

# RELIGION, SEXUAL ORIENTATION AND THE STATE: CAN PUBLIC OFFICIALS REFUSE TO PERFORM SAME-SEX MARRIAGE?

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*In Canada, civil marriages are performed by both public officials and religious officials. The Supreme Court of Canada recently confirmed that religious officials cannot be compelled to perform same-sex marriages contrary to their religious beliefs. This article concludes that accommodating the religious belief of public officials who refuse to perform same-sex marriages is an appropriate response as Canada transitions from the historical and familiar definition of marriage as the union of one man and one woman to the new and inclusive definition of marriage as the union of two persons.*

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*Au Canada, les mariages civils sont célébrés par des autorités laïques et religieuses. La Cour suprême du Canada a récemment statué qu'on ne pouvait contraindre les autorités religieuses à célébrer des mariages entre conjoints de même sexe, qui seraient contraires à leurs croyances. Cet article conclut qu'il convient également de respecter les croyances religieuses des célébrants laïcs qui refusent de célébrer un mariage entre conjoints de même sexe, durant cette phase de transition où le Canada doit passer de la définition historique et traditionnelle du mariage désignant l'union d'un homme et d'une femme à la nouvelle définition plus générale d'une union entre deux personnes.*

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## 1. Introduction

On December 9, 2004 the Supreme Court of Canada decided unanimously<sup>1</sup> that proposed federal legislation extending civil marriage to persons of the same sex was consistent with the equality provisions of the Canadian *Charter of Rights and Freedoms*.<sup>2</sup> Indeed, the Supreme Court found that the purpose of the government's proposed same-sex marriage legislation flowed from the *Charter*.<sup>3</sup>

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<sup>1</sup> *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 [Reference].

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

<sup>3</sup> *Reference*, *supra* note 1 at para. 43.

For seven months, from the date of the Supreme Court decision to the date when royal assent was given to federal legislation defining marriage to include same-sex couples, the subject of same-sex marriage made headlines in Canada on an almost daily basis. Parliamentarians, provincial politicians, writers, broadcasters, organizations, groups and individual members of the public expressed strongly held views for and against expanding the definition of marriage. Constitutional experts united to declare that a definition of marriage excluding same-sex couples was unconstitutional.<sup>4</sup> Only by using the *Charter's* notwithstanding clause<sup>5</sup> could Parliament override decisions of provincial appeal courts permitting same-sex marriage<sup>6</sup> (the federal government having decided no appeal of the provincial decisions would be made). The Prime Minister stated that his government would not invoke the notwithstanding clause.<sup>7</sup> The implication of this was that same-sex marriage was destined to be legal throughout Canada whether or not the proposed legislation passed in Parliament. If the legislation failed to pass, courts in the remaining provinces and territories that had not ruled on same-sex marriage would, one by one, declare that equality for same-sex couples meant that the definition of marriage must include same-sex marriage.<sup>8</sup>

The Supreme Court decision made clear that the definition of marriage falls within the exclusive jurisdiction of the federal government while the solemnization of marriage falls within the exclusive jurisdiction of the provinces.<sup>9</sup> The decision also stated that religious freedom guaranteed by the *Charter* is expansive enough to protect religious officials who perform both religious and civil marriages from being compelled by legislation to perform same-sex marriages contrary to their religious beliefs.<sup>10</sup>

Only days after the Supreme Court's decision, questions arose in the provinces regarding the solemnization of marriage by public officials who perform civil but not religious marriages. Would public officials authorized to perform marriages only for civil purposes be compelled to

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<sup>4</sup> S. Choudhry *et al.*, "Open Letter to The Hon. Stephen Harper from Law Professors Regarding Same-Sex Marriage" [n.d. 2004], online: University of Toronto <<http://www.law.utoronto.ca/samesexletter.html>>.

<sup>5</sup> *Supra* note 2, s. 33.

<sup>6</sup> M. Hurley, "Bill C-38: The Civil Marriage Act" (2005) Legislative Summaries, Library of Parliament – Parliamentary Information and Research Service LS-502E at 7.

<sup>7</sup> J. Brown, "Cotler Promises Same-sex Legislation" *The [Halifax] Chronicle Herald* (11 January 2005) A4.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Reference, supra* note 1 at paras. 19, 36.

<sup>10</sup> *Ibid.* at para. 56.

perform same-sex marriages contrary to their religious beliefs? The Supreme Court was not asked and did not answer this question. The federal Minister of Justice stated that public officials would not be compelled, saying that equality rights should not infringe on religious rights.<sup>11</sup> The Premier of Manitoba, on the other hand, stated that marriage commissioners in that province were required to perform same-sex marriages in order to keep their licenses.<sup>12</sup> Two marriage commissioners in Manitoba had already resigned their positions over the Manitoba government's policy regarding the requirement to perform same-sex marriages and filed human rights complaints.<sup>13</sup> In Saskatchewan, a same-sex couple has since filed a human rights complaint against a public official who has refused to perform a same-sex marriage.<sup>14</sup>

This article engages the issue on which the Minister of Justice and the Premier of Manitoba disagreed:<sup>15</sup> whether public officials who perform marriages for civil but not religious purposes should be compelled to perform same-sex marriages contrary to their religious beliefs. Recognizing that Canada equally values freedom from discrimination based on sexual orientation and freedom from discrimination based on religion and that neither is absolute, what is a satisfactory and acceptable result in this instance where these competing values arise in the course of performing a public service?<sup>16</sup>

In developing a response to this question, this article first addresses three areas of law: solemnization of marriage; provincial human rights legislation prohibiting discrimination based on sexual orientation and religion; and the rights and obligations of public servants. Two options are then considered: (1) requiring public officials to perform same-sex marriage regardless of their sincerely held religious beliefs; and (2) accommodating the religious beliefs of public officials to the point of undue hardship.

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<sup>11</sup> D. Dugas, "Civic Officials Won't Have to Perform Gay Marriages" *The [Halifax] Chronicle Herald* (15 December 2004) A1.

