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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	COUNSEL:
	)	
KEVIN RICHARD KISILOWSKY,	)	Jay Cameron,
	)	for the Applicant
Applicant,	)	
	)	
- and -	)	Allison Kindle Pejovic,
	)	for the Respondent
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA,	)	
	)	Judgment delivered:
Respondent.	)	November 21, 2016

SIMONSEN J.

[1] The applicant seeks a declaration pursuant to s. 24(1) of the *Charter* that the cancellation of his registration as marriage commissioner ("the Decision") by the Vital Statistics Agency ("the VSA") of the Province of Manitoba because of his refusal to marry same-sex couples infringes his s. 2(a) right to freedom of religion. The Decision flowed from a September 16, 2004 direction of the VSA requiring all marriage commissioners to marry all legally eligible couples, including same-sex couples. In response to that direction, the applicant, who had been a marriage commissioner, advised the VSA that he would not marry same-sex couples as it would violate his religious beliefs. As a consequence, the

VSA later cancelled his registration. The applicant also seeks an order that the respondent cease violating his s. 2(a) rights and be required to accommodate him.

[2] Manitoba takes the position that the Decision does not engage the applicant's s. 2(a) rights, and that to allow marriage commissioners to refuse to marry same-sex couples would be discriminatory under s. 15(1) of the *Charter*. Manitoba also says that if the applicant's s. 2(a) rights are engaged, the alternative measures provided by both *The Marriage Act*, C.C.S.M. c. M50 ("the *Act*") and the practice of the VSA are a reasonable limit on those rights.

THE *CHARTER* AND THE LEGISLATIVE FRAMEWORK

[3] Sections 2(a) and 15(1) of the *Charter* provide:

> 2. **Fundamental freedoms** - Everyone has the following fundamental freedoms:
>
> > (a) freedom of conscience and religion;
> > …
>
> 15.(1) **Equality before and under law and equal protection and benefit of law** - Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[4] Section 21(1) of the *Act* prescribes the requirements for a legal marriage in Manitoba, and essentially stipulates that both parties be of the age of 18 and that there be no lawful cause or legal impediment to bar the solemnization of the marriage.

[5] Section 2, as follows, provides that religious officials may solemnize marriages:

> **Authority of clergy to solemnize marriages**
> **2** If duly authorized as herein provided a person 18 years of age or more who is
>
> > (a) a member of the clergy, a rabbi, or an official of a religious denomination corresponding to a member of the clergy or a rabbi, duly ordained or appointed according to the rites and ceremonies of the religious denomination to which he belongs; or
> >
> > (b) a catechist, an evangelist, a missionary, or a theological student duly appointed or commissioned by the governing body of a religious denomination with special authority to solemnize marriages;
>
> may solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract the marriage.

[6] Section 7(1) provides for the appointment of civil marriage commissioners:

> **Appointment of marriage commissioners**
> **7(1)** The minister may appoint any person more than 18 years of age as a marriage commissioner for the province or any part thereof specified by the minister and the person may solemnize ceremonies of marriage in accordance with the tenor of the appointment.

[7] Under the "religious stream", religious officials apply to the Director of Vital Statistics to be marriage officiants – who are entitled to refuse to perform ceremonies that are not in accordance with their beliefs. As for the "civil stream", the VSA appoints marriage commissioners and may also appoint an individual to perform a particular marriage – that is, a separate application for every marriage ceremony conducted.

THE BACKGROUND

[8] The applicant is a Christian engaged in Christian ministry through the House of the Risen Son Ministries and the Bondslave Motorcycle Club. He ministers to inner city gang youth, prison inmates and outlaw motorcycle gangs. He is not an ordained minister and has no seminary background. Through his ministry, he periodically encounters people who desire a marriage ceremony with Christian content but who are not involved with, nor inclined to be involved with an organized church.

[9] In 2003, the applicant was appointed a marriage commissioner by the VSA. The applicant alleges that when he applied to be a marriage commissioner, he informed the VSA that, due to his religious beliefs, he would be unable to perform non-Christian weddings, such as ceremonies for Wiccans, Hindus or Muslims. He also alleges that the VSA informed him that his objections were acceptable and that the VSA would put his name on a "private list" so that he could perform only marriages with Christian content.

[10] However, according to Linda Harlos, the Assistant Director of the VSA (in 2014), there is no record of anyone advising the applicant that he would be put on a private list so that he could perform only marriages with Christian content. Ms. Harlos also attests that she spoke with Lise Meixner who worked with the VSA's marriage unit in 2003 who told her that she had no recollection of the applicant advising her that he would be able to perform only marriages with

Christian content, and she did not recollect ever advising him that he could be put on such a private list.

