IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

B E T W E E N :

KEVIN RICHARD KISILOWSKY	)	***J. Cameron***
	)	*for the Appellant*
(Applicant) Appellant	)	
	)	***A. L. Kindle Pejovic***
- and -	)	*for the Respondent*
	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA	)	*Appeal heard:* ***September 12, 2017***
	)	
(Respondent) Respondent	)	*Judgment delivered:* ***February 12, 2018***

On appeal from 2016 MBQB 224

CAMERON JA

Introduction

[1] This appeal concerns the applicant's right to freedom of conscience and religion pursuant to section 2(a) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). It also concerns the decision made by the respondent (Manitoba) that all persons seeking registration as a marriage commissioner must agree to perform same-sex marriages.

[2] The applicant claims that the cancellation of his registration as a marriage commissioner by the Vital Statistics Agency (VSA) for the reason that he was only prepared to solemnize Christian wedding ceremonies and not

those for same-sex couples (the Decision), violated his section 2(a) *Charter* rights.

[3] Applying a broad and expansive approach to the interpretation of the applicant's section 2(a) rights, in my view, the Decision constituted an infringement of those rights that was more than trivial or insubstantial. Despite this, the Decision was reasonable. It reflects a proportionate balancing of the applicant's section 2(a) rights and the section 15 equality rights of same-sex couples on which it was based. Manitoba has made available sufficient options that would accommodate the applicant's section 2(a) rights and allow him to solemnize marriages for whom he chooses. Accordingly, for the reasons that follow, I would dismiss the appeal.

Background

[4] The applicant describes himself as a Christian missionary evangelist who ministers to inner-city gang youth, street people, prison inmates and outlaw motorcycle gang members. According to his beliefs, homosexuality and lesbianism constitute sinful conduct and same-sex marriage is contrary to God's laws. During the course of his missionary work, the applicant periodically receives requests to solemnize marriages, which he wishes to accommodate.

[5] In Manitoba, legislation provides for two ways in which a person may be authorized to solemnize marriages. First, a person may be registered as a religious official pursuant to section 2 of *The Marriage Act*, CCSM c M50, (the *Act*) (religious official) to perform religious ceremonies. Specifically, religious denominations may ordain, appoint, or commission members of their faith and apply to register them as religious officials to

solemnize marriages. A religious official may solemnize marriages of his or her choice and is not required to solemnize same-sex marriages.

[6] The second way is to be registered as a marriage commissioner pursuant to section 7(1) of the *Act*. Marriage commissioners provide civil marriage solemnization services on behalf of Manitoba. For ease of reference, sections 2 and 7(1) of the *Act* are attached as an appendix at the end of these reasons.

[7] In addition, the VSA has made temporary marriage commissioner appointments available for the purpose of performing a single, specified marriage.

[8] In 2003, the applicant wished to be registered as a marriage commissioner. He contacted the VSA in this regard. He states that he told the VSA that he objected to performing non-Christian ceremonies. In response, he said that the VSA informed him that he would be put on a "private list" of marriage commissioners allowing him to perform only "marriages with Christian content".

[9] As a result of his inquiries, the applicant submitted an "APPLICATION FOR PRIVATE MARRIAGE COMMISSIONER APPOINTMENT" to the VSA, resulting in him receiving a "Certificate of Registration to Solemnize Marriages" (the registration certificate). The registration certificate was to expire in December 2005.

[10] Manitoba denies that there ever existed a "private list to perform only Christian marriages". However, it admits that, at the time, there was a public list of marriage commissioners and a list of marriage commissioners

who did not want their names to be made public. When the applicant was registered as a marriage commissioner, his name was placed on the latter list.

[11] In 2004, the Supreme Court of Canada released its decision in *Reference re Same-Sex Marriage*, 2004 SCC 79. In that case, the Court held that proposed federal legislation that would extend the capacity to marry to include persons of the same-sex was consistent with the *Charter*. It found that the proposed legislation embodies the government's policy stance in relation to the "s 15(1) equality concerns of same-sex couples" and that it "flows" from the *Charter* rather than violating it (at para 43).

[12] On September 14, 2004, the decision in *Vogel v Canada (Attorney General)*, [2004] MJ No 418, was released. In that case, the Court, with the consent of the Attorney General of Manitoba, held (at para 8.1):

> The opposite-sex requirement in the common law definition of marriage is of no force and effect because it violates the equality rights guaranteed by Section 15(1) of the Canadian Charter of Rights and Freedoms ("the Charter") and does not constitute a reasonable and demonstrably justifiable limit on those rights within the meaning of section 1 of the Charter.

and (at para 8.2):

> The common law definition of marriage in Manitoba is reformulated to be the voluntary union for life of two persons to the exclusion of all others.