<sup>12</sup> C. Clark, "Prairie Officials Compelled to Perform Gay Marriages" *The Globe and Mail* (18 December 2004) A1.

<sup>13</sup> *Ibid.*

<sup>14</sup> G. Galloway, "Refused Gays Rites, Marriage Official Expects to Get Axe" *The Globe and Mail* (19 July 2005) A4.

<sup>15</sup> M. Den Tandt and S. Richer, "Some Won't Marry Gay Couples" *The Globe and Mail* (3 February 2005) A7. The Minister of Justice later acknowledged solemnization as a provincial matter and suggested protection is not necessary; see Den Tandt and Richer, *ibid.*

<sup>16</sup> *Charter*, *supra* note 2, s. 1.

Ultimately, under the division of powers in Canada, the decision regarding public officials performing same-sex marriage is one for each province to make. Three provinces (Manitoba, Saskatchewan and Newfoundland) have taken the position that public officials who refuse to perform same-sex marriages must resign their positions.<sup>17</sup> Three provinces (New Brunswick, Prince Edward Island, and Alberta) have passed or have proposed to pass legislation allowing public officials to refuse. The remaining provinces (Ontario, Quebec, Nova Scotia and British Columbia) appear to be of the view that the religious beliefs of their public officials can be accommodated. That is the position adopted here, provided same-sex couples can access their right to marriage in a manner that is equally respectful of them as it is of the beliefs of religious public officials.

## 2. Solemnization of Marriage

The *Marriage for Civil Purposes Act* passed by Parliament on June 28, 2005 and given royal assent on July 20, 2005 defines marriage as “the lawful union of two persons to the exclusion of all others.”<sup>18</sup> As of that date, same-sex couples throughout Canada acquired the legal capacity to marry.<sup>19</sup> The new federal legislation defined marriage for civil (state) purposes, not religious purposes. Religions may, and many do, exclude same-sex couples from marriage by maintaining the common law definition of marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others.”<sup>20</sup>

In Canada, couples wishing to be recognized by the state as married must meet both federal and provincial marriage requirements because neither the federal government nor any provincial government has exclusive jurisdiction over marriage. Pursuant to the *Constitution Act, 1867* capacity to marry (who can be married and to whom) is a federal head of power under section 91(26), whereas solemnization of marriage (conditions of marriage and how a marriage is made valid) is a provincial head of power under section 92(12).<sup>21</sup> As confirmed by the Supreme Court in the *Reference*, it is within the competence of Parliament to define marriage to include same-sex couples, but outside the competence

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<sup>17</sup> Den Tandt and Richer, *supra* note 15.

<sup>18</sup> S.C. 2005, c. 33, s. 2 [*Civil Marriage Act*].

<sup>19</sup> Prior to this, same-sex marriage was permissible in seven provinces and one territory as a result of court rulings: British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Newfoundland and the Yukon.

<sup>20</sup> *Hyde v. Hyde and Woodmansee* (1866), 1 L.R. P. & D. 130 at 133.

<sup>21</sup> (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

of Parliament to legislate the performance of marriage ceremonies for civil or religious purposes.<sup>22</sup>

The power assigned constitutionally to the provinces by the words “solemnization of marriage” used in section 92(12) is broad in scope. The power has been described to cover “every manner or mode in which competent parties, intending to contract marriage with each other, might validly so contract.”<sup>23</sup> In 1912, the Supreme Court of Canada interpreted the words to mean that the provincial power was absolute to the following extent:

The legislatures of the several provinces may within their several legislative jurisdictions make religious ceremonies necessary to validate a marriage or may make its solemnization before a civil functionary of any kind sufficient for the purpose with or without witnesses. It is probable that they would have power to declare the solemnization of marriage to be complete without the presence of a priest, clergyman, minister, civil functionary, or witness, and by the mere consent of the parties intermarrying evidenced in writing or by mere words.<sup>24</sup>

Since provincial legislation is now subject to the *Charter* which guarantees the right to profess no religion, it is unlikely that a provincial legislature could legitimately make religious ceremonies necessary to validate a civil marriage. Provincial legislatures can legitimately prescribe how a license is issued, who may perform a marriage ceremony, whether witnesses are required and how many, and how a marriage is registered with the state after the fact. Religions may have requirements for marriage that differ from or add to federal and provincial requirements, so that couples who wish to be married civilly and religiously must meet federal, provincial and religious requirements. A religious marriage is valid for civil purposes only if, in addition to religious requirements, the marriage meets federal and provincial requirements. Provincial legislatures can, and do, permit religious officials to perform civil marriages. A civil marriage is often (but not necessarily) performed simultaneously with a religious marriage, with the ceremony thereby having a civil effect and a religious effect at the same time. The distinction between a civil marriage and a religious marriage can be “nearly invisible” since in some provinces and territories where the wedding ceremony is performed by a religious official a marriage license is not required and the religious official will often take care of registering the marriage.<sup>25</sup>

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<sup>22</sup> *Reference*, *supra* note 1 at paras. 33-34.

<sup>23</sup> *Re Marriage Laws* (1912), 46 S.C.R. 132 at 340.

<sup>24</sup> *Ibid.*

<sup>25</sup> Department of Justice Canada, “Marriage and Legal Recognition of Same-sex

At one time, weddings took place in homes and taverns, not churches.<sup>26</sup> It was in the sixteenth century that civil and religious functions were combined into one ceremony.<sup>27</sup> The practice of a single ceremony was brought to Canada prior to Confederation and has continued in each province, although today civil ceremonies without a religious element are available as well. Provinces could in theory choose to sever the ties between religious marriage and civil marriage by not authorizing religious officials to conduct civil marriages. A religious marriage would then have exclusively religious significance and effect, and marriage as performed by religious officials would be distinctly different in purpose from marriage performed by public officials. Complete separation of religious marriage from civil marriage would emphasize marriage as “a matter of social organization and decision” and de-emphasize marriage as an institution of religion.<sup>28</sup>

The concept of separating religious and civil marriages was addressed in a discussion paper prepared by the Department of Justice Canada in 2002, in which the authors commented that separating religious and secular marriage might lead to feelings of marginalization by religious groups no longer receiving civil recognition of their religious marriages.<sup>29</sup> The devaluation of religious marriage as a legal institution could imply inferiority or rejection for at least some part of the 88% of the population in Canada who have claimed a religious affiliation.<sup>30</sup> Moreover, even persons who “care little for the usual religious ordinances” may look to clergy to solemnize marriage.<sup>31</sup> Indeed, it attests to the continuing significance of religious marriage that new churches have evolved specifically to minister to gay men and lesbians and to provide same-sex marriages, meeting a need not met by more traditional churches that cannot accommodate these marriages.<sup>32</sup>

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Unions – A Discussion Paper” (Ottawa: November 2002) at 11-12.

