THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2011 SKCA 3 Date: 20110110

Docket: 1800

In the Matter of Marriage Commissioners Appointed Under *The Marriage Act, 1995*, S.S. 1995, c. M-4.1;

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal Under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29;

Coram:

Klebuc C.J.S., Vancise, Richards, Smith and Ottenbreit JJ.A.

Counsel:

Michael Megaw, Q.C. and Scott Hopley, counsel appointed to argue in favour of the constitutional validity of the possible amendments to *The Marriage Act, 1995*

Reynold Robertson, Q.C., Sean Sinclair and Candice Grant, counsel appointed to argue against the constitutional validity of the possible amendments to *The Marriage Act, 1995*

Cynthia Petersen for Egale Canada Inc.

Thomas Schuck and Ruth Ross for the Christian Legal Fellowship

Dale Blenner-Hassett for the Canadian Fellowship of Churches and Ministers

J. Scott Kennedy and Faye Sonier for the Evangelical Fellowship of Canada

Grace Mackintosh, Gerald Chipeur, Q.C. and Jill Wilkie for the Seventh-Day Adventist Church in Canada and the Manitoba-Saskatchewan Conference of the Seventh-Day Adventist Church

Patrick Loran for Reverend Paul Donlevy

Philip Fourie for Bruce Goertzen, Larry Bjerland and Désirée Dichmont

Janice Gingell for the Saskatchewan Human Rights Commission

Merrilee Rasmussen, Q.C. for the Canadian Civil Liberties Association

Larry Kowalchuk for the Saskatchewan Federation of Labour, Solidarity and Pride Committee et al

Appeal:

Heard:	May 13-14, 2010
Disposition:	Reference questions answered in the negative
Majority Reasons:	January 10, 2011
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Chief Justice Klebuc
	The Honourable Mr. Justice Ottenbreit
Concurring Reasons:	The Honourable Madam Justice Smith
In Concurrence:	The Honourable Mr. Justice Vancise

Richards J.A.

I. Introduction

[1] In 2004, the Supreme Court of Canada rendered a landmark decision confirming the legal validity of same-sex marriage. Parliament then enacted legislation redefining marriage to include such unions. This led some marriage commissioners in Saskatchewan to refuse to solemnize same-sex marriages on the basis that they could not provide services in this regard without acting in violation of their personal religious beliefs. Their position gave rise to various legal proceedings pursuant to *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 and a civil action in the Court of Queen's Bench.

[2] Against this background, the Lieutenant Governor in Council has requested the Court's opinion on the constitutional validity of two possible amendments to *The Marriage Act, 1995*, S.S. 1995, c. M-4.1. The first amendment would change the *Act* so as to allow a marriage commissioner appointed on or before November 5, 2004 to decline to solemnize a marriage if performing the ceremony would be contrary to his or her religious beliefs. The second amendment (an alternative to the first) would allow every commissioner, regardless of his or her date of appointment, to decline to solemnize a marriage if doing so would be contrary to his or her religious beliefs.

[3] This decision constitutes the response to the questions presented by the Lieutenant Governor in Council. I conclude, for the reasons set out below,

that both of the possible amendments offend the *Canadian Charter of Rights and Freedoms*. Either of them, if enacted, would violate the equality rights of gay and lesbian individuals. This violation would not be reasonable and justifiable within the meaning of s. 1 of the *Charter*. As a result, if put in place, either option would be unconstitutional and of no force or effect.

II. General Background

A. *The Marriage Act, 1995* and the Role of Marriage Commissioners

[4] Neither Parliament nor the provincial legislatures enjoy plenary authority with respect to the subject of marriage. Section 91.26 of *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 assigns Parliament jurisdiction over "Marriage and Divorce." Section 92.12 gives each provincial legislature jurisdiction with respect to "The Solemnization of Marriage in the Province." It has been long settled that, by virtue of these provisions, Parliament has exclusive legislative competence in relation to the question of the capacity to marry, whereas the provinces have authority in respect of the performance of marriage formalities. See, for example: *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 18.

[5] In Saskatchewan, *The Marriage Act, 1995*, a provincial statute, identifies the persons who are empowered to solemnize marriages. In addition to conferring such authority on various individuals with specified religious connections, the *Act* also provides that a "marriage commissioner" may solemnize marriages. Sections 3 and 4 of the *Act* read as follows:

> 3 The following persons, if registered pursuant to this Act as qualified to solemnize marriage, may solemnize marriage between persons not under a legal disqualification to contract marriage:
>
> (a) a member of the clergy of a religious body who is ordained or appointed according to the rites and ceremonies of that religious body;
>
> (b) any catechist, missionary or theological student who is appointed or commissioned by the governing body of any religious body with special authority to solemnize marriage;
>
> (c) any commissioner or appointed and commissioned officer of the Salvation Army, other than a probationary lieutenant, chosen or commissioned by the Salvation Army to solemnize marriage;
>
> (d) an ordained Rabbi who has charge of or is connected with a congregation in Saskatchewan;
>
> (e) a marriage commissioner appointed by the minister.
>
> 4 Notwithstanding any other Act or law, no person other than a marriage commissioner or a member of the clergy registered pursuant to this Act shall solemnize any marriage.
>
> [emphasis added]

[6] The *Act* does not say a great deal more about the office of marriage commissioner. Section 28 provides that commissioners may be appointed by the minister to whom administration of the *Act* is assigned. Section 29 says commissioners are entitled to receive a prescribed fee for performing a ceremony and s. 31 speaks to the form of the service a commissioner must perform. Section 30 allows the authority of an individual commissioner to be limited to situations where the couple to be married, or one of the parties, belongs to a specific creed or nationality. The record indicates that no appointment of this narrow kind has been made and, as a consequence, the balance of these reasons will focus only on commissioners with a "general" mandate.

[7] The affidavit of Lionel McNabb, the Director of the Marriage Unit in the Ministry of Justice and Attorney General, says there are presently some 372 marriage commissioners in Saskatchewan. On average, each commissioner performs six or seven marriage ceremonies each year. Some, however, conduct considerably more.

[8] The Director of the Marriage Unit does not assign commissioners to perform particular marriage ceremonies. At most, he will provide a couple with contact information and the couple will then approach the commissioner of their choice. Individuals wanting to be married are free to contact a commissioner directly without going through the Director.

[9] Marriage commissioners play a very carefully designed role in the overall scheme of *The Marriage Act, 1995*. Specifically, commissioners are the route – the only route – by which individuals who wish to be married by way of a non-religious ceremony may have their union solemnized. Section 31 of the *Act* sets out both the requirements of, and the wording for, a civil marriage ceremony. Both are strictly non-religious:

> 31 Marriage may be solemnized by a marriage commissioner and contracted in his or her office or any other place he or she selects, but only in the following form and manner:
>
> > (a) the marriage must be contracted in the presence of the witnesses mentioned in section 37, and with open doors;
> >
> > (b) in the presence of the marriage commissioner and witnesses, each of the parties shall declare: "I do solemnly declare that I do not know of any lawful impediment why I, A.B., may not be joined in matrimony to C.D."; and each of the parties shall say to the other: "I call upon these persons here present to witness that I, A.B., do take you, C.D., to be my lawful wedded wife (or husband)"; after which the marriage commissioner shall say: "I, E.F., a marriage commissioner, by virtue of the powers vested in me by *The*

> *Marriage Act, 1995*, do hereby pronounce you A.B. and C.D. to be husband and wife".

[10] All of this is particularly significant for gay and lesbian couples who wish to marry. The material filed with the Court indicates that many religions do not approve of same-sex marriages. The result of this reality is self-evident. Many gay and lesbian couples will not have access to the institution of marriage unless they are able to call on a marriage commissioner to perform the required ceremony.

B. The Events Underpinning this Reference

[11] The road leading to these proceedings begins in November of 2004 when the Court of Queen's Bench, in *N.W. v. Canada (Attorney General)*, 2004 SKQB 434, 246 D.L.R. (4th) 345, declared that the common law definition of marriage for civil purposes must be considered to be "the lawful union of two persons to the exclusion of all others." The Court said a refusal to issue marriage licences to same-sex couples would be a violation of equality rights as guaranteed by s. 15(1) of the *Charter*. In light of this ruling, the Director of the Marriage Unit advised marriage commissioners that they were required to perform marriage ceremonies for couples of the same sex. Eight commissioners subsequently resigned, citing the issue of same-sex marriage.

[12] Subsequently, in December of 2004, the Supreme Court of Canada released its decision in *Reference Re Same-Sex Marriage*, *supra*. That proceeding concerned the validity of proposed federal legislation defining marriage, for civil purposes, as the lawful union of two persons (with no

requirement that the persons be of different sexes). The Supreme Court held that the proposed definition was within the exclusive legislative competence of Parliament and was consistent with the *Charter*. The Court also said the guarantee of freedom of religion in the *Charter* afforded religious officials protection against being compelled by the state to perform same-sex marriages contrary to their religious beliefs. In 2005, Parliament enacted the *Civil Marriage Act*, S.C. 2005, c. 33 redefining marriage to include same-sex unions.

[13] These legal developments served to spawn further litigation in Saskatchewan. Three marriage commissioners, including Orville Nichols, filed human rights complaints against the Government of Saskatchewan alleging that the policy requiring them to perform same-sex marriages infringed their freedom of religion, contrary to s. 4 of *The Saskatchewan Human Rights Code* and their right to carry on an occupation without religious discrimination, contrary to s. 9 of the *Code*. These complaints were investigated and then dismissed. The Chief Commissioner said the Government of Saskatchewan had not discriminated against the marriage commissioners or, alternatively, did not have a duty to accommodate their religious beliefs.

[14] Then, in April of 2005, a human rights complaint was filed against Mr. Nichols. It alleged that he had acted in a discriminatory fashion contrary to s. 12 of the *Code* by refusing to perform a same-sex marriage ceremony. The Human Rights Tribunal upheld the complaint and concluded Mr. Nichols had violated the *Code*. Mr. Nichols then launched an unsuccessful appeal to

the Court of Queen's Bench. See: *Nichols v. Saskatchewan (Human Rights Commission)*, 2009 SKQB 299, [2009] 10 W.W.R. 513. A further appeal to this Court has been lying dormant since the proceedings in this reference were initiated.

[15] The final aspect of the relevant background concerns a civil action commenced in November of 2008 by Mr. Nichols and two other marriage commissioners. They sued the Government, the Attorney General and the Director of the Marriage Unit seeking, among other things, declarations that the Government's requirement that they solemnize same-sex marriages is a breach of their rights under s. 2(a) of the *Charter* and orders requiring the Government to accommodate their religious beliefs.