[13] Manitoba took the policy position that:

> [I]n order to provide accessible marriage solemnization services to all eligible persons in Manitoba, and in order to comply with the laws in Manitoba, civil marriage commissioners, as a requirement

> of their appointment, must be able to provide their services to same-sex couples.

Further, the VSA made the decision to publish the names of all of the marriage commissioners in Manitoba. The list of marriage commissioners who did not want their names to be published was discontinued.

[14] On the same date as the *Vogel* decision, the VSA sent a letter to all Manitoba marriage commissioners which, in part, stated:

> We anticipate your cooperation in providing your services to same-sex couples in the same manner as you have in the past to opposite-sex couples. As marriage commissioners, you act on behalf of the Province of Manitoba and as such are expected to comply with the changes to the law. In the event you are opposed to performing marriages for same-sex couples, please return your Certificate of Registration to Solemnize Marriages so we may cancel your registration and remove your name from our listings.

[15] The applicant refuses to marry same-sex couples as it is contrary to his religious beliefs. After receiving the letter from the VSA, despite the fact that he refused to marry same-sex couples, he did not return the registration certificate. Rather, in November 2004, the applicant filed a complaint with the Manitoba Human Rights Commission (the Commission), claiming that the letter constituted discrimination based on religious beliefs.

[16] Approximately one year later, on November 10, 2005, after having been advised by the Commission that it had dismissed the complaint, the VSA made the Decision and requested the return of the registration certificate.

[17] In 2006, in response to the Decision, the applicant filed a Notice of Application seeking a declaratory judgment pursuant to section 24(1) of the

Charter, claiming that the Decision infringed his section 2(a) rights. The dismissal of that application is the subject of this appeal.

[18] Despite the Decision, between 2005 and 2011, the applicant was still able to solemnize six marriages under the authority of temporary marriage commissions.

Decision at the Oral Hearing of the Appeal—The Analytical Framework to be Applied to the Decision

[19] Before considering the substance of the application judge's analysis of the Decision, it is helpful to review a ruling made by this Court at the oral hearing of the appeal regarding the analytical framework that the application judge applied in considering the constitutionality of the Decision. The applicant contended that the application judge applied the wrong framework. This ground was dismissed with the indication that further reasons would follow. These are those reasons.

[20] The application judge analyzed the Decision based on the framework found in *Doré v Barreau du Québec*, 2012 SCC 12. The applicant maintains that she should have applied the analysis found in *R v Oakes*, [1986] 1 SCR 103, as was done in *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31.

[21] Briefly, a *Doré* analysis involves the review of discretionary administrative decisions involving *Charter* values to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate underlying the

decision. See, *Doré* at paras 55-57; and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 37.

[22] It is important to recognize that throughout the proceedings before the application judge the parties agreed that the *Doré* analysis applied in considering the constitutionality of the Decision. The applicant's current position only arose in response to concerns raised by the application judge.

[23] In her reasons dismissing the application, the application judge stated (at para 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).

[24] The *Greater Vancouver Transport* case involved the analysis of a government policy as opposed to a discretionary administrative decision. In that case, the Court held (at para 65):

> [W]here a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

[25] In such a case, review of the policy involves a section 1 *Charter* proportionality analysis, balancing the interests of society with those of individuals and groups, as set out in *Oakes*.

[26] Ultimately, the application judge determined that she would apply the *Doré* analysis, based on the parties' agreement that the challenge was to the Decision and not the policy. She said that she would accept that parameter because, in the end, each approach engaged a similar proportionality analysis.

[27] Manitoba argued that it would be unfair to allow the applicant to advance this argument at such a late stage in the proceedings. It contended that to allow it would prejudice Manitoba. It maintained that, had the analysis provided for in *Oakes* been in issue, it would have called section 1 justification evidence.

[28] At the hearing of the appeal, counsel for the applicant admitted that he was "not wedded" to the argument. Moreover, he repeated that he was not challenging the policy underlying the Decision. Rather, he contended that the Decision breached the applicant's personal section 2(a) rights and, thus, had to be justified pursuant to section 1.