<sup>26</sup> P. Dickey Young, “Same-sex Relationships, Religious Traditions, Marriage and the Law” (2000) *Studies in Religion* 465 at 467.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra* note 25 at 25.

<sup>30</sup> M. Bailey, “Marriage and Marriage-Like Relationships” in *Beyond Conjugality* (2000) Law Commission of Canada Research Paper Series at 10. Although the percentage may have declined since then, Reginald Bibby has more recently reported that all religious groups in Canada are showing “important signs of life” as people struggle to find meaning and are worried about their children; see E. Shackleton “Have Faith. Canadians, Especially Young People, Returning to Church – Sociologist” *The Globe and Mail* (20 December 2004) A12.

<sup>31</sup> In *Re Marriage Laws*, *supra* note 23 at 384.

<sup>32</sup> Young, *supra* note 26 at 470, referring to the Metropolitan Community Church in Toronto.

Religious officials authorized to perform marriages for civil purposes can refuse to perform same-sex marriages based on their religious beliefs. Public officials may hold religious beliefs opposing same-sex marriage as sincerely as religious officials. Why then should public officials providing the same civil service as religious officials not be considered in the same manner as religious officials and be permitted to refuse based on sincerely held religious beliefs? It seems inconsistent to distinguish between religious officials performing a civil function and public officials performing the same or similar civil function. Yet there are differences between the position of religious officials and public officials. First, the religious official's vocation to the ministry provides *prima facie* evidence of the sincerity of a religious official's belief that may not be as easily discernible in the case of a public official who is not also a religious official. Second, the religious official's function in solemnizing marriage is primarily religious in nature. For a religious official, the civil aspect of marriage is incidental to the religious aspect; for the public official, solemnization of marriage is solely a civil function. Third, religious officials and religious institutions in Canada have historically enjoyed special consideration in some respects. There are, for example, statutory exceptions allowing religious institutions as employers to discriminate on the basis of religion, exceptions not similarly available to lay persons with religious convictions or to non-religious institutions. For these reasons the position of the public official can be distinguished from the position of the religious official. Although religious and public officials both perform a similar civil function, the position of public officials ought to be considered independently of religious officials based on criteria specifically applicable to public officials. This requires consideration of the law developed in relation to human rights and accommodation in the workplace.

### 3. *Human Rights*

#### A. *Sexual Orientation*

Human rights legislation at both federal and provincial levels prohibits discrimination in specified areas of activity, notably employment.<sup>33</sup> The prohibited grounds of discrimination found in human rights legislation across the country, like those set out in section 15(1) of the *Charter*, include age, race, colour, ethnic origin, sex, religion, mental and physical disability.

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<sup>33</sup> Federal human rights legislation pertains to the federal government and federally-regulated concerns. Provincial legislation pertains not only to provincial government and its concerns, but also to individuals and entities in the private sector.

In 1995, sexual orientation as a prohibited ground of discrimination achieved constitutional status under section 15(1) of the *Charter* when the Supreme Court of Canada held that sexual orientation is a personal characteristic analogous to grounds enumerated in section 15(1) and deserving of protection.<sup>34</sup> Subsequently in 1998, the Supreme Court held that omitting sexual orientation as a prohibited ground of discrimination in human rights legislation was discriminatory and not justifiable under section 1 of the *Charter*.<sup>35</sup> Since then, discrimination based on sexual orientation is not only a prohibited ground of discrimination under section 15 (1) but also under provincial human rights legislation, either expressly or by reading in.

### *B. Religion*

Religion is also a prohibited ground of discrimination in human rights legislation and under section 15(1) of the *Charter*. In addition, freedom of religion is a fundamental freedom under section 2(a) of the *Charter* and also in the human rights legislation of Saskatchewan and Quebec.<sup>36</sup> Freedom of religion and freedom from discrimination based on religion are distinct freedoms. Freedom of religion means that individuals are free to have religious beliefs and follow religious practices, or to have no religious beliefs or practices, and to do so, or not, freely and openly.<sup>37</sup> Freedom from discrimination based on religion is an added dimension that means individuals may not be denied opportunities, in employment for example, because of their religious or non-religious beliefs or practices.

In human rights legislation, religion is variously called “religion,” “religious belief” or “creed.” None of these words is defined in the legislation<sup>38</sup> and in the decisions of human rights tribunals the words are treated interchangeably.<sup>39</sup> Most human rights adjudicators have recognized the religious beliefs of a complainant “so long as a

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<sup>34</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5 [*Egan*].

<sup>35</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 179 [*Vriend*]. The Supreme Court stated further (at para. 106) that human rights legislation must conform to *Charter* requirements but rejected the proposition that the legislation must mirror the *Charter*. Human rights legislation may exclude an enumerated ground if the exclusion can be justified under section 1.

<sup>36</sup> *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 3; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 4.

<sup>37</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94-95.

<sup>38</sup> W. Tarnopolsky and W. Pentney, *Discrimination and the Law including Equality Rights under the Charter* (Toronto: Thomson Carswell, 2004) at 6-2.