III. The Reference Questions

[16] On June 30, 2009, the Lieutenant Governor in Council, acting pursuant to *The Constitutional Questions Act,* R.S.S. 1978, c. C-29, passed Order-in-Council 493/2009. In so doing, it sought the Court's opinion on the validity of two alternative possible amendments to *The Marriage Act, 1995*. The relevant parts of the Order-in-Council are set out below:

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the following questions be referred to the Court of Appeal for hearing and consideration:
>
> (a) Is section 28.1 of *The Marriage Act, 1995* as set out in *The Marriage Amendment Act* attached as Schedule A to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
>
> (b) Is section 28.1 of *The Marriage Act, 1995* as set out in *The Marriage Amendment Act* attached as Schedule B to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

[17] The versions of the amendments to *The Marriage Act, 1995*, included in the Order-in-Council as Schedules A and B, read as follows:

> Schedule A
>
> 28.1(1) Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner who was appointed on or before November 5, 2004 is not required to solemnize a marriage if:
>
> (a) to do so would be contrary to the marriage commissioner's religious beliefs; and
>
> (b) the marriage commissioner has filed the notice mentioned in subsection (2) within the period mentioned in that subsection.
>
> (2) A marriage commissioner who wishes to rely on the exemption mentioned in subsection (1) must file a written notice with the director, within three months after the date this section comes into force, stating that the marriage commissioner intends to rely on the exemption.
>
> (3) A marriage commissioner who does not file the notice mentioned in subsection (2) within the required period cannot rely on the exemption mentioned in subsection (1).
>
> Schedule B
>
> 28.1 Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner's religious beliefs.

[18] The significance of the reference to marriage commissioners appointed "on or before November 5, 2004" in the Schedule A option is that this is the date of the Court of Queen's Bench decision striking down the prohibition against same-sex marriage in Saskatchewan. Accordingly, for ease of reference, we will refer to this as the "*Grandfathering Option*" and to the Schedule B alternative as the "*Comprehensive Option.*"

[19] After the questions were referred to the Court, the Ministry of Justice and the Attorney General arranged for the appointment of counsel to argue the

two sides of the issues raised by the reference. Michael Megaw, Q.C. was appointed to argue in favour of the constitutional validity of the possible amendments to *The Marriage Act, 1995*. Reynold Robertson, Q.C. was appointed to argue the contrary position. I should note that, in the end, Mr. Megaw did not attempt to defend the *Grandfathering Option*.

[20] Pursuant to an order of the Court, Mr. Megaw and Mr. Robertson filed various affidavits containing the factual information they considered relevant to the proceedings. Those affidavits are admissible and form part of the record in this proceeding.

[21] The Court also granted intervenor status to the individuals and groups listed in the style of cause. Some of them filed affidavits. We found those affidavits to be admissible.

IV. Analysis

A. The Particulars of the Amendments

[22] Both the *Grandfathering Option* and the *Comprehensive Option* would, if enacted, allow a marriage commissioner to refuse to solemnize a marriage if doing so would be contrary to the commissioner's religious beliefs. The difference between the two alternatives is that, as indicated, the *Grandfathering Option* would operate only with respect to those commissioners appointed on or before November 5, 2004. Any commissioner wishing to take advantage of the exemption provided by the amendment would be required to file a written notice to that effect with the Director of the Marriage Unit. By way of contrast, the *Comprehensive Option* would apply

to all commissioners and would not involve any obligation to file a notice with the Director.

[23] I should perhaps note here that, in the analysis which follows, I do not typically set out a separate line of analysis for the validity of each of the *Grandfathering Option* and the *Comprehensive Option*. Although the *Grandfathering Option* has a more narrow reach than the *Comprehensive Option*, this difference is not of enough significance to place it on different constitutional ground. The root obligation of a marriage commissioner is to solemnize marriages in keeping with how the concept of marriage is legally defined from time to time. Commissioners who were appointed before the Queen's Bench decision recognizing the legality of same-sex marriage in this jurisdiction are in no meaningfully different position than those appointed after the decision was rendered. Indeed, as noted above, Mr. Megaw did not even attempt to defend the constitutional validity of the *Grandfathering Option*.

[24] It may also be worth observing at this point that, although the submissions of counsel understandably focused on the issue of same-sex marriages, neither the *Grandfathering Option* nor the *Comprehensive Option* are limited to such marriages. Rather, they are drafted in general terms and, as a result, would engage in *any* circumstance where solemnizing a marriage would be contrary to the religious beliefs of a marriage commissioner. As a consequence, there might be a variety of situations where, depending on the religious affiliation of a commissioner, he or she could be led to decline to perform a ceremony. The marriages identified in the affidavit of Prof. James

Mullens as potentially offending the religious beliefs of a commissioner include interfaith unions, marriages of individuals who were previously married in a religious ceremony but who have not been released from such marriages, inter-racial marriages, and, finally, marriages involving individuals deemed to be too closely related by blood or family ties. Thus, for example, if a commissioner belonging to a religion which rejects interfaith marriages is asked to marry an interfaith couple, he or she might decline to do so in reliance on one of the proposed amendments.

[25] All of that said, in analyzing the constitutional validity of the two proposals at hand, I intend to focus on the circumstances of same-sex couples. I take that approach because there is no information in the record as to how frequently, if ever, the sorts of situations described by Prof. Mullens might actually arise. More importantly, same-sex marriage is the issue which lies behind the Order-in-Council that initiated these proceedings, and it is the matter which undeniably occupies centre stage in the debate surrounding both the *Grandfathering Option* and the *Comprehensive Option*.

B. The *Charter of Rights and Freedoms* – Basic Principles

[26] With that background, I turn to the question of whether the *Grandfathering Option* and the *Comprehensive Option* are consistent with the *Charter of Rights and Freedoms*.

[27] The *Charter*, of course, is an integral part of the Canadian constitution. Any law that is inconsistent with it is unlawful and of no force or effect.

[28] The basic methodology of *Charter* analysis is well settled. The first step involves an inquiry as to whether either the purpose or the effect of the legislative provision in issue is to curtail one or more of the rights and freedoms guaranteed by the *Charter*. If this is the case, it is necessary to determine whether any such infringement can be justified, within the meaning of s. 1 of the *Charter*, as a reasonable limitation of those rights or freedoms.

C. Do the Amendments Curtail Guaranteed Rights and Freedoms?

[29] The arguments to the effect that the *Grandfathering Option* and the *Comprehensive Option* are unconstitutional are grounded in s. 15(1) of the *Charter*. It sets out a guarantee of equality in these terms:

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

[30] The equality rights issues presented by these proceedings are relatively straightforward and, as a consequence, it is not necessary to parse all of the subtleties of the s. 15 jurisprudence in order to assess the constitutional validity of the *Grandfathering Option* and the *Comprehensive Option*. Nonetheless, in order to understand the principles that animate s. 15(1), it is necessary to briefly highlight the key features of the leading cases.

[31] In the seminal decision of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court indicated that there are two key elements to a successful s. 15(1) claim. First, there must be differential treatment based on one of the grounds listed in s. 15(1) or on an analogous

ground. Second, there must be discrimination involving factors such as prejudice, stereotyping and disadvantage.

[32] Ten years after *Andrews*, and in the wake of some division of opinion with respect to the proper approach to s. 15(1), the Supreme Court indicated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 that the section should be understood as being aimed at preventing the violation of "human dignity" through the imposition of disadvantage, stereotyping, or political or social prejudice. Iacobucci J. identified four factors relevant to determining whether legislation has the effect of demeaning dignity in the relevant sense: (a) pre-existing disadvantage experienced by the individual or group alleging a *Charter* violation, (b) the relationship between the ground on which the claim is based and the nature of the differential treatment, (c) the ameliorative purpose or effects of the impugned measure on a more disadvantaged individual or group, and (d) the nature and scope of the interest affected by the legislation.

[33] Subsequently, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at paras. 14-26, the Court indicated that *Law* should not be understood as having imposed a new test for discrimination but, rather, as having affirmed the basic approach to s. 15(1) set out in *Andrews*. The Court acknowledged and accepted the academic and other criticism of the "human dignity" approach to s. 15(1) and suggested that the analysis in any particular case should focus on the idea of discrimination with "perpetuation of disadvantage and stereotyping" being the primary indicators of discrimination. In this regard, it appeared to suggest that the four factors identified in *Law* as bearing on the

question of whether the impugned measure offends human dignity were also relevant to the question of whether it was discriminatory in the required sense. The Chief Justice and Abella J. jointly wrote as follows:

> [23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[34] Most recently, in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, Rothstein J., writing for the Court, described the operation of s. 15(1) in the following terms:

> [188] This Court's equality jurisprudence makes it clear that not all distinctions are discriminatory. Differential treatment of different groups is not in and of itself a violation of s. 15(1). As this Court stated in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 182 (restated in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 28), a complainant must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (emphasis added). *The analysis, as established in Andrews, consists of two questions: first, does the law create a distinction based on an enumerated or analogous ground; and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping.*
>
> [italics added]

[35] Accordingly, *Kapp* and *Ermineskin Band* provide the most recent guidance about how s. 15(1) should be understood and applied. In this regard, despite its failure to reference the factors mentioned in *Kapp*, I do not think

Ermineskin Band should be read as somehow saying those factors are not relevant to the issue of discrimination and should be ignored. At a minimum, considerations of pre-existing disadvantage and the nature of the interest affected by the impugned law or action are clearly important to the question of whether there has been discrimination.

[36] With that background, I turn to the specifics of the *Grandfathering Option* and the *Comprehensive Option*. Neither makes an express distinction between individuals based on an enumerated or analogous ground and, in my opinion, neither can be impugned on the basis that its *purpose* is to deny rights guaranteed by s. 15(1). As discussed more fully below under the heading "The Objective of the Amendments," the general and immediate aim of both options is to accommodate the religious beliefs of marriage commissioners rather than to deny the rights of same-sex couples. As a result, neither the purpose of the *Grandfathering Option* nor the purpose of the *Comprehensive Option* offends s. 15(1).

[37] What then of the effects of the two options? This question must be considered because a practice or law which is neutral on its face can nevertheless result in a violation of a *Charter* right or freedom. With respect to s. 15(1), it is enough that the effect of the legislation is to deny equal protection or benefit of the law. See: *Andrews v. Law Society of British Columbia*, *supra* at pp. 173-74; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at pp. 544-49; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 62.

[38] In my assessment, the effect of both the *Grandfathering Option* and the *Comprehensive Option* is clear. Either one, if enacted, will create situations where a same-sex couple contacting a marriage commissioner for the purpose of getting married will be told by the commissioner that he or she will not provide the service requested. This is not a merely theoretical concern. It is entirely clear from the affidavits filed by Messrs. Nichols and Bjerland that some marriage commissioners will refuse to perform same-sex marriages if *The Marriage Act, 1995* is amended to give them that option.

[39] In other words, both the *Grandfathering Option* and the *Comprehensive Option* will have the effect of drawing a distinction based on sexual orientation, a ground analogous to those listed in s. 15(1). See: *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 13; *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 at para. 24. Gay and lesbian individuals will be treated differently than other people who wish to be married. The differential treatment will be negative and will flow directly from their sexual orientation.

[40] It was suggested in argument by Mr. Megaw, and some of the intervenors supporting him, that any such impact flowing from either the *Grandfathering Option* or the *Comprehensive Option* will be insignificant because a gay or lesbian couple turned away by a commissioner who does not solemnize same-sex marriages will be able to easily contact another commissioner who will be prepared to proceed. Moreover, they say the number of same-sex marriages will be small and the chances of a gay or

lesbian couple being denied services will not be great. In my view, this line of argument is not persuasive.

[41] First, and most importantly, this submission overlooks, or inappropriately discounts, the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union. As can be easily understood, such effects can be expected to be very significant and genuinely offensive. It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.