[11] Manitoba says that, in 2003, there was no private list of people who would perform marriages with only Christian content; however, for reasons of which Manitoba is unaware, there was a private list of marriage commissioners as well as a public list at that time. But in 2004 following the decision in ***Vogel v. Canada (Attorney General)***, [2004] M.J. No. 418 (QL), the private list was abolished as being inappropriate.

[12] On September 16, 2004, this court rendered the decision in ***Vogel*** declaring that the opposite sex requirement for marriage violates the equality provision of the *Charter*, with the result that the common law definition of marriage in Manitoba was changed from the union of one man and one woman to the union of two persons. Therefore, the right of same-sex couples to become lawfully married was recognized. Immediately following that court decision, indeed on the same day as the decision, the VSA issued a letter to all marriage commissioners in Manitoba informing them of the court decision and confirming that they were expected to comply with the law. The letter also requested that any marriage commissioner opposed to performing marriages for same-sex couples return their Certificate of Registration.

[13] The applicant filed a complaint with the Manitoba Human Rights Commission arguing that the September 16, 2004 letter constitutes discrimination based on his religious beliefs. That complaint was dismissed and

on November 10, 2005, the VSA informed the applicant that his registration as a marriage commissioner had been cancelled.

[14] In the course of these proceedings, the applicant has also made it clear that, due to his religious beliefs, he will not marry individuals who are divorced for reasons other than abuse, and that it is very important to him that the ceremonies he conducts include a reference to God and Jesus. As well, his evidence is that he has only performed marriage ceremonies for people within his ministry or for individuals that he knows. Between 2007 and 2011, he applied for seven temporary marriage commission appointments and solemnized six marriages on this basis.

ANALYSIS AND DECISION

[15] As I have said, this is an application for a declaration that the cancellation of the applicant's certificate of registration as a marriage commissioner violates his s. 2(a) rights. However, counsel for the applicant concedes that the real issue is the validity of the underlying policy, namely that all marriage commissioners must perform marriages for anyone who is eligible to marry, including same-sex couples. That is to say, the cancellation of the applicant's registration was not really the discriminatory decision of an administrative tribunal or official but followed directly from a rule of general application. This distinction is important to determine the proper analytical framework for assessing the validity of the Decision. I will come back to this later.

[16] Both counsel have submitted that, before analyzing the VSA's actions, I must first determine the applicable "standard of review". On this issue, counsel referred to authorities such as ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190, ***Mouvement laïque québécois v. Saguenay (City)***, 2015 SCC 16, [2015] 2 S.C.R. 3, and ***Trinity Western University v. Law Society of Upper Canada***, 2016 ONCA 518, 131 O.R. (3d) 113. Counsel for the applicant argued for a standard of correctness, taking the position that this case involves a question of "state neutrality" (***Saguenay***). Crown counsel suggested a standard of reasonableness (***Dunsmuir***).

[17] However, unlike the "standard of review" cases referred to above, I am not being asked to review the reasons of a tribunal that determined whether a person's *Charter* rights have been infringed. Rather, it is the decision of the tribunal itself (i.e., the cancellation of the registration) which is alleged to breach the applicant's *Charter* rights. In such cases, the applicable analytical framework is set out in ***Doré v. Barreau du Québec***, 2012 SCC 12, [2012] 1 S.C.R. 395, and followed more recently in ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12, [2015] 1 S.C.R. 613. In their briefs and submissions, counsel referred extensively to ***Doré***. And in his brief, counsel for the applicant stated that the ***Doré*** framework of analysis governs the *Charter* issues in this case.

[18] Before embarking on the ***Doré*** analysis, I note that it may have been better to recognize that the real issue before the court is the validity of the policy

which underlies the Decision. If the focus was on the policy, then the correct analytical approach would be to determine if the policy breached the applicant's s. 2(a) rights and, if so, whether it could withstand s. 1 scrutiny (see ***Greater Vancouver Transport Authority v. Canadian Federation of Students - British Columbia Component***, 2009 SCC 31, [2009] 2 S.C.R. 295). The court in ***Doré*** explained the difference between a s. 1 approach and the ***Doré*** approach (paras. 36-39)

[19] That said, the parties have chosen to frame this as a challenge to the decision to cancel the applicant's appointment as a marriage commissioner. I will accept that parameter because, in the end, both ***Doré*** and the s. 1 approach engage a similar proportionality analysis.

[20] Under ***Doré***, the task of a court reviewing a discretionary administrative decision is to determine whether the decision engages the *Charter* by limiting its protections, and if it does, to determine whether in "assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual context, the decision reflects a proportional balancing of the *Charter* protections at play" (para. 57). This analysis is a highly contextual exercise.