<sup>39</sup> *Ibid.* at 6-11.



complainant's beliefs are sincerely held and fall within the rubric of 'religion' broadly defined."<sup>40</sup>

In 1996, Paul Horwitz commented that religion had been poorly defined in Canada and that a "proper definition" was required.<sup>41</sup> A proper definition, in his view, would have to be a broad one, inclusive of more than mainstream religions, in order to respect Canadian values of pluralism and multiculturalism. Yet, the definition would have to be specifically religious in character to distinguish it from the separate guarantee of freedom of conscience also found in section 2(a).<sup>42</sup>

In 2004, Iacobucci, J. in *Syndicat Northcrest v. Amselem* wrote that it is "perhaps not possible to define religion precisely."<sup>43</sup> He then defined religion as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>44</sup>

This definition of religion has three key elements:

- (1) *personal beliefs and practices*. The significance here lies in the personal nature of beliefs and practices, no matter whether others share the same beliefs and practices;
- (2) *self-definition and spiritual fulfillment*. In understanding "self-definition," it must be kept in mind that as an enumerated ground of discrimination under section 15 of the *Charter*, religion is "immutable or changeable only at unacceptable cost to personal identity;"<sup>45</sup> and

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<sup>40</sup> R. Zinn, *The Law of Human Rights in Canada Practice and Procedure* looseleaf (Aurora, Ontario: Canada Law Book Inc., 2005) at 9-10.

<sup>41</sup> P. Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U.T. Fac. L. Rev. 1 at 6-7.

<sup>42</sup> *Ibid.* at 8-9.

<sup>43</sup> [2004] S.C.R. 551 at para. 39 [*Amselem*].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13.

- (3) *a connection with the divine or the object or subject of spiritual faith.* Religious beliefs and practices must be intended to connect the individual with a source of strength or power that is spiritual, not temporal.

It is the combination of the second and third elements, self-definition and the fostering of communion with spiritual power, which makes an individual's personal beliefs and practices particularly religious in nature, separate and distinct from non-religious beliefs and practices.

Since the definition of religion given by Iacobucci J. is applicable to both human rights legislation and the *Charter*, the decision in *Amselem* is useful in that it brings *Charter* and human rights law together on this point.<sup>46</sup>

### *C. Religion and Sexual Orientation*

Notwithstanding that sexual orientation is now firmly entrenched as a prohibited ground of discrimination in human rights legislation and under the *Charter*, many religious persons oppose same-sex relationships as conduct contrary to their religious belief. Because religion is a fundamental freedom under the *Charter* and a prohibited ground of discrimination in both human rights legislation and the *Charter*, those who disapprove of same-sex sexual conduct on religious grounds are entitled to hold this belief and are entitled to protection from discrimination based on their belief, subject to reasonable limits.

Given the opposition of many religious persons to gay and lesbian relationships, the stage is set for potential conflict between the right to enjoy religious freedom and to be free from discrimination based on religion, on the one hand, and the right to be free from discrimination based on sexual orientation, on the other hand. Where conflict exists, it will be a difficult issue for persons on both sides since both religion and sexual orientation are personal characteristics related to human dignity — to self-worth and self-perception. Robert Wintemute addresses the opposition of many religious individuals and institutions toward gays, lesbians, bisexuals and transsexuals in terms of religious hostility.<sup>47</sup> But it can also be observed that hostility goes both ways.<sup>48</sup> Hostility and contempt can exist toward religion, not just on issues involving sexual

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<sup>46</sup> *Amselem*, *supra* note 43 at para. 36.

<sup>47</sup> R. Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?" (2002) 1 J.L. & Equality 125 at 127.

<sup>48</sup> *Ibid.* The author (at 127) states: "If you are an LGBT person anywhere in the world, it is hard to have warm feelings towards most major religious institutions."

orientation, but toward religion generally, particularly by those who view religion as the antithesis of reason.<sup>49</sup>

The development of constitutional protection for sexual orientation is traced by Brenda Cossman<sup>50</sup> through cases such as *Canada (Attorney General) v. Mossop*,<sup>51</sup> *Egan*,<sup>52</sup> *Vriend*,<sup>53</sup> and *M. v. H.*<sup>54</sup> In tracing this development, she notes:

The history of lesbian and gay rights challenges is also a history of the mobilization of many conservative religious organizations who have opposed these challenges in the name of religion.<sup>55</sup>

Canadian law has evolved over the relatively short period of twenty years to recognize the equality rights of gays and lesbians, individually and as couples. The process of inclusion at law has not however been paralleled in the world of religion. Not all religions prohibit same-sex conduct and some religious institutions have begun a process of inclusion for gays and lesbians. A recent document of the U.S. Episcopal Church is reported to state: "We believe that God has been opening our eyes to acts of God that we had not seen before."<sup>56</sup> The document apparently affirmed "the eligibility for ordination of those in covenanted same-sex unions" when previously gays and lesbians in same-sex relationships would not have been eligible for ordination.<sup>57</sup> Within other religions, a prohibition against same-sex sexual relations has existed for centuries and continues to exist whether or not the relations are within a "covenanted" relationship. Indeed, the stance of the U.S. Episcopal Church on homosexuality may cause a schism within the world-wide communion of the Anglican Church.<sup>58</sup> John Von Heyking has expressed the difficulty this way:

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<sup>49</sup> J. Nedelsky, "Legislative Judgment and the Enlarged Mentality: Taking Religious Perspectives" in R. Bauman and T. Kahana eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006).

<sup>50</sup> B. Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" (2002) 40 Osgoode Hall L. J. 223.

<sup>51</sup> [1993] 1 S.C.R. 554.

<sup>52</sup> *Egan*, *supra* note 34.

<sup>53</sup> *Vriend*, *supra* note 35.

<sup>54</sup> [1999] 2 S.C.R. 3.

<sup>55</sup> Cossman, *supra* note 50 at 245.

<sup>56</sup> J. Lawless, "Anglicans Debate Homosexuality" *The [Halifax] Chronicle Herald* (22 June 2005) A7.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

It may be asking too much to require churches to abandon teachings that have lasted for thousands of years, especially considering that the teaching on homosexual acts is part of a broader teaching on chastity and sexuality, and on sanctity and worldliness.<sup>59</sup>

It is increasingly likely there will be occasions when the right to religious freedom and to be free from discrimination based on religion will be in conflict with the right to be free from discrimination based on sexual orientation as boundaries are determined for the interaction of these equality rights.