[42] Second, if either of the amendments is enacted, it is entirely possible that a significant number of commissioners will choose not to perform same-sex marriages. The impact of commissioners opting in this direction would be compounded by the fact there is nothing in the proposed amendments to ensure some minimum complement of commissioners will always be available to provide services to same-sex couples. Accordingly, if more than a very few commissioners do opt out of solemnizing same-sex marriages, it might well be more difficult than has been suggested for a gay or lesbian couple to find someone to marry them. They might be forced to make numerous calls and face numerous rejections before locating a commissioner who is prepared to assist them.

[43] My third concern about the arguments aimed at minimizing the impact of the amendments is that they take no account of geography. The material filed with the Court suggests marriage commissioners are appointed with a view to ensuring that people in all areas of the Province have a commissioner or commissioners reasonably close at hand. It seems obvious that, if commissioners can opt out of the obligation to perform same-sex marriages, a situation might quickly emerge where gay and lesbian couples (particularly in northern and rural areas or smaller centres) would have to travel some distance to find a commissioner willing to perform a marriage ceremony.

[44] In the result, I have no difficulty concluding that both the *Grandfathering Option* and the *Comprehensive Option* will have the effect of creating a negative distinction based on sexual orientation.

[45] I also have no difficulty finding that the distinction created by both of the possible amendments would be discriminatory within the meaning of s. 15(1) of the *Charter*. The historical marginalization and mistreatment of gay and lesbian individuals is well known. See, for example: *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 173-174. They have been able to recently claim the right to marry only after travelling a very difficult and contentious road. Accordingly, putting gays and lesbians in a situation where a marriage commissioner can refuse to provide his or her services solely because of their sexual orientation would clearly be a retrograde step – a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions.

[46] As a result, the enactment of either the *Grandfathering Option* or the *Comprehensive Option* would curtail rights guaranteed by s. 15(1) of the *Charter of Rights and Freedoms*. Both options, by way of their effect, would draw negative distinctions on the basis of an analogous ground and do so in a discriminatory manner.

D. The Need to Perform a Section 1 Analysis

[47] Before turning to the question of whether the curtailment of s. 15(1) rights that would be occasioned by the *Grandfathering Option* and the *Comprehensive Option* can be justified, it is useful to briefly consider two lines of argument which would render a full s. 1 inquiry unnecessary.

[48] The first argument is advanced by Mr. Megaw and some of the intervenors supporting his position. It is to the effect that the Supreme Court, in *Reference Re Same-Sex Marriage, supra*, has already determined that legislative initiatives of the sort in issue in these proceedings are constitutionally justifiable. They read the Court's decision as saying that the state cannot oblige officials of any sort to solemnize same-sex marriages contrary to their personal religious beliefs and, in this regard, they rely on the following parts of the decision:

> 58 It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.
>
> …
>
> 60 … absent unique circumstances with respect to which we will not speculate, the guarantee of religious freedom in s. 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or

> religious same-sex marriages that are contrary to their religious beliefs.

[49] This line of argument involves a misunderstanding of the Supreme Court's decision. The passages quoted above are taken from the section of the judgment dealing with Question 3 of the reference: "Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?" It is entirely clear that the Court's use of the words "religious officials" in this context was a reference to those individuals, such as priests or rabbis, who hold formal positions in faiths or religious organizations. It was not a reference to *civil* officials who happen to have religious beliefs which do not embrace same-sex marriage. I note that, at the time the *Reference re Same-Sex Marriage* was initiated and argued, there was a not infrequently voiced concern that, if same-sex marriage was recognized as being lawful, church and other such officials (regardless of the dictates of their faiths) would be obliged to solemnize such unions. This was the issue placed before the Supreme Court for consideration. The Court was not asked to consider the circumstances of *civil* officials, such as marriage commissioners, who are responsible for solemnizing marriages.

[50] The second argument which needs to be considered at this point is grounded in the *Civil Marriage Act, supra*. This is the federal legislation enacted after the *Reference re Same-Sex Marriage* to define marriage to include same-sex unions. Section 3 of the *Act* clarifies the intended impact of the new definition of marriage:

> 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.

[51] The intervenor group led by the Seventh Day Adventist Church in Canada submits that, by virtue of the doctrine of federal paramouncy, s. 3 means Saskatchewan cannot deprive marriage commissioners of the right to decline to solemnize same-sex marriages. Reliance is placed on *The Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113.

[52] In my view, this submission is not persuasive. Section 3 of the *Civil Marriage Act* is confined to the federal legislative sphere. It is expressly worded so as to say that 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" by reason of their exercise of specified rights and freedoms. Accordingly, the section does not implicate matters beyond the limits of federal jurisdiction and, as a result, it does not help to resolve the issues involved in the present proceedings. A provincial requirement that marriage commissioners solemnize same-sex marriages does not contradict or in any way frustrate the operation of s. 3 of the *Civil Marriage Act*. As a consequence, there is no basis here for engaging the doctrine of paramountcy.

E. Is the Curtailment of Rights Justifiable?

[53] I return, therefore, to the issue of justification. As indicated, the fact that the *Grandfathering Option* and the *Comprehensive Option* would limit rights guaranteed by s. 15(1) of the *Charter* does not end the inquiry concerning their constitutional validity. It merely leads to s. 1 and the second stage of the analysis: is the limitation justifiable?

[54] In order to answer this question, it is appropriate to begin by highlighting, in broad terms, the principle constitutional values which must be reconciled in these proceedings. As explained above, there are concerns about the equality rights of gay and lesbian individuals in that both the *Grandfathering Option* and the *Comprehensive Option* would offend s. 15(1) of the *Charter*. However, the questions before us are also said to involve the freedom of religion interests of marriage commissioners. This latter point must be fleshed out before we can turn to the particulars of s. 1.

[55] Section 2(a) of the *Charter* provides that "[e]veryone has…freedom of conscience and religion." This guarantee has been defined in very broad terms. Dickson C.J.C. described it as follows in the seminal decision of *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 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.

[56] More recently, in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, Iacobucci J., for the majority of the Supreme Court, said this about the scope of freedom of religion:

> [47] But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties. Indeed, the Ontario Court of Appeal quite correctly noted this in *R. v. Laws* (1998), 165 D.L.R. (4th) 301, at p. 314:
>
> > There was no basis on which the trial judge could distinguish between a requirement of a particular faith and a chosen religious practice. Freedom of religion under the *Charter* surely extends beyond obligatory doctrine.
>
> …
>
> [56] 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.

[57] Fundamentally, this generous view of s. 2(a) freedoms reflects a preference for reconciling competing rights and interests by way of a s. 1 analysis rather than by way of placing internal limits on the scope of religious freedom. La Forest J. made the point as follows in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315:

> [109] This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative

> scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*; see *R. v. Jones, supra,* and *R. v. Edwards Books and Art Ltd., supra.* A similar approach was taken in the context of s. 2*(b)* of the *Charter*, freedom of expression. In *R. v. Keegstra, supra,* Dickson C.J., writing for the majority, stated that s. 1 was better suited than s. 2*(b)* to facilitate the necessary balance between state and individual interests. McLachlin J. (in dissent but not on this point) also rejected several proposed limits to the scope of s. 2*(b)* rights. She suggested that expression should not be excluded from the scope of s. 2*(b)* merely because the effect of such expression was to impede free expression by others.
>
> [110] In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2*(a)*….

[58] The case law illustrates how this approach has been applied. For example, in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* itself, a majority of the Court held that the decision of a mother and father to prohibit doctors from giving a blood transfusion to their infant daughter was protected by freedom of religion because it was dictated by the Jehovah's witness faith. *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 is also a useful reference on this point. There, the court dealt with a school teacher who had voiced public opinions to the effect that Christian civilization was being destroyed by a Jewish conspiracy. La Forest J., writing for the majority, accepted that these actions were protected by freedom of religion. In both cases, the reconciliation of s. 2(a) and other interests was addressed in the context of a s. 1 analysis.

[59] It is now well settled that a breach of s. 2(a) is established if two conditions are satisfied. First, the claimant must sincerely hold a belief, or believe in a practice, that has a nexus with religion. Second, the measure in

issue must be shown to interfere, in more than a trivial or insubstantial way, with the claimant's ability to act in accordance with his or her practices or beliefs. See: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 32; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

[60] The affidavit material filed with the Court indicates that at least some marriage commissioners say solemnizing a same-sex marriage would violate their religious beliefs. As I understood their submissions, none of the participants in these proceedings took significant issue with this idea, *i.e.*, the idea that there are marriage commissioners who would have to act in contravention of sincerely-held religious beliefs in order to solemnize a same-sex marriage. Put more directly, it was generally accepted that the current state of affairs under *The Marriage Act, 1995*, where all commissioners must either perform same-sex ceremonies or lose their offices, represents an incursion on the s. 2(a) freedoms of at least some commissioners. (Counsel for Egale did briefly suggest in her factum that s. 2(a) was not in issue here but this point was not pressed in oral argument.)

[61] That said, it must be remembered that this reference concerns only the constitutional validity of the *Grandfathering Option* and the *Comprehensive Option*. The question before us is whether, if enacted, either *Option* would be constitutionally valid. It is not whether any specific marriage commissioner will ultimately be able to bring himself or herself within the terms of the *Options* or whether any individual commissioner or intervenor in these proceedings has demonstrated to the Court that his or her s. 2(a) rights would

in fact be violated if he or she was required to solemnize a same-sex marriage. As a result, it is not necessary to examine the specifics of the affidavits filed by those who say *The Marriage Act, 1995,* as presently drafted, does not respect their *Charter* rights. While this material adds colour and context to our deliberations, it is not determinative of any of the issues before us. In the present inquiry, no individual marriage commissioner is obliged to "prove" a violation of his or her rights.

[62] Put somewhat differently, the question as to whether there are in fact s. 2(a) freedoms in play in these proceedings must be answered by looking, not so much at the material filed with us by marriage commissioners, but at the specific wording of the *Grandfathering Option* and the *Comprehensive Option*. More directly, the real issue is whether the s. 2(a) freedoms of a marriage commissioner would be curtailed if solemnizing a marriage would, in the words of the *Options*, "be contrary to the marriage commissioner's religious beliefs."

[63] In light of the very broad interpretation the Supreme Court has placed on s. 2(a) of the *Charter*, I conclude that the religious freedom of marriage commissioners would be infringed in such circumstances. As noted above, the Court said, in *R. v. Big M Drug Mart Ltd.*, at p. 337, that freedom of religion means, among other things, "no one is to be forced to act in a way contrary to his beliefs" and, in *Syndicat Northcrest v. Amselem*, at para. 56, that "a practice or belief, having a nexus with religion, which calls for a particular line of conduct" can operate as the foundation of a s. 2(a) claim. Given this view of s. 2(a), it follows that s. 2(a) freedoms are implicated if a

marriage commissioner is obliged to perform a ceremony contrary to his or her religious beliefs.