[29] The applicant's argument is contrary to his Notice of Application, wherein he seeks a section 24(1) remedy, and his position that he is not challenging the policy. Section 1 does not apply to remedies sought pursuant to section 24(1). It applies to cases where a law is challenged and a remedy is sought pursuant to section 52(1) of the *Charter*. In the event of an infringement, a section 1 analysis informs whether the limit constitutes a "reasonable limi[t] prescribed by law as can be demonstrably justified in a free and democratic society".

[30] Thus, in light of the above, this ground of appeal was dismissed for the following combined reasons: i) the parties proceeded throughout the application on the basis that *Doré* applied; ii) the applicant took the position

on appeal that the policy was not being challenged; and iii) both *Doré* and *Oakes* involve a similar proportionality analysis.

Decision of the Application Judge

[31] The application judge held that the provisions of the *Charter* apply to marriage commissioners when they are acting on behalf of the government. Therefore, the government's obligation to respect section 15 rights applied to the applicant when acting as a marriage commissioner.

[32] Applying *Doré*, the application judge considered the nature of the section 2(a) infringement alleged. She stated that, "requiring marriage commissioners to perform same-sex marriages may impinge on their rights under s. 2(a)" (at para 28). However, she found that the impact of the Decision on the applicant was not more than trivial or insubstantial on the basis that the applicant did not perform many marriages and, in any event, did not and would not marry same-sex couples.

[33] She further held that, assuming an infringement of the applicant's section 2(a) rights that was more than trivial or insubstantial, the Decision was reasonable. She considered that the ability of marriage commissioners to refuse to marry same-sex couples could significantly impact the section 15 rights of those couples. She also found that there were alternative avenues that allowed the applicant to solemnize marriages of his choice, either as a religious official or by temporary appointment.

[34] Based on the above, she concluded that the Decision reflected a proportionate balancing of the applicant's section 2(a) rights and Manitoba's goal of protecting the section 15 rights of same-sex couples.

Grounds of Appeal

[35] The applicant lists six remaining grounds of appeal. I have summarized them as:

1. The application judge erred in finding that the *Charter* applies to marriage commissioners.

2. The application judge erred in finding that marriage commissioners are required to marry all eligible couples.

3. The application judge erred in concluding that the impact of the cancellation of the registration certificate was not more than trivial or insubstantial.

4. The application judge erred in finding a conflict between the applicant's section 2(a) rights and same-sex couples' section 15 rights.

5. The application judge erred in creating a hierarchy of *Charter* rights favouring the section 15 rights of same-sex couples.

6. The application judge erred in concluding that Manitoba had sufficiently accommodated the applicant's section 2(a) rights by providing alternate methods by which he could marry couples of his choosing.

[36] In my view, the first two grounds of appeal can be summarily dismissed.

Ground 1: The application judge erred in finding that the Charter applies to marriage commissioners.

[37] I disagree with the applicant's argument that, as a private individual, he is not subject to the *Charter* when fulfilling his responsibilities as a marriage commissioner. In considering this argument, the application judge held (at para 21):

> [A]ccording 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 [Queen's Bench], 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.

[38] I agree with the application judge. Further support for this conclusion may be found in *Reference re Same-Sex Marriage* at para 22 (from the perspective of the state, marriage is a civil institution); and *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 at para 98 (marriage commissioners serve as agents of the state when they discharge their official duties).

Ground 2: The application judge erred in finding that marriage commissioners are required to marry all eligible couples.

[39] Regarding the second ground of appeal, the applicant argues that, because section 7 of the *Act* is permissive in that it allows that a marriage commissioner "may solemnize ceremonies of marriage in accordance with the

tenor of the appointment" (at section 7(1)), there was no basis to conclude that he was obliged to perform same-sex marriages.

[40] In my view, the VSA had the authority to impose conditions which it believed were in accordance with the "tenor of the appointment". Accordingly, the VSA determined that, as part of the "tenor of the appointment" and in consideration of same-sex couples' section 15 *Charter* rights, marriage commissioners were required to marry same-sex couples. The VSA was able to impose this requirement regardless of the empowering language of the legislation.

Analysis

Doré and Loyola

[41] Before embarking on an analysis of the remaining grounds of appeal, it is helpful to review the analysis in *Doré* and the Supreme Court of Canada's subsequent consideration of it in *Loyola*.