#### *D. Religion as an Exception*

In the employment setting, once a practice or rule has been proven by a complainant to be discriminatory, the employer bears the burden to justify the practice as a bona fide occupational requirement (BFOR). In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, generally referred to as the *Meiorin* case, the Supreme Court of Canada determined that a discriminatory practice or rule is justifiable as a BFOR if: the rule is rationally connected to performance of the job; the rule was adopted in an honest and good faith belief that it is necessary for fulfillment of the work-related purpose; and it is impossible to accommodate the employee without imposing undue hardship on the employer.<sup>60</sup>

An employer's duty to accommodate, subject to the limitation of undue hardship, requires an employer on occasion to treat an employee in a different manner than others in light of the employee's personal characteristics in order to avoid a discriminatory result. "Undue hardship" infers that an employer may have to experience some hardship amounting to more than a minor inconvenience to accommodate an employee<sup>61</sup> but not undue interference with business operations or undue expense.<sup>62</sup> An employee seeking accommodation

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<sup>59</sup> J. Von Heyking, "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada" (2000) 33 U.B.C.L. Rev. 663 at 694.

<sup>60</sup> [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*].

<sup>61</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 984 [*Renaud*].

<sup>62</sup> *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 23. Factors that may be considered when determining whether an accommodation constitutes undue hardship include: the financial cost of accommodation, disruption to a collective agreement, the interchangeability of the workplace and facilities, whether accommodation will cause substantial interference with the rights of other employees (including morale problems with other employees) and safety; see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 520-21. There is no definitive list of factors and accommodation to the point of undue

has a duty to respond to reasonable steps taken by an employer, by, for example, accepting a new assignment or re-scheduled work hours, in order to avoid the discriminatory situation, even at some inconvenience to the employee.<sup>63</sup>

Human rights legislation permits discrimination on the basis of religion in some instances. While the statutory wording differs from jurisdiction to jurisdiction, generally religious organizations either are exempt from the prohibition with respect to the persons they employ or may show religion as a BFOR for their employees. Where a religious school, for example, can show that it is a BFOR to hire only members of that religion to work in the school, religious-based discrimination may be permissible. Likewise it may be permissible for a religious institution to discharge employees who violate the tenets of the faith.<sup>64</sup> What is the rationale for this type of exemption or BFOR? As Bastarache J. wrote in dissent in *Amselem*, religion is personal but also includes a relationship with others who identify with the same religion.<sup>65</sup> Human rights legislation allowing religious institutions to discriminate on the basis of religion acknowledges that religions may have community based norms that are not always human rights based norms. Alvin Esau describes the community aspect of religion as necessarily exclusivist in doctrine and in lifestyle:

To legally compel the religious organization as employer to change the nature of the religious workplace from exclusivity as to doctrine and lifestyle, to a degree of inclusiveness so as to provide employment for those of other religions and other religious practices....is a direct assault on the religion of the employer at its very core.<sup>66</sup>

Esau describes debate over discrimination exercised by religious institutions when restricting employment on the basis of religion as “a clash of normative cultures” where the “exclusivity norms” of the

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hardship is limited only by innovation and practicality; see *Meiorin*, *supra* note 60 at para. 64.

<sup>63</sup> *Renaud*, *supra* note 61 at 994.

<sup>64</sup> A. Esau, “‘Islands of Exclusivity’: Religious Organizations and Employment Discrimination” (2000) 33 U.B.C. L. Rev. 719 at 750. See for example *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, where the Supreme Court upheld a Roman Catholic school board decision not to renew a teacher’s contract because she had married a divorced man in a civil ceremony contrary to Catholic dogma. See also *Schroen v. Steinbach Bible College* (1999), 35 C.H.R.R. D/1 (Man. Bd. Adj.), where the position of accounting clerk in a Mennonite Bible College was held to have a religious component which justified not hiring a Mormon to the position.

<sup>65</sup> *Amselem*, *supra* note 43 at para. 137.

<sup>66</sup> Esau, *supra* note 64 at 733.

religious group conflict with the “inclusivity norms” of human rights legislation.<sup>67</sup> In this clash of cultures, the interest of a religious institution as employer, unlike the interest of a non-religious employer, is preservation of religious integrity rather than economic efficiency in finding the best person for the position regardless of religion.<sup>68</sup>

#### 4. *Public Servants*

As the Supreme Court of Canada has observed, “The government of a large modern state is impossible to manage without a relatively large public service.”<sup>69</sup> Government employees, as public servants, hold many different positions and offices within the public service. In the performance of their jobs, government employees represent the state, serving both the public and the public interest. The public interest is based on the democratic values of our society, including freedom of religion and freedom from discrimination based on religion. In the recent case of *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, LeBel J. in dissent described freedom of religion as imposing “on the state and public authorities, in relation to all religions and citizens, a duty of religious neutrality that assures individual or collective tolerance, thereby safeguarding the dignity of every individual and ensuring equality for all.”<sup>70</sup> LeBel J. continued that the duty of religious neutrality represents the dissolution, or at least loosening, of historical ties between the church and the state. Historically, a religious belief officially sanctioned by the state would influence the legislative and policy decisions of that state. In Canada at the time of Confederation in 1867, the Christian religions of Protestantism and Catholicism held such influence.<sup>71</sup> More recently, philosophical, political and legal theories have influenced the view that religion should relate more to how individuals in their private lives and

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<sup>67</sup> *Ibid.* at 735.

<sup>68</sup> *Ibid.* at 732.

<sup>69</sup> *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 42. In this case, Ontario public servants unsuccessfully challenged legislation prohibiting them from running for Parliament without taking a leave of absence, raising funds for federal political parties and publicly expressing opinions on federal political issues. The Court determined that such restrictions on political activity ensure impartiality, a hallmark of responsible government.