[64] I note as well that, given the applicable authorities, there is no basis for concluding the infringement of rights arising in such circumstances would be merely "trivial or insubstantial" and hence not a cognizable breach of s. 2(a) of the *Charter*. The notion of a trivial or insubstantial interference with freedom of religion does not involve an inquiry into the extent to which the measure in issue encroaches on s. 2(a) freedoms in the sense of examining whether "core" or "peripheral" freedoms are in issue. Rather, it concerns an examination of the degree to which the freedom is burdened by the measure in question. See: *R. v. Jones*, [1986] 2 S.C.R. 284 at pp. 313-14. Thus, by way of example, when examining this point in *Multani*, *supra*, the Court did not ask how central the practice of wearing a kirpan was to the Sikh faith. Rather, it noted that Mr. Singh's choice was between wearing his kirpan and leaving the public school system. It was because of the consequences of exercising his s. 2(a) freedoms that the interference with them was said to be neither trivial nor substantial. See also: *Syndicat Northcrest v. Amselem*, *supra*, at paras. 58 and 59; *Alberta v. Hutterian Brotherhood of Wilson Colony*, *supra* at para. 34.

[65] In the circumstances at issue here, marriage commissioners have to make a choice. They can either perform same-sex marriages or they can leave their offices. Accordingly, the obligation to perform same-sex ceremonies does not interfere in a trivial or insubstantial way with the s. 2(a) freedoms of

those commissioners who would have to act contrary to their religious beliefs in order to solemnize a same-sex union.

[66] It is apparent, therefore, that answering the questions posed by the Lieutenant Governor in Council is, at bottom, concerned with managing the intersection of the freedom of religion of marriage commissioners on the one hand, and the equality rights of gay and lesbian individuals on the other. Both interests are guaranteed by the *Charter* and this is not a situation where their potential conflict can be resolved through the way in which the scope of either s. 2(a) or s. 15(1) of the *Charter* is delineated. As a consequence, their accommodation or balancing must be conducted by resort to s. 1 of the *Charter*. See: *Reference Re Same-Sex Marriage, supra*, at para. 50; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 878. This assessment must, of course, proceed on the basis that the *Charter* does not create a hierarchy of rights and that neither s. 2(a) interests nor those interests arising under s. 15(1) are, by definition, more worthy of being safeguarded than the other. See: *Dagnais v. Canadian Broadcasting Corp., supra*, at p. 877.

[67] All of this, therefore, takes me at last to s. 1 of the *Charter*. It reads as follows:

> 1. 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.

[68] The basic framework of analysis to be conducted in connection with s. 1 was set out by Dickson C.J.C. in *R. v. Oakes*, [1986] 1 S.C.R. 103 at

pp. 138-39. The first requirement is that the objective of the impugned law be of sufficient importance to warrant overriding a *Charter* right or freedom. The second requirement involves the satisfaction of a form of "proportionality" test. Three factors are considered in determining if a law is proportional in this sense: (a) the particulars of the law must be rationally connected to its objective, (b) the law must impair the right or freedom in question as minimally as possible, and (c) there must be an overall proportionality between the deleterious effects of the law and its object.

[69] I turn now to an examination of each of these matters.

1. The Objective of the Amendments

[70] As indicated, *R. v. Oakes* provides that, in order for a challenged law to be a reasonable limitation of rights or freedoms, the objective of the law must be of sufficient importance to warrant a limitation of rights or freedoms. In Dickson C.J.C.'s words, the objective must relate to concerns that are "pressing and substantial."

[71] The participants in these proceedings do not agree about how to state the objective of the *Grandfathering Option* and the *Comprehensive Option*. Mr. Megaw and various intervenors supporting the validity of the amendments contend both *Options* are generally aimed at protecting the religious freedom of marriage commissioners, a goal which is said to be pressing and substantial. By contrast, it is suggested by Mr. Robertson and some of those opposing the amendments that their objective is to facilitate or permit discrimination against gay and lesbian couples, a self-evidently

improper and unworthy goal which would not satisfy the requirements of the *Oakes* test.

[72] As discussed above, it is true that both the *Grandfathering Option* and the *Comprehensive Option*, if enacted, would have a negative *effect* on the rights of gay and lesbian couples. However, this fact does not control the answer to the question of whether the *objective* of the amendments is sufficiently important to warrant a limitation of rights. In order to respect the integrity of the *Oakes* analytical framework, the effect of an impugned law cannot be allowed to wholly drive the characterization of the objective of the law. Any such approach will confuse and conflate the first step of the *Oakes* inquiry, concerning the importance of the objective of the law, with the final step of the inquiry which, of course, concerns the proportionality between the deleterious effects of the law and the merit of its objective. While the effect of a law can no doubt sometimes cast light on its true purpose, the statement of the objective of the law for purposes of a s. 1 analysis turns on considerations broader than its mere impact.

[73] This is clearly illustrated by the fact that, in any case where a s. 1 analysis is required, it would be possible to state the objective of the impugned measure as involving the denial of *Charter* rights. *R. v. Oakes* itself neatly illustrates the point. It concerned the constitutional validity of s. 8 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, a provision which placed a reverse onus on an offender found to have been in possession of a narcotic to prove that he or she was not in possession for the purpose of trafficking. The Supreme Court could have said the objective of s. 8 was to deny offenders'

rights to be presumed innocent as guaranteed by s. 11(d) of the *Charter*, but it did not. It said the objective of the section was the prevention of drug trafficking by facilitating the conviction of drug traffickers.

[74] Similarly, in the present situation, it is not appropriate to default to the idea that the objective of the *Grandfathering Option* and the *Comprehensive Option* is the denial of the rights of gay and lesbian couples. Rather, the history of this matter clearly indicates that the broad goal of both options is the accommodation of the religious beliefs of marriage commissioners. There is a self-evident link between the lawsuit commenced in November of 2008 to force the Government to accommodate their beliefs and the subsequent initiation of these proceedings which, of course, are designed to test the validity of two different ways that such an accommodation might be effected.

[75] In saying this, I recognize that both the *Grandfathering Option* and the *Comprehensive Option* expressly are said to operate "[n]otwithstanding the *Saskatchewan Human Rights Code*." Extraordinary as this may be, it is at its root a reflection of the fact that, as described above, there is an extant ruling of the Court of Queen's Bench upholding a Tribunal decision to the effect that Mr. Nichols acted contrary to s. 12 of the *Code* by declining to solemnize a same-sex marriage. This is important because the *Code*, in s. 44, says it takes precedence over any other enactment unless the enactment is expressly declared to operate notwithstanding the *Code*. Accordingly, in light of the Queen's Bench ruling, it would be necessary for the Legislature to exempt the *Grandfathering Option* and the *Comprehensive Option* from the application of the *Code* for either to be effective, *i.e.* if they are to accommodate the

religious beliefs of marriage commissioners. All of this is obviously relevant to the inquiry involved in the final step of the *Oakes* analysis concerning the assessment of the proportionality between the effects of the two options and their objectives. However, as explained, it is not appropriate to confuse the effects of the *Options* with their objectives.

[76] As a result, both the *Grandfathering Option* and the *Comprehensive Option* must be seen, in broad terms, as being aimed at accommodating the religious beliefs of marriage commissioners rather than as being aimed at denying the rights of gay and lesbian couples. However, for the specific purpose of the *Oakes* analysis, some further refinement is required in order to avoid stating the legislative objective in overly abstract or general terms. After all, the *Options* do not involve a generalized defence of freedom of religion. Rather, they operate in a very specific context concerning the work of marriage commissioners. Thus, with *Oakes* in mind, it is best to describe the objective of the *Options* as the accommodation of the s. 2(a) *Charter* freedoms of commissioners by relieving them of the obligation to perform marriage ceremonies in circumstances where doing so would be contrary to their religious beliefs.

[77] That initial point resolved, the next question is whether this is an objective of sufficient importance to warrant the limitation of *Charter* rights. I believe it is. 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.

[78] By way of clarification on this point, in coming to the conclusion that the objective of the *Options* satisfies the first element of the *Oakes* test, I have not failed to consider that the religious freedoms in issue here are the freedoms of marriage commissioners acting *qua* commissioners, *i.e.* while acting in a public office. I recognize it might be contended that the objective of accommodating the rights of commissioners in this context is not particularly important because their individual interests are overtaken by a larger community imperative to the effect that public services must be provided on a fair and non-discriminatory basis. However, as indicated, this sort of "balancing" is best conducted in the proportionality wing of the *Oakes* test. In my view, this approach allows for the fullest and most transparent examination of the relevant considerations and best respects the overall design of the *Oakes* framework.

[79] Accordingly, it is my opinion that both the *Grandfathering Option* and the *Comprehensive Option* satisfy the first step of the *Oakes* analysis. Their objective is sufficiently important to warrant the curtailment of *Charter* rights. This takes the analysis to the next stage on the inquiry.

2. Proportionality

[80] As noted earlier, the proportionality side of the *Oakes* framework involves consideration of three matters: (a) the connection between ends and means, (b) less restrictive alternatives, and (c) the proportionality between the objective and deleterious effects of the measure in issue.

(a) Rational Connection

[81] The first step is an inquiry into whether the particulars of the impugned law are "rationally connected" to its objective. The law must be "carefully designed to achieve the objective in question" and it must not be "arbitrary, unfair or based on irrational considerations." See: *R. v. Oakes, supra* at p. 139; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 770. The government "must show a causal connection between the infringement and the benefits sought on the basis of reason or logic." See: *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 153.

[82] There can be no doubt that both the *Grandfathering Option* and the *Comprehensive Option* satisfy these requirements. Allowing commissioners to opt out of solemnizing marriages when performing such ceremonies would offend their religious beliefs is obviously rationally connected to the objective of accommodating those beliefs.

(b) Minimal Impairment

[83] The second stage of the proportionality inquiry involves an assessment of whether the law in issue impairs rights and freedoms as little as reasonably possible in order to meet its objective. The impairment must be "minimal" in

that the law must be carefully constructed so as to limit rights no more than necessary.

[84] The application of the minimal impairment feature of the *Oakes* test involves a certain measure of practical flexibility in the sense that the ultimate question is not whether the law in issue satisfies a bench mark of perfection but, rather, whether it falls within a range of reasonable alternatives. "Minimal impairment" is not an absolute standard and a law will not be found to be overbroad merely because it is possible to conceive of an alternative which might be less restrictive of the rights and freedoms in issue. See, for example: *R v. Edwards Books and Art Ltd.*, *supra*, at p. 782.

[85] That said, during the course of argument on the minimal impairment issue, the Court asked counsel whether there might be a different way of accommodating the religious beliefs of marriage commissioners than the one reflected in the *Grandfathering Option* and the *Comprehensive Option*. Specifically, we raised the possibility of a "single entry point" system under which a couple seeking the services of a marriage commissioner would proceed, not by directly contacting an individual commissioner, but by dealing with the Director of the Marriage Unit or some other central office. In such a system, if the request for the services of a commissioner included information about the sorts of matters that might lead a commissioner to excuse himself or herself on religious grounds, then the religious beliefs of individual commissioners could be accommodated "behind the scenes" with the result that no couple would be denied services because of a consideration which would engage s. 15 of the *Charter*.

[86] This sort of approach can perhaps most easily be understood by describing it in more concrete terms. What if the request for the services of a marriage commissioner involved completion of a form indicating, not just the time and place of the proposed ceremony, but also the genders of the two people planning to marry? (This information is presumably already available in the system in that, in order to obtain a marriage licence, people planning to marry must present identification documents which would typically, or perhaps always, reveal their genders.) Assume too that the Director operated a simple internal system whereby a commissioner who did not want to perform same-sex marriage ceremonies because of his or her religious beliefs could make that fact known to the Director. In this sort of arrangement, the Director's office could reply to a request for marriage services by privately taking into account the religious beliefs of commissioners and then providing, to the couple planning to marry, a list of commissioners in the relevant geographical area who would be available on the planned date of the wedding and who would be prepared to officiate. The accommodation of commissioners who did not want to be involved in a same-sex ceremony would not be apparent to the couple proposing to wed and there would be no risk of the couple approaching a commissioner and being refused services because of their sexual orientation.