[42] In *Doré*, Abella J explained how an administrative decision-maker applies *Charter* values in the exercise of statutory discretion. Briefly, after considering the statutory objectives underlying the decision to be made, the decision-maker should ask how the *Charter* value at issue will best be protected in light of the statutory objectives. The core of the proportionality exercise requires the decision-maker to "balance the severity of the interference of the *Charter* protection with the statutory objectives" (at para 56).

[43] The preliminary issue for a reviewing judge is to determine whether the decision "engages the *Charter* by limiting its protections" (*Loyola* at

para 39). If so, the decision is reviewed for reasonableness. A reasonable decision is a proportionate one. See *Doré* at paras 57-58.

[44] In *Loyola*, Abella J (writing for a majority) summarized the reasonableness review (at para 37):

> On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.

[45] It is also important to remember that "there may be more than one proportionate outcome" (*Loyola* at para 41).

[46] The remaining grounds of appeal in this case concern the application judge's application of the *Doré* analysis to the Decision.

Standard of Review

[47] This appeal involves the decision of the application judge to dismiss the applicant's request for a declaration. Therefore, the civil standards of review found in *Housen v Nikolaisen*, 2002 SCC 33 apply. Questions of law are reviewed on the correctness standard and those of fact on the standard of palpable and overriding error.

[48] Previously, there was some disagreement as to the standard of review to be applied to questions of mixed fact and law in the determination

of constitutional issues. In Manitoba, the issue was determined by Beard JA in *Young v Ewatski et al*, 2012 MBCA 64. She concluded (at para 42):

> While there appears to be some inconsistency as to the appropriate standard of review in a civil case dealing with constitutional issues for a question involving the application of the law to the facts where there is no extricable error of law, the weight of the authority favours the civil standard of review, being that of palpable and overriding error.

Ground 3: The application judge erred in concluding that the impact of the cancellation of the registration certificate was not more than trivial or insubstantial.

[49] In finding that the impact of the Decision was not more than trivial or insubstantial, the application judge stated (at para 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 [he] believes are not justified). He does not intend to conduct marriages for the public at large.

[50] The applicant argues that, after having found that "requiring marriage commissioners to perform same-sex marriages may impinge on their rights under section 2(a)," (*ibid*) the application judge erred when she found that the impact of the Decision on him was not more than trivial or

insubstantial. He maintains that, as a result of the Decision, he has had to choose between his religious beliefs and fully participating in society by being a marriage commissioner. He says that being forced to make that choice is not trivial or insubstantial.

[51] Manitoba maintains that the applicant chose to apply to become a marriage commissioner and that, because he married very few couples, this voluntary role constituted a small part of his life. Therefore, it asserts that the impact of the Decision was insubstantial.

[52] The parties agree, as do I, that the issue of whether the applicant's section 2(a) rights have been infringed constitutes a question of law to be reviewed on the correctness standard.

[53] In the recent case of *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, McLachlin CJC and Rowe J, writing for the majority of the Court, described the section 2(a) right as follows (at paras 62-63):

> The seminal case on the scope of the *Charter* guarantee of freedom of religion is this Court's decision in *Big M Drug Mart* [*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295]. The majority of the Court, per Justice Dickson (as he then was), defined s. 2 (*a*) as protecting "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" (p. 336).
>
> So defined, s. 2 (*a*) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 68; *Saskatchewan (Human Rights Tribunal) v. Whatcott*, 2013 SCC 11, [2013] 1

> S.C.R. 467, at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 32; *Amselem* [*Syndicat Northcrest v Amselem*, 2004 SCC 47], at para. 40.

[54] In *Reference re Same-Sex Marriage*, the Court stated that, "The performance of religious rites is a fundamental aspect of religious practice" (at para 57).

[55] In order to show an infringement of section 2(a), an individual must demonstrate that they have a sincere belief, "having a nexus with religion, which calls for a particular line of conduct" (*Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56). Sincerity of belief is not at issue in this case.

[56] Next, the individual must show that the state conduct infringed on the right in a manner that was not trivial or insubstantial. See *Amselem* at paras 58-60. For example, in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, Dickson CJC opined that "a modest sales tax extending to all products, including those used in the course of religious worship" would not constitute a breach of section 2(a) on the basis that the burden could not be shown to be more than trivial or insubstantial (at p 759).