<sup>70</sup> [2004] 2 S.C.R. 650 at para. 65 [*Lafontaine*]. This case involved a congregation of Jehovah Witnesses planning to build a Kingdom Hall. Their rezoning application was refused three times, twice without reasons. The majority decided the case on the basis of procedural fairness remitting the application back to the municipality for reconsideration. LeBel J., who would have dismissed the application on other grounds, addressed arguments made by the Congregation regarding religious freedom.

<sup>71</sup> *Ibid.* at para. 66.

religious associations ought to conduct themselves and less to how the state ought to conduct itself.<sup>72</sup> Matters of religious belief or practice are considered distinct from factors appropriate to state decision-making or administration. In the vein of separating religion and state, LeBel J. described the state in this country as a “neutral intermediary” between religions and also between religion and society.<sup>73</sup>

As Julien Taieb notes: “The balance between freedom of religion and other values...is always difficult to find. This balance will be different in each country depending on its political history and culture.”<sup>74</sup> In France, where freedom of religion and religious neutrality are premised on a greater degree of separation of religion and state than most countries, that country’s political history and culture moved government to pass legislation prohibiting distinctive religious signs and apparel such as Islamic headscarves in public schools.<sup>75</sup> This legislation has been described as placing state objectives of formal equality (treating everyone the same) over religious objectives of substantive equality (the recognition of differences based on belief).<sup>76</sup> In a state where the separation of religion and state is so pronounced, there will be few if any conflicts to resolve between the interests of the state and religion since the state does not take religious interests into consideration.

The political history and culture of Canada with respect to religion is quite different. Religion has been the subject of accommodation by the state since at least 1867, as reflected in the protection of minority religious rights in Ontario (Roman Catholic) and Quebec (Protestant) by virtue of section 93(1) of the *Constitution Act, 1867* which has been

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<sup>72</sup> *Ibid.* at para. 67.

<sup>73</sup> *Ibid.*

<sup>74</sup> J. Taieb, “Freedom of Religion: from France to the United States, a National Conflict of Law” (2004) 4:3 Global Jurist Advances 1, online: <http://www.bepress.com/gj/advances/vol4/iss3/art1> at 48. See also B. Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29 Sup. Ct. L. Rev. (2d) 169 at 171: “Neutrality has no fixed meaning. Its content is heavily influenced by historical factors and changing cultural contexts.”

<sup>75</sup> *Code de l’éducation* Art. L. 141-5-1, as am. by *Loi n° 2004-228 du 15 mars 2004*, J.O., 17 March 2004. In response to public debate regarding female students wearing Islamic headscarves in public schools, an independent commission recommended a statutory response precipitating passage by the French government of legislation prohibiting in public schools conspicuous religious signs and apparel that immediately identify a student’s religious affiliation. According to government policy, it is still possible to wear discreet signs of a religious nature: *République Française, Ministère de la jeunesse, de l’éducation nationale et de la recherche*, NOR: MENX0400001L/B2, *Exposé Des Motifs*.

<sup>76</sup> Taieb, *supra* note 74 at 35.

called “the Confederation compromise.”<sup>77</sup> Canadian human rights codes enacted by federal, provincial and territorial governments include specific exceptions for religious associations and institutions. The Supreme Court has required employers to accommodate for religious belief to the point of undue hardship. Canadian *Charter* jurisprudence has adopted a substantive approach to equality recognizing differences, including religious differences. Conflicts between the state and religion are resolved by balancing respective interests on a case-by-case basis looking at context and applicable principles.

What does religious neutrality mean in Canada in the relationship between the state and its employees? The answer depends on how neutrality is defined. If religious neutrality is defined along lines similar to the recent experience with Islamic headscarves in France it could mean *no religion* in the government workplace. If a duty of ensuring that no religious manifestation occurs is applied to the whole of the government workplace in an organic way, neutrality might require that employees, if religious, give no outward sign of their religion in appearance or by conduct.<sup>78</sup>

Supporters of this definition would argue that the best way to protect all religious belief is to bar all outward signs of religion from the public sector. Recently in the United States, the Supreme Court held that displays of the written text of the Ten Commandments posted and readily visible inside two courthouses in Kentucky were unconstitutional.<sup>79</sup> The displays were unconstitutional because they contained an inherently religious message favouring Judaism and Christianity over other religions (or non-religion) to no secular purpose. Responding to the decision, a spokesperson for the American Civil Liberties Union of Kentucky, a party to the litigation, said: “Our Constitution’s ban on government entanglement with religion is good for both government and religion. It keeps religion free, and it allows government to represent us all.”<sup>80</sup> While it may be appropriate to ban the Ten Commandments from courthouses in order to create a public space where persons of all religions or no religion feel welcome, arguably there

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<sup>77</sup> *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1198.

<sup>78</sup> Esau, *supra* note 64 at 734, describes an organic view of employment where “the employee is expected to participate in the mission of the organization as a whole” and in contrast an instrumental view of employment where the employee is to do an assigned task and no more.

<sup>79</sup> *McCreary County v. ACLU* 125 S. Ct. 2722.

<sup>80</sup> American Civil Liberties Union, “ACLU Applauds Supreme Court Ruling in Kentucky Ten Commandments Case”, American Civil Liberties Union Press Release, June 27, 2005, online: American Civil Liberties Union <<http://www.aclu.org/religion>



are circumstances where religion has a place in public and failure to accept religious diversity in public is not good for the state. Commenting on the French government decision to ban Islamic headscarves in public schools, Taieb observes that the legislation creates a reason for the Islamic community to reject the values of state since the state has rejected the community.<sup>81</sup> Horwitz gives meaning to this proposition when he says:

The loyalty of a citizen to the state, and the likelihood that that person will fully contribute to his or her society, is surely related to how that person is treated by the state. If the language of the courts indicates a measure of indifference toward, or lack of comprehension of, religion and its value, the courts will cease to command the respect or obedience of many who would otherwise be valuable citizens. Thus, even if individual outcomes do not change, a judicial and legislative approach to religious freedom that is properly respectful of the value of religion will result in a stronger and healthier society.<sup>82</sup>

Rather than defining religious neutrality as a duty of ensuring that no manifestations of religion occur in public space, religious neutrality could be defined as a duty of *religious tolerance* either in an instrumental way or in an organic way. In an instrumental way, a religious employee might be permitted to wear distinctive religious apparel or observe religious practices while at the workplace, so long as there is no interference with the employee getting done the assigned tasks of the job.<sup>83</sup> This approach respects religion but in a limited way, suppressing it whenever religion is in conflict with the work of government. Alternately, defined as a duty of religious tolerance and in an organic way, religious neutrality might permit employees not only to wear religious dress and observe religious practices at the workplace, but also to refuse to perform some tasks of the job based on sincerely-held religious beliefs.