[87] Mr. Megaw conceded and accepted that this sort of system did in fact represent a less restrictive means of achieving the objectives of the *Grandfathering Option* and the *Comprehensive Option*. None of the other participants in the hearing suggested otherwise or expressed concern that such an approach would be impractical, overly costly, or administratively

unworkable. Further, we were advised by counsel for Egale that in Ontario, or in Toronto at least, a system along these lines is presently in place and operating.

[88] In these circumstances, I am obliged to conclude that neither the *Grandfathering Option* nor the *Comprehensive Option* satisfies the minimal impairment aspect of the *Oakes* test. This conclusion would be enough to resolve an ordinary appeal. However, because this is a reference, I propose to also consider the final aspect of the *Oakes* analysis.

[89] Before moving to that point, however, I note that the constitutional validity of any "single entry point" system would need to be assessed in light of all of the relevant facts pertaining to it and with reference to the specific features of the proposed system. The assessment that, in broad terms, a single entry point model would be less restrictive of s. 15(1) rights than the *Options* is not necessarily a determination that any such system would ultimately pass full constitutional muster.

(c) Proportionality Between Effects and Objective

[90] The third and final aspect of the proportionality inquiry involves consideration of whether the deleterious effects of the impugned law are, overall, proportionate to the public benefit conferred by the law. This involves a broad assessment of whether the positive effects of the law warrant its negative impact on guaranteed rights or freedoms. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, recently

quoted with approval in *Alberta v. Hutterian Brethren of Wilson Colony, supra*, at para. 77, Bastarache J. explained as follows:

> [77] …
>
> The third stage of the proportionality analysis performs a fundamentally distinct role. … The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. *The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.*
>
> [italics added]

[91] Historically, this aspect of the *Oakes* test has been the subject of some academic criticism and has not featured prominently in the jurisprudence. But, in *Alberta v. Hutterian Brethren of Wilson Colony, supra,* at paras. 72-78, the Supreme Court recently reconfirmed this aspect of the proportionality inquiry and clearly endorsed its ongoing application.

[92] What then of the salutary effect of the *Grandfathering Option* and the *Comprehensive Option*? The answer is straightforward and easily described. Both would allow marriage commissioners to avoid acting in situations which would offend their religious beliefs – beliefs which are, no doubt, of very significant importance to some commissioners. The *Grandfathering Option* would, of course, extend this benefit only to those commissioners appointed before November 5, 2004, while the *Comprehensive Option* would make it available to all commissioners regardless of their date of appointment.

[93] 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.

[94] I turn then to the question of deleterious effects. Three points warrant emphasis on this front. First, both the *Grandfathering Option* and the *Comprehensive Option* would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome. It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions.

[95] Second, and more concretely, allowing marriage commissioners to deny services to gay and lesbian couples would have genuinely harmful impacts. This can be seen, for example, in *M.J. v. Nichols* (2008), 63 C.H.R.R. D/145, where M.J. testified as follows about his reaction to being denied services by a marriage commissioner:

> It was actually pretty devastating… So when this happened I was quite devastated. I rehashed this I don't know how much when I couldn't sleep because I actually wound up sleeping very little. I was just crushed about it. I couldn't believe that as a human being I wasn't going to be treated as a real person. And everybody should be treated as a real person. …

[96] Negative effects of this sort would not be restricted to those gay and lesbian individuals who are directly denied marriage services. A more generalized version of it would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole. Simply put, it is not just gay and lesbian couples themselves who would be hurt or offended by the notion that a governmental official can deny services to same-sex couples. Many members of the public would also be negatively affected by the idea.

[97] The third, and in some ways most important deleterious effect of the *Grandfathering Option* and the *Comprehensive Option*, is that both would undermine a deeply entrenched and fundamentally important aspect of our system of government. 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. Any idea of this sort would sit uneasily with the principle of the rule of law to the effect that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." See: *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 748; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

[98] 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.

[99] Taking all of the relevant considerations into account, it is readily apparent that the positive aspects of the objective sought by the *Grandfathering Option* and the *Comprehensive Option* do not outweigh their deleterious effects. As a result, neither alternative satisfies the third aspect of the proportionality wing of the *Oakes* test.

[100] In my opinion, neither the *Grandfathering Option* nor the *Comprehensive Option* curtail equality rights in a way that is justifiable within the meaning of s. 1 of the *Charter*. The Supreme Court has repeatedly confirmed that freedom of religion is not absolute and that, in appropriate cases, it is subject to limitation. This is clearly one of those situations where religious freedom must yield to the larger public interest.

V. Conclusion

[101] I answer the questions posed by the Lieutenant Governor in Council as follows:

(a) Is s. 28.1 of *The Marriage Act, 1995* as set out in *The Marriage*

Amendment Act attached as Schedule A to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer:

No. If enacted, s. 28.1, as set out in Schedule "A", would offend s. 15(1) of the *Canadian Charter of Rights and Freedoms* and would not be justifiable pursuant to s. 1.

(b) Is section 28.1 of *The Marriage Act, 1995* as set out in *The Marriage Amendment Act* attached as Schedule B to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer:

No. If enacted, s. 28.1, as set out in Schedule B, would offend s. 15(1) of the *Canadian Charter of Rights and Freedoms* and would not be justifiable pursuant to s. 1.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of January, A.D. 2011.

"RICHARDS J.A."

RICHARDS J.A.

I concur "OTTENBREIT J.A."

for KLEBUC C.J.S.

I concur "OTTENBREIT J.A."

OTTENBREIT J.A.

Smith J.A.

I. Introduction

[102] I have had the opportunity to read the judgment of Richards J.A. and I agree with the conclusions that he has reached that both of the proposed amendments to *The Marriage Act, 1995,* S.S. 1995, c. M-4.1, are inconsistent with the *Canadian Charter of Rights and Freedoms* because, if enacted, they would offend s. 15(1) of the *Charter* and would not be justifiable pursuant to s. 1. Certainly I agree that the amendments, if enacted, would have a discriminatory effect on same-sex couples contrary to s. 15(1) of the *Charter.* However, it is my view that the full implications of the proposed legislation raise fundamental issues of constitutional principle that should be further articulated in the context of a constitutional reference by the Attorney General of this Province seeking the opinion of this Court. In particular, I would articulate the legislative objective of the proposed amendments differently than my colleague has done, and accord it a considerably more attenuated value in the context of the s. 1 analysis in accordance with the criteria established in *R. v. Oakes,* [1986] 1 S.C.R. 103. This, in turn, leads to a somewhat different analysis of the proportionality portion of the *Oakes* test.

[103] It is important to undertake this analysis for, in my view, if the proposed legislative amendments were constitutionally acceptable, so too would be virtually any legislative provision protecting individual discrimination in the delivery of services to same-sex couples, in either the public or the private sector, on the basis of religious disapproval of a same-sex lifestyle. For this

reason, it is important, in my view, to articulate as fully as possible the reasons that these proposed amendments are constitutionally offensive.

II. The Discriminatory Effect of the Proposed Legislation

[104] I begin with a few comments about the discriminatory effect of the proposed amendments. Like my colleague, and for the same reasons, I will focus on the effect these amendments would have on same-sex couples, although it is true that they would also, on a proper reading, authorize marriage commissioners to discriminate on other grounds. It is my view, which I will set out more fully below, that the purpose of the proposed amendments is to permit marriage commissioners to refuse to marry same-sex couples if they object to doing so for religious reasons.

[105] I agree that a refusal on this ground could be devastating to a same-sex couple and that there is no reason for us to assume that this would rarely happen. Indeed, if anything, the evidence before us would indicate that religious objection to same-sex marriage and, indeed, to same-sex relationships, is widespread and, if permitted by legislation, would be frequently invoked to deny service to same-sex couples.

[106] According to the evidence before us, a significant number of religious organizations currently disapprove of same-sex marriages and, as I will further explain below, clergy related to these organizations are permitted to and will therefore refuse to perform same-sex marriages. These include most Christian denominations including Roman Catholic, Lutheran, Baptist, Pentecostal, Apostolic, Christian Reformed, Orthodox Christianity, member

churches of the Evangelical Fellowship of Canada and churches who are historically descended from the Holiness Movement of the 19th century (Salvation Army, Church of the Nazarene, Christian Missionary Alliance and many others) and others too numerous to list. In addition, Judaism, Islam, Confucianism, and Taoism, among other non-Christian religious, tend to be opposed to the expression of homosexuality. (See the affidavit of Bryan Hillis in Information and Materials Forming the Record, (hereafter, "the Record") Tab 8, paragraphs 8 and 9) Accordingly, for many same-sex couples, civil marriage by a marriage commissioner is the only option for obtaining a legal marriage. The potential for psychological harm and for inconvenience to individual same-sex couples, as described by my colleague, is therefore significant.

[107] More important, however, is the affront to dignity, and the perpetuation of social and political prejudice and negative stereo-typing that such refusals would cause. Furthermore, even if the risk of actual refusal were minimal, knowing that legislation would legitimize such discrimination is itself an affront to the dignity and worth of homosexual individuals. History has established and jurisprudence has confirmed the extreme vulnerability of this group to discrimination and even hatred. The historical, social, political and economic disadvantage suffered by homosexuals in Canadian society is well described in this often quoted passage from the judgment of Cory and Iaccobucci JJ. in *Egan v. Canada,* [1995] 2 S.C.R. 513:

> **173** The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation: *Equality For All: Report of the Parliamentary Committee on Equality*

Rights (1985), at p. 26; Cynthia Petersen, "A Queer Response to Bashing: Legislating Against Hate" (1991), 16 *Queen's L.J.* 237; Nova Scotia Public Interest Research Group, "*Proud but Cautious": Homophobic Abuse and Discrimination in Nova Scotia* (1994); Bill C-41 (1994). They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation: *Equality For All, supra*, at pp. 30-32; *Douglas v. Canada* (1992), 58 F.T.R. 147. The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life.

174 For example, a study by the Quebec Human Rights Commission has indicated that the isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths: *De l'illégalité à l'égalité: Rapport de la consultation publique sur la violence et la discrimination envers les gais et lesbiennes* (Commission des droits de la personne du Québec, May 1994), at p. 125. Until 1969, certain forms of homosexual sexual intercourse were criminal offences. Until 1973, the American Psychiatric Association labelled homosexuality a psychiatric disorder and the World Health Organization considered it a psychiatric disorder until as recently as 1993.

175 Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner. The Charter protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection. Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected. The European Parliament, in its legislation prohibiting discrimination on the basis of sexual orientation, specifically sought to address the discrimination faced by homosexuals not only as individuals but as couples: *Resolution on Equal Rights for Homosexuals and Lesbians in the European Community* (A3-0028/94). These studies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.

