the proposed legislation did not do so in a way that would minimally impair the equality rights of same-sex couples. The Court even raised the possibility of the “single entry system” that is in use in Ontario. While the Government of Saskatchewan has chosen not to pursue that route, it is still open to other provincial governments, subject to the specifics of such a scheme being able to pass *Charter* scrutiny.
- 2) A noteworthy feature of this case is that both the Richards and Smith Reasons place limits on the scope of freedom of religion that do not appear to be found in the leading Supreme Court of Canada cases of *Big M Drug Mart* and *Amselem*. Both sets of reasons draw a distinction between what they consider “interests at the heart of” or the “fundamental core” of freedom of religion. They limit these core

elements to worship and holding beliefs, in effect making a distinction between private and public belief. By contrast, Chief Justice Dickson in *Big M Drug Mart* goes beyond the liberty to hold beliefs to the right to “manifest belief” and not to be forced to act contrary to one’s beliefs or conscience. The Court’s competence to judge which beliefs and practices are “core” is unclear, in light of the *Amselem* case, which held that it was not for the Court to determine if a belief is in conformity with religious dogma, but only to assess if the claimant sincerely holds a belief that has a nexus with religion. In deference to the broad and generous interpretation given to freedom of religion in the Supreme Court of Canada cases, Mr. Justice Richards did not restrict its definition until the analysis under section one of the *Charter* rights, but this approach results in a less robust right for the section 1 analysis. Madame Justice Smith makes the distinction at an earlier stage of the *Charter* analysis with the result that the right is so diluted there is nothing to reconcile.

- 3) The most compelling feature of the case is the principle that all public services should be available to all members of the public without distinction or discrimination. The position of the marriage commissioners was not that same-sex marriage should be unavailable, or that the definition of marriage should conform to their religious belief, or that religious practice should be imported into a civil ceremony, but that same-sex marriages should be performed by commissioners who were able to do so without offending their religious beliefs.
- 4) The implications of the decision in this reference could be far reaching if the religious beliefs and consciences of those who work for public institutions can not be accommodated. Both reasons for decisions give insufficient weight to the consequences faced by the marriage commissioners – they must choose between losing their position or staying and acting contrary to their religious beliefs.

E. CONCLUSION

In the future, there are likely to be more cases with different factual contexts where competing *Charter* rights are in issue. It is hoped that in attempting to reconcile these rights that the Courts will seek “constructive compromises” as suggested in a recent Ontario case,⁷ and respect to the extent possible all *Charter* rights that are in play.

⁷ *R.v. N.S.* [2010] O.J. No.4306