Adopting a stance of tolerance, religion is accommodated in the workplace to a lesser (instrumental) or greater (organic) degree. Accommodation of religious belief in the workplace reflects what Steven Smith calls a “wide” version of religious neutrality. The “wide” version

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/tencomm/16265prs20050627.html>. In a second decision, the Supreme Court held that a stone monument of the Ten Commandments which had stood outside the Texas Statehouse for forty years was constitutional: *Van Orden v. Perry*, 125 S. Ct. 2854.

<sup>81</sup> Taieb, *supra* note 74 at 37.

<sup>82</sup> Horwitz, *supra* note 41 at 61.

<sup>83</sup> Ryder, *supra* note 74 at 179-80, observes that “...the existing jurisprudence would likely require governments to adjust their employment policies to accommodate, up to the point of undue hardship, the religious needs of public sector employees by making time and space available for prayer or meditation; it does not require

constrains government, on the one hand, not to invoke or rely on – that is, endorse – religious belief to justify important decisions and, on the other, not to reject – that is, disapprove of – religious beliefs.<sup>84</sup> The American Constitution, which prohibits government action establishing religion, such as posting a display of the Ten Commandments in a courthouse, also guarantees the free exercise of religion.<sup>85</sup> In the context of free exercise, employees in the United States who, for example, require time off to observe the Sabbath can be accommodated if there is no hardship to the employer. In Canada, the law also requires accommodation of religious belief although the threshold of hardship is higher in Canada than in the United States.<sup>86</sup> In Canada, the test is not just hardship but “undue hardship.” Nonetheless, undue hardship is a defence available to an employer and is a limit on accommodation and the right to be free from religious discrimination.<sup>87</sup>

There are few cases from the Supreme Court of Canada involving persons employed in the public sector and issues of equality under human rights legislation. In *Ross v. New Brunswick School District No. 15*, a public school teacher was ordered to be moved from his position as a classroom teacher to a non-teaching position.<sup>88</sup> The court held that his publicly-stated anti-Semitic beliefs “poisoned” the educational environment at the school where he taught and interfered with the educational services provided to Jewish students attending the school.<sup>89</sup> Although not employed directly in government, Ross was employed by

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governments to pass laws requiring private sector employers to do the same.” See also M. H. Ogilvie, “The Unbearable Lightness of *Charter* Canada” (2002) 3 J. of the Church Law Assoc. 201 at 218: “Although there are no cases, it is also the practice in most workplaces to make accommodations such as providing quiet rooms and times for prayer or study.”

<sup>84</sup> S. Smith, “The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom” University of San Diego Public Law and Legal Theory Research Paper Series, Working Paper 5 (March 2004), online: <http://law.bepress.com/sandiego/lwps/pllt/art5> at 10.

<sup>85</sup> U.S. Const. amend. I. The relevant words of the First Amendment of the United States Constitution are: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” All three branches of the national government and the governments of all state are bound by the First Amendment; see M. Perry, *Under God?: Religious Faith and Liberal Democracy* (Cambridge, Cambridge University Press: 2003) at 5.

<sup>86</sup> *Renaud*, *supra* note 61 at 983-84. The American test is *de minimis*, which means that the employer is not required to bear more than a *de minimis* cost in order to accommodate religious belief.

<sup>87</sup> S. Day and G. Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Can. Bar Rev. 433 at 465.

<sup>88</sup> [1996] 1 S.C.R. 825 [*Ross*].

<sup>89</sup> *Ibid.* at para. 6.

a public authority representing the state's interest in public education and in that sense he was a public servant. In the words of the Court in that case:

The respondent's freedom to make discriminatory statements [must be balanced] against the right of the children in the School Board "to be educated in a school system that is free from bias, prejudice and intolerance", a right that is...entrenched in s. 15 of the Charter...[T]he State, as employer, has a duty to ensure that the [fulfillment] of public functions is undertaken in a manner that does not undermine public trust and confidence.<sup>90</sup>

Within the ambit of accommodation, to what extent may employees of the state exercise their religious beliefs in a way that discriminates against others without undermining public trust and confidence as referred to by the Court in *Ross*?

In *Moore v. British Columbia (Ministry of Social Services)*, the complainant was employed on a probationary basis as a provincial government financial assistance worker.<sup>91</sup> She was a Roman Catholic whose faith opposed abortion. On one occasion, she refused on religious grounds to authorize financial assistance for an abortion. At the end of her probationary period, she was dismissed. The reasons were two-fold: she would not follow the instructions of a superior to perform certain tasks, and she was not able to provide the full range of services of a financial assistance worker.<sup>92</sup> The competing interests involved here were expressed before a human rights adjudicator hearing a complaint filed by Moore. From the perspective of Moore's supervisor, it was not appropriate for him to re-assign her work to someone else because she as employed to carry out all the work of a financial aid worker.<sup>93</sup> From Moore's perspective, she was required to choose between two important aspects of her life: her livelihood and her faith.<sup>94</sup>

Moore's supervisor was concerned that work assigned to her should not have to be assigned to someone else. A broader concern is that Moore's religious belief required her, a public servant, to refuse a public service to a member of the public. Moore lost her job on account of her religious belief. At one level, this result was administratively and perhaps economically efficient, if work assigned to Moore did not have to be re-assigned to others. At another level, it also eliminated a source of offence

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<sup>90</sup> *Ibid.* at paras. 83-84.

<sup>91</sup> [1992] B.C.C.H.R.D. No. 15 [*Moore*].

<sup>92</sup> *Ibid.* at para. 47.