[108] Those who support the legislative amendments before this Court have argued that the proposed legislation seeks to achieve a balance between the right of same-sex couples to marry (which would not be significantly affected by the legislation) and the right of marriage commissioners to religious freedom. But it is not merely or even primarily the right of same-sex couples to marry that the amendments would infringe. It is the right of this vulnerable group to be free from discrimination and prejudice in the delivery of a public service, available without discrimination to all other members of society. In my view, there can be no question but that this legislation, if enacted, would violate the right of same-sex couples to equal protection of the law contrary to s. 15(1) of the *Charter*.

III. Section 1 of the *Charter*: The *Oakes* Test

[109] The question, then, is whether this infringement can be justified under s. 1 of the *Charter*, as a reasonable limit to the s. 15(1) *Charter* right, prescribed by law, that can be demonstrably justified in a free and democratic society. The *Oakes* test requires the Court to first determine whether the objective of the legislation is pressing and substantial. If so, the question is whether the legislation passes the proportionality part of the *Oakes* test in that (a) it is rationally connected to its objective, (b) it is designed to achieve its objective in a way that minimally impairs the *Charter* right at issue, and, (c) its salutary effects in respect to its objective are not outweighed by the deleterious effects in relation to the offended *Charter* right. (*R. v. Oakes*, *supra*, at pp. 138-9.)

A. The Legislative Objective

[110] The question of how the objective of the impugned legislation is characterized can be of significance in the analysis required by the *Oakes* test. It is evident, for example, that the first two of the branches of the proportionality test presume the validity of the legislative objective and question only how it is best and most equitably to be achieved. In early *Charter* jurisprudence, as in *Oakes* itself, for example, it was assumed that only an objective of considerable public value and importance could warrant infringement of a constitutionally protected *Charter* right. In fact, for some time, little emphasis was placed on the third branch of proportionality—the balancing of salutary and deleterious effects, and some considered this part of the test redundant. That approach appears to have ended with the decisions of the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877, where a true assessment of whether the benefits of the legislation are proportional to the deleterious effect of the *Charter* infringement was endorsed. One result, it appears, has been to apply a less exacting standard to determine whether the legislative objective is sufficiently pressing and substantial, so long as it is at least a legitimate governmental concern, leaving doubts as to the value of the objective to be resolved in the balancing required by the third branch of the proportionality test.

[111] There are dangers, nonetheless, in characterizing a doubtful legislative objective in such broad and abstract terms that there can be no serious question as to whether it is sufficiently important to override a *Charter* right, for to do so can unduly limit the proportionality analysis as well. For this

reason, the Supreme Court has in a number of cases emphasized that it is preferable to state the objective of the law as precisely and specifically as possible, clearly identifying the societal harm which the legislation purportedly addresses and considering the context in which the legislation was proposed as well as the context of the statute as a whole in which the impugned provision occurs.

[112] See, for example, *Thomson Newspapers Co. v. Canada, supra* where Bastarache J. insisted on a precise statement of the exact nature of the harm sought to be remedied by the impugned legislative provision, stating,

> …for the purpose of the s. 1 analysis…it is desirable to state the purpose of the limiting provision as precisely and specifically as possible so as to provide a clear framework for evaluating its importance and the precision with which the means have been crafted to fulfil that objective. (At para. 98, citing in support of this proposition R*JR-MacDonald* [[1995] 3 S.C.R. 199] and *Vriend v. Alberta* [1998] 1 S.C.R. 493 at para. 110).

[113] The desirability of stating the objective of limiting provisions as precisely and specifically as possible so as to provide a clear framework for evaluating its importance and for the proportionality analysis was restated in *Harper v. Canada*, 2004 SCC 33; [2004] 1 S.C.R. 827 (at para. 92). Similarly, in *Canada v. Hislop*, 2007 SCC 10; [2007] 1 S.C.R. 429 (at para 53), regarding the constitutionality of amendments to Canada Pension Plan ("CPP") legislation that would limit the claims of same-sex dependents, the Court held that, while, in an appropriate case, the matching of benefits conferred under the CPP with obligations imposed on same-sex partners under other legislation may be a pressing and substantial objective, it was not enough to make only general reference to those relationships. There had to be an

explanation supported by relevant evidence as to what those relationships were, why they were relevant and why they justified the limit on the *Charter* right that had been found to be violated. Finally, the same point is reiterated in *R. v. Bryan*, 2007 SCC 12; [2007] 1 S.C.R. 527 at para. 11.

[114] In the case before this Court, it is a mistake, in my view, to characterize the objective of the proposed amendments simply as "accommodating the religious beliefs of marriage commissioners," or, as many argued, simply "protecting the religious freedom of marriage commissioners", if it is assumed that this necessarily takes us directly to a conflict of equally protected *Charter* rights: a conflict between the freedom of religion of marriage commissioners (protected by s. 2(a) of the *Charter*), on the one hand, and the equality rights of gay and lesbian individuals to be free from discrimination (protected by s. 15(1)), on the other, requiring an analysis in which neither right is more worthy of being safeguarded than the other. The objective of the proposed legislation must be stated specifically, and the societal harm at which it is directed examined critically prior to an assumption of the unquestionable value of the legislative objective.

[115] The objective of the proposed legislation is to permit marriage commissioners to refuse to perform same-sex marriage ceremonies when to do so conflicts with their religious beliefs. It is evident that complaints by some marriage commissioners that they were compelled to perform same-sex marriages and that this conflicted with their religious beliefs was the impetus for the legislation. This is the purported societal harm that the legislation is intended to address. This goal is apparent from the history preceding this

reference and from the inclusion of the so-called “grandfathering” option in the proposed amendments, the time lines of which are clearly tied to jurisprudence giving same-sex couples the right to marry. But the validity of this goal, and especially its importance, are questions worthy of further attention.

[116] This takes us, I believe, to a more careful examination of the scheme of *The Marriage Act*, *1995* and the role that marriage commissioners and civil marriages play in that scheme. Much of the information in relation to this issue is set out in the affidavit of Lionel McNabb, Director of the Marriage Unit, which is part of the Family Justice Services Branch of the Saskatchewan Ministry of Justice and Attorney General. This affidavit was filed as part of the Record, jointly submitted by Mr. Robertson and Mr. Megaw. It is found at Tab 5 of that volume.

[117] Section 3 of the *Act* provides as follows:

> The following persons, if registered pursuant to this Act as qualified to solemnize marriage, may solemnize marriage between persons not under a legal disqualification to contract marriage:
>
> (a) a member of the clergy of a religious body who is ordained or appointed according to the rites and ceremonies of that religious body;
>
> (b) any catechist, missionary or theological student who is appointed or commissioned by the governing body of any religious body with special authority to solemnize marriage;
>
> (c) any commissioner or appointed and commissioned officer of the Salvation Army, other than a probationary lieutenant, chosen or commissioned by the Salvation Army to solemnize marriage;
>
> (d) an ordained Rabbi who has charge of or is connected with a congregation in Saskatchewan;
>
> (e) a marriage commissioner appointed by the minister.

[118] Mr. McNabb explains that s. 3 of the *Act* authorizes two alternative types of officials to solemnize marriage in the Province: members of the clergy (i.e., the religious officials identified in subsections (a)-(d)) and marriage commissioners (subsection (e)) appointed by the Minister of Justice. No person other than a marriage commissioner or member of the clergy may solemnize any marriage although the Act makes special provision for the celebration of marriages by Doukhobortsi according to the rites and ceremonies of their creed.

[119] Members of the clergy must be registered by the Director, who must be satisfied that the religious body in question is sufficiently well-established to warrant registering the clergy of that body. Section 5(3) of the *Act* requires the Director to consider the continuity of existence of the religious body and whether it has recognized rites and usages respecting the solemnization of marriage. There are currently 138 religious bodies that are considered to satisfy this requirement and from time to time a new religious body is recognized. Subject to this requirement, the Director is required to register any member of the clergy who is permanently resident or regularly attends to pastoral duties in Saskatchewan and whose name is submitted to the Director by the proper ecclesiastical authority of the religious body to which the member of the clergy belongs. The decision whether a particular member of the clergy is authorized to perform marriages is therefore made by the proper ecclesiastical authority of the registered religious body, and not by the Director. In addition, the *Act* does not prescribe a particular form for religious marriage ceremonies performed by members of the clergy. It is expected that members of the clergy will conduct such ceremonies according to the

"recognized rites and usages respecting the solemnization of marriage" of their respective religious bodies. [McNabb affidavit, para. 30]

[120] These provisions are clearly designed to give wide scope to the constitutionally protected value of freedom of religion insofar as the concept of marriage as a religious rite or sacrament is concerned. The question of who can perform a religious marriage and the form the ceremony can take are matters left exclusively to the religious bodies to determine. Further, in *Reference Re Same-Sex Marriage,* 2004 SCC 79; [2004] 3 S.C.R. 698, the Supreme Court has held that religious officials are entitled to decide who may be married in accordance to the rites, practices and beliefs of the religion in question, and, in particular, has held that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter* that could not, absent exceptional circumstances, be justified under s. 1 of the *Charter*. This is because the performance of religious rites, including marriage, is recognized as a fundamental aspect of religious practice. It is at the core of values protected by s. 2(a).

[121] But s. 2(a) of the *Charter* protects not only the right to freely exercise one's religion but also the right to be free from compulsion to practice or recognize any religion. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under the scheme of the *Act*, it is clear that solemnization of marriage by a marriage commissioner is provided as a non-religious alternative for those who, for any reason, are unable to have their marriage solemnized by clergy, or who choose not to do so. This is as much a part of the scheme of the *Act*,

and a recognition of the s. 2(a) *Charter* values inherent in its scheme, as is the provision for and protection of religious marriage ceremonies. Section 30 of the *Act* provides as follows:

> **30** The authority of a marriage commissioner to solemnize marriage may be limited to cases where the parties to the intended marriage belong, or one of them belongs, to a certain creed or nationality, or it may include all cases where either of the parties objects to being or does not desire to be married by any of the persons enumerated in clauses 3(a), (b), (c) and (d).

[122] Although the first portion of this section permits the appointment of marriage commissioners to officiate at marriages for persons of certain creeds or nationalities, Mr. McNabb attests that he is unaware of any present or former marriage commissioners who have held a limited appointment. For the purpose of our discussion, it is only necessary to consider the situation of marriage commissioners with a general appointment.

[123] It is clear that marriage commissioners with a general appointment are intended by the legislation to perform non-religious, civil, as opposed to religious ceremonies. Section 31 of the *Act* sets out the requirements for a civil marriage ceremony, and expressly limits the wording to be used in solemnizing a civil marriage:

> **31** Marriage may be solemnized by a marriage commissioner and contracted in his or her office or any other place he or she selects, but only in the following form and manner:
>
> (a) the marriage must be contracted in the presence of the witnesses mentioned in section 37, and with open doors;
>
> (b) in the presence of the marriage commissioner and witnesses, each of the parties shall declare: “I do solemnly declare that I do not know of any lawful impediment why I, A.B., may not be joined in matrimony to C.D.”; and each of the parties shall say to the other: “I call upon these persons here present to witness that I, A.B., do take you, C.D., to be my lawful wedded wife (or husband)”; after which the marriage commissioner shall say: “I, E.F., a marriage commissioner, by virtue of the powers vested in me by *The*

> *Marriage Act, 1995*, do hereby pronounce you A.B. and C.D. to be husband and wife".