[21] Before returning to ***Doré***, I will address two preliminary issues raised by the applicant which are related to, but not directly based on an alleged infringement of his s. 2(a) rights. First, he says that he did not become a "civil servant" by being appointed a marriage commissioner – such that he had the

right to decide when and how he would use his appointment. He takes the position that he was not obliged to perform any services. However, according to the Supreme Court of Canada in ***Eldridge v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 (QL), a private entity that implements a specific government policy or program acts as "government" and is subject to the *Charter* (para. 43). In ***Nichols v. M.J.***, 2009 SKQB 299, 339 Sask.R. 35, the Saskatchewan Court of Appeal, applying ***Eldridge***, found that a marriage commissioner is properly characterized as "government" within s. 32 of the *Charter* and thus subject to its purview (para. 52). That is to say, a marriage commissioner is required to perform his authorized function in a manner that does not breach the *Charter* rights of others.

[22] The applicant also says that the VSA was not statutorily authorized to cancel his appointment as a marriage commissioner. However, s. 3(3) of the *Act* gives the VSA the power to cancel if it is in "the public interest", which, for the reasons that follow, was a proper basis for the cancellation in this case:

> **Cancellation of registration**
> 3(3) Where, in the opinion of the minister, a person registered under this Act
>
> (a) has ceased to be qualified as provided in section 2; or
>
> (b) should not, in the public interest, continue to be registered;
>
> the minister may cancel the registration of that person; and thereupon that person ceases to be qualified to solemnize ceremonies of marriage.

[23] Turning now to the ***Doré*** analysis, I must first decide whether the VSA's Decision violates the applicant's s. 2(a) rights. Justice Dickson, in ***R. v. Big M***

Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 (QL), outlined the hallmarks of freedom of conscience and religion:

> 94 A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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.
>
> 95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. 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.

[24] The test to determine whether the Decision interferes with the applicant's religious freedom was recently restated in ***Saguenay***:

> 86 … To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied that the complainant's belief is sincere, and (2) find that the complainant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial ….

[25] The applicant argues that it would violate his sincere religious beliefs to marry a same-sex couple and that his ability to act in accordance with his beliefs has been interfered with in a manner that is more than trivial or insubstantial;

the cancellation precludes him, as a marriage commissioner, from performing only those wedding ceremonies that conform to his religious beliefs.

[26] Manitoba acknowledges that the applicant holds a sincere belief that due to his Christian faith, he cannot solemnize marriages of same-sex couples. But Manitoba says that he has not met the second part of the ***Saguenay*** test. It maintains that his ability to act in accordance with his beliefs has not been interfered with in a substantial manner. He is not forced by law to marry anyone. He chooses to apply to be a civil marriage commissioner.

[27] This issue was addressed by the Saskatchewan Court of Appeal in ***In the Matter of Marriage Commissioners Appointed under the Marriage Act, 1995, S.S. 1995, c. M-4.1 ("the Marriage Reference")***, 2011 SKCA 3, [2011] 3 W.W.R. 193). In that case, the court was asked to consider whether proposed amendments to the *Marriage Act*, 1995, S.S. 1995, c. M-4.1, which would grant marriage commissioners the right to refuse to marry same-sex couples, were unconstitutional. Writing for the court, Richards J.A. concluded that the religious freedom of marriage commissioners would be infringed in a manner that was not trivial or insubstantial, if required to perform same-sex marriages contrary to their 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 (S.C.C.), 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.
>
> (Emphasis added)

[28] I accept that requiring marriage commissioners to perform same-sex marriages may impinge on their rights under s. 2(a). However, I do not find that the impact of the Decision on the applicant is more than trivial or insubstantial. He says (on cross-examination on his affidavit) that he has only performed marriage ceremonies for people within his ministry and approximately five couples outside his ministry who were known to him. If he were now registered as a marriage commissioner, he would be willing to perform only specific and limited types of ceremonies that accord with his religious beliefs. He has not in

the past, nor would he in the future, perform marriages for non-Christians or for Christians who offend his moral code (those who have been divorced for reasons be believes are not justified). He does not intend to conduct marriages for the public at large.

[29] But even assuming an infringement of s. 2(a) rights that is more than trivial or insubstantial, the Decision is a reasonable one. It reflects a proportionate balancing of the *Charter* rights that are at play – the applicant's rights under s. 2(a) and the rights under s. 15 of those wishing to marry. The applicant contends that it would not infringe the s. 15(1) rights of same-sex couples if he were allowed to continue to be a marriage commissioner because there would be other marriage commissioners who could perform their marriage ceremonies, and there is no evidence that he ever had to inform potential marriage applicants that he could not perform their ceremony due to his religious beliefs. So he says that there is no real clash of *Charter* rights, only a hypothetical one.