[57] In *Marriage Commissioners (Re)*, the Saskatchewan Court of Appeal considered the constitutionality of proposed amendments to *The Marriage Act*, 1995, SS 1995, c M-4.1, that would allow marriage commissioners who were sworn in prior to the Supreme Court of Canada's decision in *Reference re Same-Sex Marriage* to decline to solemnize a marriage if performing it would be contrary to his or her beliefs. An alternative amendment would have allowed all marriage commissioners to refuse to solemnize a marriage if, to do so, would be contrary to their religious

beliefs. In considering whether the rights of the marriage commissioners would be infringed by a requirement that all marriage commissioners marry all couples legally capable of getting married, including same-sex couples, Richards JA (as he then was) reached the opposite conclusion to that of the application judge. He found that an obligation to perform same-sex ceremonies would interfere with marriage commissioners' section 2(a) rights in a manner that was more than trivial or insubstantial. He stated (at para 64):

> 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*, [*Multani v Commission scolaire Marguerite—Bourgeoys*, 2006 SCC 6], 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 [in]substantial. See also: *Syndicat Northcrest v. Amselem, supra,* at paras. 58 and 59; *Alberta v. Hutterian* [*Bretheren*] *of Wilson Colony,* [2009 SCC 37] at para. 34.

He then concluded (at para 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.

[58] In my view, the broad view of the right conferred by section 2(a) at the first stage of the *Doré* analysis taken by Richards JA is consistent with the jurisprudence.

[59] For example, in *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518, leave to appeal to SCC granted, [2016] SCCA No 418, the Ontario Court of Appeal considered section 2(a) and section 15 in the context of a decision of the Law Society of Upper Canada (LSUC) to deny accreditation to the proposed law school of Trinity Western University (TWU). TWU is a private post-secondary institution that provides an education founded on evangelical Christian principles. Members of the lesbian, gay, bisexual, transgender and queer (LGBTQ) community may apply to the proposed law school, but they will not be admitted unless they are willing to sign and observe TWU's "Community Covenant" (at para 21), which forbids "sexual intimacy that violates the sacredness of marriage between a man and a woman" (at para 23).

[60] TWU claimed that the decision to deny it accreditation violated its section 2(a) rights. In considering whether the LSUC's decision interfered with TWU's freedom of religion rights in a manner that was more than trivial or insubstantial, MacPherson JA stated (at paras 100-101):

> In the context of the analysis mandated by *Doré*, in my view it is appropriate to adopt a broad definition of freedom of religion at this stage of the analysis and instead consider the impact of the exercise of that freedom on other *Charter*-protected interests at the second stage of the analysis.
>
> Accordingly, I would find that the LSUC's decision infringes Mr. Volkenant's and TWU's right to freedom of religion under s. 2(a) of the *Charter*.

[61] In my view, to adopt a broad definition of section 2(a) when considering whether an infringement exists is consistent with *Doré* and preferable.

[62] In this case, the applicant has been able to perform marriages by obtaining a temporary appointment as a marriage commissioner. However, similar to *Marriage Commissioners (Re)*, the effect of the Decision forced the applicant to make a choice between manifesting his religious beliefs and having his registration as a marriage commissioner cancelled.

[63] Thus, in my view, the application judge erred in taking too narrow of an approach to the definition of section 2(a) for the purpose of the *Doré* analysis. This led her to conclude, incorrectly, that the applicant's rights were not infringed. Consistent with *Marriage Commissioners (Re)*, I would find that the Decision did interfere with the applicant's section 2(a) rights in a manner that was not trivial or insubstantial.

[64] Having found an infringement, I turn to a consideration of the remaining grounds of appeal. They involve the second stage of the *Doré* analysis, the review of the Decision for reasonableness.

Ground 4: The application judge erred in finding a conflict between the applicant's section 2(a) rights and same-sex couples' section 15 rights.

[65] As earlier indicated, in assessing reasonableness, consideration must be given to the statutory objectives underlying the Decision, the applicant's rights at stake and whether the Decision represents a reasonable balance between the two (see *Doré* at paras 55-58).

[66] The statutory objective of the Decision is to prevent discrimination against those who wish a civil marriage. More particularly, in this case, it is to prevent a breach of the section 15 rights of same-sex couples.

[67] Thus, it is helpful to review the nature of the section 15 equality rights alleged to be in conflict with the applicant's refusal to marry same-sex couples.