[124] Director McNabb has appended to his affidavit a copy of a manual distributed to all marriages commissioners including Form-MA-3, a recommended format for a civil marriage ceremony. At the bottom of the page of this distribution is a notation: "*Please Note*--There are to be no religions connotations in a civil ceremony." (The Record, McNabb affidavit at Tab 5, attachment at Tab 5E, emphasis in the original.)

[125] The civil and non-religious nature of marriages performed by marriage commissioners is acknowledged by Orville Kenneth Nichols (Affidavit at Tab 9 of the Record). Mr. Nichols is 73 years old and was first appointed a marriage commissioner in April 1983. He has on three occasions declined to officiate at a same-sex marriage, in each case indicating to the couple that he was unable to participate due to his religious beliefs. One of these couples laid a complaint of discrimination with the Saskatchewan Human Rights Commission. Mr. Nichols was, after a hearing, ordered to pay to the couple damages in the amount of $2,500. The decision was unsuccessfully appealed to the Court of Queen's Bench and a further appeal is pending before this Court.

[126] In the instant proceeding, Mr. Nichols attests as follows:

> 8. I understand and accept my responsibility as a marriage commissioner to conduct a civil marriage ceremony without the introduction of any religious comment or statement. I conduct civil marriage ceremonies according to the legislation and my personal religion or religious beliefs do not impact upon those civil marriage ceremonies which I perform. I do not view myself as having any discretion as a

> marriage commissioner to deviate from the requirements of a marriage commissioner set out under the legislation.

[127] Significantly, Mr. Nichols also indicates that, apart from the identified refusals to perform marriages for same-sex couples, he does not refuse to complete any other marriages he is asked to perform unless he has reasonable grounds to believe the marriage is being completed for an improper purpose, such as violation of *Immigration Act* [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27] requirements.

[128] According to Mr. McNabb, there have been 5,713 persons registered with the Marriage Unit by religious bodies as members of the clergy eligible to solemnize marriages since the Marriage Unit was created. There are currently 372 marriage commissioners and there have been 578 since the Marriage Unit was created. Marriage commissioners are appointed by the Minister but are not considered provincial government employees. They are entitled to be paid a prescribed fee of $50 plus travelling expenses by the couple to be married. They are often older individuals, and many of them are retired. On average, marriage commissioners perform approximately six or seven marriage ceremonies per year, but this number clearly varies widely. Mr. Nichols, for example, attests that he performs approximately 75 to 100 ceremonies per year.

[129] With this context in mind, I return to the task of delineating the social harm that the proposed legislation is intended to remedy. Some marriage commissioners have said that performing same-sex civil marriages conflicts

with their religious beliefs and they should not be compelled to perform them. The sincerity of their beliefs is unchallenged. However, in light of the clearly non-religious nature of civil marriage ceremonies conducted by marriage commissioners, and the significance of this aspect of civil marriage in the larger scheme of the *Act*, it is important to ask in precisely what respect being compelled to perform a same-sex marriage can offend the religious freedom of a marriage commissioner. Considerable evidence was put before the Court on this point and it merits attention.

[130] The purpose of this attention to the evidence is not, of course, to examine whether the marriage commissioners who have in fact objected on religious grounds to performing same-sex marriages, and at whom the proposed legislation is in fact directed, would actually fall within the protection these amendments would offer. It is clear that they would. Rather, it is to examine the significance of the societal harm these provisions are intended to remedy and, in particular, whether, and if so, to what extent s. 2(a) *Charter* values are in fact offended by requiring marriage commissioners to perform same-sex marriages. In my view, this inquiry is essential for a proper *Charter* analysis in the case before us.

[131] One of the affiants who support the proposed amendments states his religious objection to marriage commissioners being compelled to perform same-sex marriages in extremely vague and general terms, leaving the reader somewhat mystified as to the nature of the objection. Mr. Nichols sets out his position as follows:

> 10. Public service to my community is of significant importance to me. I view it as my obligation to the society in which I live to actively participate in society functions. I have chosen to exercise this participation through my association as a Justice of the Peace, Senior Presiding Justice of the Peace and Marriage Commissioner. I see the participation in these positions as fulfilling my duties as a citizen and ensuring I put back into society as a responsible, caring member of society.
>
> 11. I am also a practicing Christian. My duty to my religion compels me to refuse to complete certain acts as articles of my faith. I fully understand and accept the right of individuals to obtain a same sex marriage as a legal right and I do not oppose those individuals exercising this legal right. However, I find that I am unable to participate in the exercise of this right due to my religious views. I have arrived at this position only after much reflection and consideration. I have also sought the assistance of those within my faith to provide guidance and advice. In the end, I have resolved that my religious views do not allow me to participate in same-sex marriage ceremonies.

[132] Others, however, are considerably more plain-spoken in relation to their objection to same-sex unions, and many refuse to acknowledge any distinction between the civil and the religious concepts of marriage. Some, like Mr. Nichols, acknowledge in one breath the legality and legitimacy of same-sex civil marriages, while in the next claim that to perform a same-sex marriage ceremony would offend their religious beliefs. Others express strong objection to the way Canadian law legitimizing same-sex marriage has evolved and, indeed, object to the current law. A theme that runs through this evidence, however, is the view that officiating at a same-sex marriage offends the religious beliefs of some marriage commissioners because to do so would constitute condonation or approval of same-sex relationships, which they find religiously and morally repugnant and socially harmful.

[133] Intervener Reverend Paul Donlevy, Chancellor of the Roman Catholic Diocese of Saskatoon, indicates that Catholic teaching would fail to acknowledge the *validity* of same-sex marriage, for, "[f]rom its inception, and by its nature, procreative love is excluded from such relationships." (Affidavit of Reverend Donlevy, para. 16). He offers this justification for declining to perform civil same-sex marriages:

> 18. Based on conscience and adherence to their religion, a devout, practising Catholic marriage commissioner would have strong reasons to decline a request to officiate at a same sex marriage. These reasons may include the following:
>
> > (a) Incapability: The conscientious Catholic marriage commissioner would recognize that he or she is not capable of making one kind of relationship into another by participating in the exchange and pronouncing the couple "married".
> >
> > (b) Integrity: To solemnize a same-sex marriage would be to proclaim something which, according to Catholic conscience, is not a true marriage. It would be a misuse of office and it would mislead. It would be against conscience as illustrated by the 7th commandment which forbids false witness.
> >
> > (c) Cooperation in Immorality: Participating in same-sex marriage would require a Catholic marriage commissioner to promote what is regarded in the Catholic Faith as sinful or immoral actions of others and to act contrary to scriptures and church teachings concerning sexuality and the conditions for sexual relationship.

[134] The Christian Legal Fellowship filed affidavits of Reverend Joe Boot, Bishop Albert Thévenot, Dr. Paul Cameron and Dr. John Digs.

[135] Reverend Boot purports to set forth "the orthodox Christian position on marriage and the responsibilities man has to God and His law." (para. 3) He discusses the marriage covenant, opining that "monogamous, non-polygamous, heterosexual marriage is…a uniquely Christian doctrine. A Christian must always recognize marriage as such, and understand that any

attempt on the part of society to define it in any other way is disobedience to the Covenant and incurs the righteous judgment of God." (para. 14) He concludes that where secular civil laws contradict God's laws, the Christian is duty bound to obey God's law rather than man-made statute. (para 27)

[136] Bishop Thévenot is Bishop of Prince Albert Roman Catholic Diocese. His affidavit quotes from the *Catechism of the Catholic Church*, describing homosexual acts "as acts of grave depravity…contrary to natural law." It goes on, "….They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved…..Homosexual persons are called to chastity." (para. 9) Bishop Thévenot concludes:

> 12. Therefore, because of the teachings of the Roman Catholic Church, it is immoral for a Catholic to participate in a ceremony, civil or religious, that purports to marry a same-sex couple. Marriage is a sacrament created by God and specially designed for a particular purpose. The teachings of the Catholic Church prohibit adherents from being involved in any way in the creation, promotion or public affirmation of the same-sex marriage relationship itself, *as these constitute condoning or approving the sexual activity of such unions between members of the same gender which is morally wrong and disobedient to God.*…(emphasis added.)

[137] Dr. Paul Cameron, a psychologist, and Dr. John R. Diggs, a medical doctor, attest to the opinions that those who engage in homosexuality are less mentally and physically healthy than those who only engage in heterosexuality, although these opinions, interestingly, would support the view that monogamous same-sex marriages might alleviate many of their concerns.

[138] Finally worthy of mention are the affidavits of the inteveners Bruce Goertzen, Larry Bjerland and Désirée Dichmont. The first two are Saskatchewan marriage commissioners who seek the right to refuse to perform same-sex marriages. Ms. Dichmont was a marriage commissioner in Newfoundland who resigned her commission when she was required to perform same-sex marriages if asked.

[139]Mr. Goertzen is a member of a Southern Baptist Church in Prince Albert. He expresses the religious belief that marriage is ordained by God and only God has authority to alter its definition. He adds this:

> 21. I also believe marriage is an external manifestation of community acceptance of a couple into a long-term commitment to a sexual relationship. Therefore I believe that by marrying a couple, a person is approving and spreading the approval of the conduct that is involved.
>
> 22. Performing same-sex marriage ceremonies dramatically offends my sincerely held religious convictions. *I believe that by marrying same-sex couples I would act to approve and spread the approval of conduct that my deepest religious convictions hold as immoral and harmful.*(emphasis added)
>
> 23….My religious beliefs themselves do not distinguish between marriages officiated by clergy and marriages officiated by a marriage commissioner. My religious beliefs prohibit me from being involved in any way in the creation of the same-sex marriage *relationship* itself….

Mr. Bjerland and Ms. Dichmont express the same sentiments in virtually identical words. Ms. Dichmont explains that she resigned as a marriage commissioner in Newfoundland when informed that she would be required to perform same-sex marriages:

> 13. My personal religious convictions, devoid of any prejudice against individuals, required me to refrain from marrying same-sex couples. *By marrying same-sex couples I would have been acting to approve and spread the approval of conduct that my deepest religious convictions hold as immoral and teach to be harmful, not only to the participants, but to society as a whole.* Therefore, I sent my letter of

> resignation on January 12, 2005, albeit most reluctantly, triggering the cancellation of my commission. (Emphasis added)

[140] In short, and in general, the interveners who support the position of the marriage commissioners who seek the immunity that would be provided by the proposed amendments explain the religious objection to performing same-sex marriages on two bases, sometimes alternatively, but often in conjunction: (1) that same-sex marriage is not included in their religious conception of marriage and, there being *no difference* between religious and civil marriage, it is therefore *illegitimate*; and (2) that the claimant believes, on religious grounds, that a same-sex union is sinful (to put it mildly—some also say unhealthy, perverse, etc.) and that to officiate in the ceremony would give the appearance of approval of, and might serve to encourage, such a sinful lifestyle.

[141] The first of these positions, in my view, is contrary to the essence of the provisions of the *Act* designed to protect freedom of religion by providing for both religious marriages, where the ceremony is to be performed by clergy in accordance with the beliefs, rites and sacraments of their religious faith, and also for non-religious civil marriages, where the ceremony is expressly intended to carry no religious implications. The first position is, moreover, expressly contrary to and disapproving of the legislative and jurisprudential evolution of the law upholding the right of same-sex couples to marry.