[30] Manitoba counters that the clash is not speculative because the applicant has made his intentions very clear – he will refuse to marry same-sex couples. Manitoba also says that, on this issue, the following comments of Richards J.A. in ***the Marriage Reference*** are apt:

> 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 Buddhist) 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.

[31] I agree that the effect of the applicant telling a same-sex couple that he cannot marry them would be significant and offensive. If the applicant were allowed to refuse to do so, other marriage commissioners may follow suit. This could result in more rejections and difficulty for same-sex couples finding a marriage commissioner who would marry them. This difficulty could be compounded in remote or small communities where the number of marriage commissioners is small. These concerns also apply to non-Christian couples, such as Wiccans, Hindus and Muslims, as well as the divorced couples whom the applicant has said he would also turn away.

[32] In assessing proportionality, I also note that the Decision has had a limited impact on the applicant's s. 2(a) rights because the VSA and the *Act* provide him with an alternative avenue to authorize him to perform marriage ceremonies.

[33] The applicant says that if the *Charter* rights of same-sex couples under s. 15 are engaged, reasonable alternative measures involve placing his name on a private list of marriage commissioners, such that his name would be available only to those who know him and whose marriages would be consistent with his Christian values. This is what he says existed for him prior to 2004. Or he suggests a "Single Point Entry" System, endorsed by the Saskatchewan Court of Appeal in ***the Marriage Reference***.

[34] Manitoba submits that it already provides two reasonable alternative options to the applicant, namely: he could seek to qualify as a religious official by having his organization recognized as a religious denomination; or he could apply for and obtain, as he has in the past, a temporary marriage commissioner's appointment for any specific marriage ceremony he wishes to perform.

[35] With respect to the religious official option, the applicant says that the key to his ministry is that the people he deals with desire Christian content in their marriage ceremonies but are not involved with and do not wish to be involved with an organized church. Therefore, he maintains that this is not a reasonable alternative.

[36] Under s. 2 of the *Act*, the Director of Vital Statistics registers officials of "a religious denomination" as persons authorized to solemnize marriages in a religious ceremony.

[37] Religious denominations may appoint members of that faith to be registered to perform marriage ceremonies. Those individuals may then perform ceremonies in accordance with the tenets of their faith – provided the essential requirements of the *Act* for a legal marriage are met.

[38] "Religious denomination" is defined under s. 1 of the *Act*, as follows:

> **"religious denomination"** means an organized society, association, or body of religious believers or worshippers consisting of not less than 25 persons professing to believe in the same religious doctrines, dogma, or creed and closely associated or organized for religious worship or discipline or both.

[39] During cross-examination on his affidavit, the applicant explained that he meets each week with approximately 20 to 30 bikers for a ride, following which they gather to engage in prayer. He could apply to register this group as a religious denomination. According to the affidavit of Denise Koss, Director of the VSA, if a religious-based group of at least 25 individuals wishes to be recognized as a denomination, they must apply to the VSA, providing the following information:

1. The name of their religious denomination;
2. Proof that they are organized as a society, association or body of religious worshippers who profess to believe in the same religious doctrine, dogma, or creed, for the purposes of associating for religious worship or discipline;

3. The names and addresses of 25 adult members; and,

4. A statement of their religious doctrine, dogma or creed.

Ms. Koss attests that the VSA recognizes a small number of independent religious denominations every year.

[40] If the applicant's organization was approved, it could designate him to perform marriages; he could then do so according to his faith and could refuse to marry couples for religious reasons.

[41] With respect to the temporary marriage commissioner's appointment, the applicant argues that this too is not reasonable. Many of the individuals who want to be married by him seek to do so on short notice, and the temporary appointment is often not issued until four to six weeks after application. As well, there is paperwork involved.

[42] The appointment as a temporary marriage commissioner allows a person to perform a single particular marriage – and allows the applicant to apply to perform only those marriages that conform to his Christian beliefs. Indeed, as I noted earlier, the applicant has applied for seven temporary marriage commission appointments and solemnized six marriages on this basis between 2007 and 2011.

[43] On cross-examination, the applicant indicated that it is not actually the paperwork but rather the delay that makes this process difficult. That said, he was not prepared to identify the names of any individuals he says he has been unable to marry due to delay, nor any details about their requests. As well,

following his cross-examination, Manitoba filed a supplementary affidavit of Ms. Koss, indicating that the VSA can issue a temporary marriage commissioner's appointment within 24 to 48 hours after the application is received. During submissions, Crown counsel allowed that this would occur only in exceptional circumstances.