[68] In *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, Iacobucci J, writing for a unanimous Court, described the purpose of section 15(1) in the following terms (at p 529):

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[69] Several courts have found that the opposite-sex requirement for civil marriage violates the equality guarantee enshrined in section 15(1) of the *Charter*: see *Hendricks c Québec (Procureur Général)*, 2002 CarswellQue 1890 (Sup Ct); *Barbeau v British Columbia (Attorney General)*, 2003 BCCA 251; and *Halpern v Canada (Attorney General)* (2003), 225 DLR (4th) 529 (Ont CA).

[70] The applicant contends that the only *Charter* infringement in this case concerns his section 2(a) rights. He argues that there are no other infringements in the evidence. Rather, he asserts that the application judge only hypothesized that to allow him to refuse to solemnize the marriages of same-sex couples would violate those couples' section 15 rights. He says

there is no evidence that he was ever asked to do so and, consequently, he never refused to marry a same-sex couple. In this regard, he relies on *Mackay v Manitoba*, [1989] 2 SCR 357, and *Reference re Same-Sex Marriage* for the proposition that *Charter* rights are not to be determined in a vacuum. Based on this reasoning, he argues that no conflict has been shown between the rights in question.

[71] Alternatively, the applicant argues that, if there is a conflict of rights, it resulted from the VSA's discontinuance of the private list of marriage commissioners. He maintains that, while he was on the private list, he enjoyed the freedom to marry no one if he found no need or opportunity to do so. At the same time, same-sex couples could be accommodated by marriage commissioners willing to marry same-sex couples. In this regard, he relies on *Reference re Same-Sex Marriage*, which states (at para 52):

> The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(*a*). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

[72] He says, but for the Decision, the rights of same-sex couples and his section 2(a) rights could have been properly delineated and accommodated, thereby avoiding conflict.

[73] Manitoba argues that the applicant has been adamant that he would refuse to marry same-sex couples, should he be appointed a marriage

commissioner. Further, it argues that the effect of his refusal would be compounded by other marriage commissioners refusing to marry same-sex couples, especially in remote communities. In addition, Manitoba notes that the applicant would refuse to marry all non-Christian couples as well as some divorced couples, if infidelity was a factor in their divorce.

[74] The ultimate issue of conflict of rights is a question of law. However, the underlying facts relied on by the application judge, and her application of them, is subject to review on the standard of palpable and overriding error.

[75] Regarding the applicant's argument that there was no factual foundation giving rise to a conflict, I agree with Manitoba. In my view, the fact scenario is not hypothetical. The applicant filed an application for a declaration that the Decision violated his section 2(a) rights. The applicant clearly stated in his affidavit it would be "sinful for [him] to assist in a same-sex ceremony" and that he advised the VSA that he "would not be able to perform services that violated [his] Christian faith". The Decision was the direct result of his refusal to comply with the requirement that he marry same-sex couples.

[76] The application judge carefully considered the issue of conflict. She stated (at para 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.

[77] In reaching this conclusion, she relied on *Marriage Commissioners (Re)*. In that case, Richards JA rejected the argument that to allow marriage commissioners to refuse to marry same-sex couples would have minimal effect. He reasoned that the impact of same-sex couples being told by a marriage commissioner that he or she will not solemnize their union could be expected to be "very significant and genuinely offensive" (at para 41). He further observed that, if marriage commissioners were allowed to opt out of performing same-sex marriages, it might be difficult for such a couple to find someone to marry them (at para 42). In his view, this difficulty could be compounded for persons who were from northern or rural areas or smaller centers who "would have to travel some distance to find a commissioner willing to perform a marriage ceremony" (at para 43).

[78] The evidence provided by Manitoba shows that, between 2004 and 2016, 939 same-sex marriages were performed in Manitoba. Furthermore, the evidence demonstrates that there are numerous small towns in Manitoba where there are only one or two marriage commissioners. Thus, the evidence is consistent with the decision in *Marriage Commissioners (Re)*. In my view, the application judge did not err in determining that to allow marriage commissioners to refuse to marry same-sex couples would result in an infringement of their section 15 rights.

[79] Based on all of the above, I would dismiss this ground of appeal. As to the applicant's argument—that the decision to discontinue the list of marriage commissioners who did not want their names to be public and

require all marriage commissioners to perform same-sex marriages created a conflict—as I later discuss, in my view, Manitoba has provided accommodations.

Ground 5: The application judge erred in creating a hierarchy of Charter rights favouring the section 15 rights of same-sex couples.

Ground 6: The application judge erred in concluding that Manitoba had sufficiently accommodated the applicant's section 2(a) rights by providing alternate methods by which he could marry couples of his choosing.