[142] In relation to the second position, it is far from clear that officiating at a civil marriage ceremony carries any implication or connotation at all that the marriage commissioner who officiates necessarily *approves* of the particular

union. The only evidence we have on this point is to the contrary—the evidence of Mr. Nichols, mentioned above, that no proposed marriages are refused (apart from same-sex marriages) unless they are thought to be for legally improper purposes. However, to *refuse* to perform a same-sex marriage on this basis without doubt expresses *condemnation* of same-sex unions and practices as socially harmful and perverse. Thus, while performing the ceremony when asked might well be neutral, refusing to do so is an overtly discriminatory act that causes psychological harm to couples so refused and perpetuates the prejudice and inequality that gays and lesbians have suffered historically.

[143] While this last point is perhaps most relevant to the balancing of salutary and deleterious effects required by the third leg of the proportionality test within the *Oakes* analysis, it requires consideration at this stage as well, in my view, in determining whether and to what extent the objective of the legislation is pressing and substantial.

[144] There are in addition two further points that must be made in relation to the suggestion that it is of pressing importance to protect the right of marriage commissioners to refuse to perform civil same-sex marriages because to perform them connotes approbation of same-sex relationships, which some marriage commissioners do not, on religious grounds, approve.

[145] The first point, and the most significant, is that precisely the same argument could be invoked by those who sell marriage licenses, or those who rent halls for marriage celebrations, and disapprove, on religious grounds, of

same-sex relationships. But more than this, it could just as easily, and with as much validity, be made by those who provide rental living accommodation to married couples, and even those who provide restaurant meals or entertainment to the public. The desire of individuals providing these services to the public to withhold the service from same-sex couples, on grounds of religious disapproval, is not legislatively protected. 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.

[146] The second point is that, while the right to hold certain religious beliefs, and to engage in particular rites and practices, lie at the core of the right to religious freedom protected by s. 2(a) of the *Charter*, Canadian constitutional jurisprudence has consistently distinguished between the right to hold certain beliefs and the right to act on those beliefs, particularly as one moves out of the fundamental area of religious rites and practices and when acting on a religious belief harms or infringes the rights of others. See, for example, the analysis in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31; [2001] 1 S.C.R. 772, where the Court was at great pains to distinguish between the right of education students to hold negative and stereotypical *beliefs* about gays and lesbians, held to be protected by s. 2(a), from the right to discriminate against others, based on those beliefs, by implication, not protected. At the very least, the protection of s. 2(a) of the

Charter, like s. 2(b) encompasses a range of activities that diminish, as they recede from a fundamental core, in constitutional value.

[147] The performance of a civil marriage by a marriage commissioner under the *Act* is not a religious rite or practice. Nor does the requirement to do so limit or restrict religious belief.

[148] Further, the requirement that marriage commissioners perform same-sex marriages when asked to do so affects their religious objection to same-sex conduct only in a secondary way. In other words, these marriage commissioners are not themselves compelled to engage in the sexual activity they consider objectionable. Their objection is that it is sinful for *others* to engage in such activity. It is therefore arguable that the interference with the right of marriage commissioners to act in accordance with their religious belief, if compelled to perform same-sex marriages of which they disapprove on religious grounds, is trivial or insubstantial, in that it is interference that does not threaten actual religious beliefs or conduct. To the extent that this is so, it does not even fall within the protection of s. 2(a) of the *Charter*.

[149] In *R. v. Jones*, [1986] 2 S.C.R. 284, the appellant operator of a private religious academy was charged with failing to comply with provincial requirements to arrange for external testing of the academy and its pupils. Although he had no objection to school authorities inspecting his academy or his pupils, he took the position that his religious beliefs prevented his making the request, for it implied his subjection to state authority.

[150] Wilson J. although writing in dissent, spoke for four of seven members of the Court in finding that this requirement was so insignificant that s. 2(a) was not offended:

> **63** I believe that the appellant must fail on this ground of appeal. It does not, in my view, offend the appellant's freedom of religion that he is required under the statute to recognize a secular role for the school authorities. And this is what it is. It would be strange indeed if, just because a school had a religious approach to education, it was free from inspection by those whose responsibility it was to ensure that the standards of secular education set by the Province were being met. This, however, is not really the appellant's position. He acknowledges the Board's interest; he simply states that to apply to it for an exemption offends his s. 2(a) right. I think he has failed to establish this. There are many institutions in our society which have both a civil and a religious aspect, e.g. marriage. A person's belief in the religious aspect does not free him of his obligation to comply with the civil aspect. No-one is asking the appellant to replace God with the School Board as the source of his right and his duty to educate his children. They are merely asking him to have the quality of his instruction approved by the secular authorities so that minimum standards may be maintained in all educational establishments in the Province.
>
> . . .
>
> **65** The appellant's real complaint, it seems to me, is effects-based rather than purpose-based. It is the effect of the statutory machinery for certification on his religious beliefs that he is concerned about and he points to this Court's decision in *R. v. Big M Drug Mart Ltd., supra*, at p. 331 as authority for the proposition that legislation may be invalidated if its effect is to violate a constitutional guarantee. However, even assuming that this legislation does affect the appellant's beliefs, which for the reasons given I doubt, not every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion. Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. I believe that this conclusion necessarily follows from the adoption of an effects-based approach to the *Charter*. The U.S. Courts in determining constitutionality sometimes deny the relevance of effect. Thus, in the equal protection area they will look only to the legislative purpose when deciding whether the constitutional guarantee has been violated: *Washington v. Davis*, 426 U.S. 229 (1976). However, in the area of freedom of religion, as noted earlier, if the effects of the legislation are unconstitutional, the legislation has been held to be unconstitutional: *Committee for Public Education and Religious Liberty v. Regan, supra* [444 U.S. 646 (1980)].

[151] If this right did fall under s. 2(a), its restriction would clearly be justifiable pursuant to s. 1. In short, any claim for *Charter* protection of the refusal to perform same-sex marriages in the context of this reference is, at best, an exceedingly weak one.

[152] However, even if the right of marriage commissioners sought to be protected by the proposed legislation is seen to fall within the scope of s. 2(a) protection, liberally construed, it is doubtful that the precise and specific legislative objection in this case can be characterized as "pressing and substantial" within the meaning of the *Oakes* test. That test, I would suggest, requires that the legislative objective, when defined with precision and viewed in the context of the legislation as a whole and the context of the social harm it purports to remedy, must be of sufficient importance that, at least theoretically, it *could* justify the infringement of a *Charter* right. 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 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.

[153] In any case, it is my conclusion that it is at least doubtful that the objective of the proposed amendments meets the threshold of "pressing and substantial" established by the *Oakes* test. Therefore, even if one accepts that the legislative objective does pass this threshold, perhaps by a more abstract

characterization of the objective, it is my view that the doubts I have raised about its value recur and must be recognized in the context of the proportionality analysis and particularly, of course, in the third leg of that test.

B. Proportionality

(i) Rational Connection

[154] In relation to the rational connection leg of the proportionality test, it is true, I concede, that the legislation proposed accomplishes its goal, even where the objective is characterized as I would do: to permit marriage commissioners to refuse to perform same-sex marriages when they object, on religious grounds, to doing so. However, two points need to be made in this context.

[155] The first, as I have already noted, is that, when seen in the context of the *Act* as a whole, the goal of accommodating the religious freedom of marriage commissioners is achieved only at the price of undermining the distinction between religious and civil marriages instituted in the *Act* to protect religious freedom more generally, for it would permit marriage commissioners to import their personal religious beliefs in a significant way into what is necessarily intended to be a non-religious civil ceremony.

[156] The second point arises in relation to the "not withstanding clause" with which both of the proposed amendments commence: "Notwithstanding *The Saskatchewan Human Rights Code*… a marriage commissioner….is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner's religious beliefs." The inclusion of this clause is neither

accidental nor incidental. The legislative objective cannot be achieved without the inclusion of this clause, for refusal to perform a marriage ceremony for a same-sex couple would certainly offend the prohibition against discrimination on grounds of sexual orientation in *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24-1. Section 12(1) of the *Code* prohibits denial of any service offered to the public to any person on the basis of a prohibited ground. Section 2(m.01) (vi) of the *Code* defines "prohibited grounds" to include sexual orientation. Section 44 provides:

> 44. Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

In short, the provisions of the *Code* prevail over other provincial legislation unless they are expressly overridden by a legislative provision. Thus, the proposed amendments would be ineffective in achieving their goal without the notwithstanding clause.

[157] Submissions by the intervener, the Saskatchewan Human Rights Commission indicate that there is no other legislative provision in this Province that is expressly declared to operate notwithstanding the *Code*. The inclusion of the "not withstanding" clause in these proposed amendments is not merely extraordinary. It is unprecedented.

[158] Astonishingly, this clause would grant to a public official, charged with the delivery of a public service, an immunity to the anti-discrimination provisions of the *Code* not enjoyed by any other person in this Province.

Moreover, in practice, it would deny to gays and lesbians the protection from discrimination that the *Code* provides to others. In the words of the Supreme Court's decision in *Vriend, supra,* this clause would send "a strong and sinister message" that "gays and lesbians are less worthy of protection as individuals in Canada's society." (*Vriend, supra*, at paras. 100 and 104.)

[159] While these points do not sit comfortably within the traditional analysis required in relation to the rational connection test, they do point to significant concerns in relation to the means employed by these proposed legislative provisions to achieve their objective.

(ii) Minimal Impairment

[160] The government has conceded that the proposed amendments do not pass the minimal impairment test and I have nothing to add to the analysis of Richards J.A. on this point, with which I fully agree.

(iii) Balancing of Salutary and Deleterious Effects

[161] In relation to the third leg of the proportionality test, the balancing of the salutary and deleterious effects of the legislation, I fully agree that the fact that these proposals would permit discrimination by a public official in the delivery of a public service is so contrary to fundamental principles of equality in a democratic society that these amendments cannot pass this test. However, I would go further, for it is my view that, quite apart from that point, this legislation cannot pass this leg of the proportionality test when one takes into account the doubtful and limited value of the legislative objective, which I have already fully canvassed in the discussion above, and which a full

analysis requires. The purported salutary effects are, in this light, minimal, and they are therefore clearly outweighed by the devastating discriminatory effects of the legislation, compounded by the exclusion of gays and lesbians from the protection of *The Saskatchewan Human Rights Code* in this respect, provided by the notwithstanding clause. The proposed amendments cannot pass this leg of the proportionality test.

IV. Conclusion

[162] I, too, would answer the questions posed by the Lieutenant Governor in Council as follows:

(a) Is s. 28.1 of *The Marriage Act, 1995* as set out in *The Marriage Amendment Act* attached as Schedule A to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer:

No. If enacted, s. 28.1, as set out in Schedule "A", would offend s. 15(1) of the *Canadian Charter of Rights and Freedoms* and would not be justifiable pursuant to s. 1.

(b) Is section 28.1 of *The Marriage Act, 1995* as set out in *The Marriage Amendment Act* attached as Schedule B to this Order consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Answer:

No. If enacted, s. 28.1, as set out in Schedule B, would offend s. 15(1) of the *Canadian Charter of Rights and Freedoms* and would not be justifiable pursuant to s. 1.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of January, A.D. 2011.

"SMITH J.A."

SMITH J.A.

I concur "SMITH J.A."

for VANCISE J.A.