[44] Therefore, the alternatives available to the applicant are reasonable.

[45] For the above reasons, I am satisfied that the cancellation of the applicant's appointment as a marriage commissioner reflects a proportional balancing of the *Charter* protections that are at play, and thus meets the test in ***Doré***.

[46] Given this conclusion, I need not address the other alternatives suggested by the applicant, but will nonetheless do so briefly as counsel made extensive submissions in this area.

[47] With respect to the private list, this would allow the applicant to refuse to marry not only same–sex couples, but Wiccans, Hindus, Muslims and individuals who are divorced for reasons that do not accord with his religious beliefs. In support of his position that this list should be available to him as a further alternative, the applicant relies, in part, on what transpired at the time he applied to be a marriage commissioner. He says that this past practice is critical.

[48] However, on cross-examination, he was unable to identify the individual at the VSA who told him that he could marry only Christian couples (although I appreciate that he was cross-examined more than ten years after any such

discussion allegedly took place). And the VSA says that there was no conversation. Based on the evidence before me, I am unable to find that such a conversation occurred. Regardless, even if the alleged statement was made, it would, for the reasons outlined, be discriminatory for a marriage commissioner to be permitted to refuse to marry those who do not conform to his Christian beliefs.

[49] The applicant raises not only the option of a private list, but also says that there should be a Single Point Entry System, which was recommended by Richards J.A. in ***the Marriage Reference*** (paras. 85-87) and also considered as potentially suitable by the Newfoundland and Labrador Supreme Court (Trial Division) in ***Dichmont v. Newfoundland and Labrador***, 2015 NLTD(G) 14, 361 Nfld. & P.E.I.R. 256 (NLSC). Under this system, a central authority assigns marriage commissioners to couples seeking to be married.

[50] Manitoba has filed an affidavit of Ms. Koss on this issue, the admissibility of which is challenged by the applicant on the basis that it is hearsay. Specifically, Ms. Koss attests that she has been advised by an officer with the Saskatchewan Marriage Unit that Saskatchewan does not use a Single Point Entry System and that marriage commissioners in that province are expected to marry all eligible couples and that all marriage commissioners are listed by name on the government's website. Ms. Koss also attests that she has been advised by a representative of the Vital Statistics Branch of the Ontario government that at one point the Single Point Entry System was used in Toronto but that this

policy had ended because the government determined that the questions being asked of the couples who were seeking a marriage commissioner violated the Human Rights Code.

[51] With respect to the admissibility of this evidence, the fact that these systems are not in place is the kind of evidence that can be tendered based on information and belief; Queen's Bench Rule 39.01(5) allows for affidavit evidence on applications with respect to facts that are not contentious if the source of the information is specified in the affidavit. Whether or not this system is in place in these provinces is a fact that could have been confirmed by simple inquiry or challenged by affidavits or cross-examination. None of that was done here. I find the evidence to be admissible and I accept it.

[52] The evidence as to why the Single Point Entry System is not in place is another matter, however – that information is challenged and goes to the root of this application. That kind of hearsay is not admissible.

[53] Regardless, I understand Manitoba's submission that, with the Single Point Entry System, the necessary personal questioning of couples by provincial officials would be discriminatory. Presumably, the couples would be questioned on their race, religious beliefs, and sexual orientation, in order to be referred to a suitable marriage commissioner.

[54] Counsel for the applicant notes that, in the application for a marriage license form attached to the affidavit of Ms. Harlos, the applicants are required to

complete a box identified as "Religious Denomination". Crown counsel says that this too is discriminatory and will forthwith be removed from the form.

[55] In any event, Manitoba need not choose the alternative measures that are least intrusive to the applicant's rights. As I have explained, I am satisfied that Manitoba has provided reasonable alternatives to him in this case.

[56] To conclude, I reiterate that the Decision reflects a proportional balancing of the *Charter* protections at play and the statutory objective of governing access to marriage. The positive effects of the Decision are significant. It was a rejection of discrimination against gays and lesbians and their right to marry in Manitoba. It has prevented the applicant from engaging in discriminatory behaviour against same-sex couples. At the same time, the effects on the applicant have been limited. He may practice his faith as he chooses but is simply not permitted to use his faith as a basis to refuse to marry couples whose weddings, due to religious or moral views, offend his. He may marry who he wishes by applying for a temporary marriage commissioner's appointment.

[57] For the foregoing reasons, the application is dismissed.

_____J.