[80] The final two grounds of appeal are interrelated and I will therefore deal with them together.

[81] The applicant argues that the Decision created an impermissible hierarchy of rights resulting in his section 2(a) rights being oppressed by the section 15 rights of same-sex couples. He argues that he was, and continues to be, prohibited from being a marriage commissioner. He maintains that the discontinuance of the list of marriage commissioners who did not want their names to be public amounted to the removal of a reasonable accommodation. In his view, the current accommodation that would authorize him to solemnize marriages by way of registration as a religious official or by way of a temporary appointment is not proportionate to the impairment of his section 2(a) rights. He submits that he should be accommodated by having his name placed on a private list. If that were done, he reasons that he would not be asked to solemnize marriages in situations that would violate his religious beliefs.

[82] The applicant also submits that another reasonable accommodation could be instituted similar to that considered in *Marriage*

Commissioners (Re). In that case, the Court considered a "'single entry point' system" to be a potentially suitable accommodation (at para 85). Under such a system, a central authority would assign marriage commissioners to couples seeking to be married in a manner that would accommodate the religious beliefs of the marriage commissioners and still allow for the solemnization of same-sex marriages.

[83] Manitoba agrees that there can be no hierarchy of rights. However, it maintains that the application judge properly balanced the rights in question, as opposed to creating a hierarchy. It argues that, where competing rights are at stake, the court must try to resolve the claims in a manner that will preserve both rights. It asserts that the application judge did not err when she held that the fact that the applicant could register as a religious official and thereby not have to perform ceremonies contrary to his religious beliefs, or that he could apply for a temporary appointment as a marriage commissioner, constituted reasonable accommodation.

[84] Manitoba submits that, to allow marriage commissioners to marry whom they wish through the creation of a private list, would constitute discrimination. Regarding the creation of a single entry point system, Manitoba submits that the implementation of such a system, wherein the request for a marriage commissioner would require responses to many personal questions such as religious affiliation, gender and sexual orientation, would amount to discrimination.

[85] The issue of whether a hierarchy of rights was created by the Decision constitutes a question of law. There can only be one correct answer to that issue. On the other hand, the trial judge's determination of whether the

accommodations provided were reasonable constitutes a question of mixed fact and law to be reviewed on the standard of palpable and overriding error.

[86] Where an infringement that is not trivial or insubstantial has been demonstrated, consideration must be given to whether the exercise of the right "impacts upon the rights of others in the context of the competing rights of private individuals" (*Amselem* at para 62). Conduct which impacts the rights of others is not automatically protected. Despite the broad and expansive approach to be taken in the consideration of the definition of section 2(a), no *Charter* right is absolute.

[87] As I earlier indicated, a reasonable decision is one that reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate. In order for a decision to be defensible, it must be in line with the fundamental values protected by the *Charter*.

[88] Regarding the reasonableness of the Decision, the application judge found that, based on the evidence given by the applicant regarding the nature of his religious activities, he could be eligible to be registered as a religious official.

[89] Regarding his already-established ability to obtain a temporary appointment as a marriage commissioner, the application judge considered his argument that the six-week delay in obtaining a temporary appointment was too long a timeframe to accommodate some couples' wishes. However, she also noted that, in exceptional circumstances, Manitoba could provide a temporary commissioner appointment within 24 to 48 hours.

[90] The application judge found that the above two accommodations were reasonable. She stated (at para 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.
>
> [emphasis added]

[91] The above analysis clearly indicates that a balancing of rights occurred, as opposed to the creation of a hierarchy. I agree with the application judge. The Decision is reasonable. It reflects a considered balancing of the *Charter* protections in issue, accommodating both interests in a proportionate manner and in accord with the fundamental values protected by the *Charter*.

[92] While it is true that the applicant will not be afforded the accommodation of either the placement of his name on a private list or a single entry point system, as I earlier stated, there can be more than one proportionate outcome. The fundamental issue in this case concerns the applicant's ability to exercise his section 2(a) rights by solemnizing marriages for persons of his choice. He continues to be able to do that.

Decision

[93] For all of the above reasons I would dismiss the appeal.

Cameron JA

I agree: Monnin JA

I agree: leMaistre JA

APPENDIX

The Marriage Act, CCSM c M50 (at sections 2, 7):

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 representative of a religious denomination duly appointed or commissioned by the governing body of the 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.

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.