<sup>93</sup> *Ibid.* at para. 35.

<sup>94</sup> *Ibid.* at para. 36.

to a member of the public originating with a government employee which, if permitted, would seemingly be condoned by government. Yet the result can be seen as non-inclusive and discriminatory of Moore and her lawful religious belief. Did the result which required Moore to lose her job represent a religiously neutral decision by government respectful of Moore's religious belief or did it represent rejection and disapproval of Moore's religious belief?

The sincerity of Moore's religious belief opposing abortion was not questioned.<sup>95</sup> The adjudicator found a *prima facie* case of discrimination since the requirement that Moore authorize financial assistance in circumstances contrary to her religious beliefs had an adverse effect leading to loss of her job. The adjudicator, who had to consider not only that Moore was a person of religious faith but also that Moore was a public servant, looked to American case law for guidance and cited *Haring v. Blumenthal*, a case from the District of Columbia which also involved a Roman Catholic public servant who opposed abortion:

Decision-makers at all levels not infrequently face conflicts of interest financial, family-related, or concerning matters of conscience or fixed opinion. Officials are justly criticized when they make decisions notwithstanding interest or bias, particularly when there is no disclosure. Law and public policy encourage disclosure and disqualification, and public confidence in our institutions is strengthened when a decision-maker disqualifies himself on account of financial interest, insuperable bias, or the appearance of partiality. In a very significant sense, therefore, public policy favors the course of disclosure of bias and disqualification ....<sup>96</sup>

The adjudicator found that Moore ought to have voluntarily disqualified herself at the outset from the request for financial assistance for abortion. This failure to disclose her religious bias at the outset did not, however, go to the merits of the case, only to remedy.<sup>97</sup> The adjudicator found that it would not have created undue hardship on either the employer or Moore's fellow employees to re-assign any files that would require Moore to make decisions contrary to her religious beliefs. If Moore had been the *only* employee able to approve an application for abortion, it is less clear that she would have been able to maintain both her exclusive religious belief and her employment at the expense of the inclusiveness necessary to serve the public and meet public expectations of fairness, religious neutrality and respect.

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<sup>95</sup> *Ibid.* at para. 54.

<sup>96</sup> 471 F. Supp. 1172 (DDC 1979) at 1183.

<sup>97</sup> *Moore*, *supra* note 91 at para. 65.

The issue in this case was not simply that Moore had a different view on abortion than the applicant because of her religion. Suppose the applicant had applied for financial assistance for some other health benefit such as eye surgery; there would be no grounds for Moore to refuse to assist the applicant even if the applicant approved of abortion whereas Moore did not. Nor could Moore rely on her religion to deny the application on the basis that the applicant was a person who had acted in a manner contrary to Moore's religious beliefs by previously having had an abortion.<sup>98</sup> It appears from the decision that the basis on which Moore could rely on her religious belief to decline to serve the applicant was quite narrow: the requirement that she participate directly in approving financial assistance for the applicant's abortion. In the circumstances, allowing Moore to refuse on religious grounds represented neither endorsement nor disapproval of her beliefs or the beliefs of the public served. By reinstating Moore to her position, the state signaled its willingness to take on the role of "neutral intermediary" described by LeBel J. in *Lafontaine*.<sup>99</sup> The applicant's decision regarding abortion was respected, notwithstanding Moore's religious objection to abortion; Moore's religious objection to abortion was respected, notwithstanding support for the applicant to procure an abortion.

What was the effect of Moore's religion on the applicant for financial assistance, a member of the general public? Moore did not sufficiently identify her religious objection to her employer at an early stage. Furthermore, she discussed her opposition to abortion with the applicant requesting financial assistance.<sup>100</sup> In fact, as the adjudicator found, Moore initially refused the application for financial assistance, not for religious reasons, but because she believed the application did not meet eligibility requirements. The applicant was successful on appeal and received the requested financial assistance. Ultimately, Moore's religion had no effect on this member of the public since the appeal was successful and in the end the applicant received assistance. Initially, however, since Moore stated her opposition to abortion, the applicant might have perceived that her application was rejected on religious grounds; she could have claimed discrimination based on religion, arguing that she was refused assistance for an abortion because her convictions about religion did not accord with Moore's. Members of the public should not be denied a government service because of their own or someone else's religious belief, nor should public officials convey the perception that service is based on religious belief or lack of belief. The

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<sup>98</sup> As it happened, the applicant had previously had an abortion and received financial assistance; *ibid.* at para. 40.

<sup>99</sup> *Supra* note 70.

<sup>100</sup> *Ibid.* at para. 65.

applicant as a member of the public dealing with government was entitled to religious neutrality and to the appearance of religious neutrality with respect to the decision-making process. The applicant was entitled not to experience rejection based on religious grounds, whether real or perceived. As a public servant, Moore ought to have disqualified herself from assessing the application as soon as she realized the request created a conflict of religious beliefs.<sup>101</sup>

The necessity to accommodate religious belief in the workplace is a significant development in employment and labour law. In the ordinary course, an employee who refuses to work on scheduled workdays or refuses to do a work-related task is subject to discipline by the employer, including dismissal. Refusing to come to work or to do assigned work is unacceptable workplace conduct. After all, an employee is paid to do the employer's work whatever that work is and at the time when the employer needs the work done. Discipline for unacceptable conduct in the workplace is based on fault. The employer who disciplined Moore by terminating her employment when she refused to work or to do a work-related task in effect found her at fault when she chose to follow the beliefs of her religion rather than the employer's demands. The finding of discrimination based on religion in the *Moore* decision was based on an acknowledgement that a religious-based objection to specific aspects or modes of work is not related to fault and therefore does not warrant discipline but accommodation.

The public servant Moore was reinstated to her position, implying that her conduct based on religious belief did not undermine public trust and confidence. The public servant Ross was removed from his position as a classroom teacher because his anti-Semitic conduct did undermine public trust and confidence. The respective positions and visibility of these two public servants helps to distinguish the results in these cases and explain why the limits of acceptable reliance on religious belief differed in these cases despite the commonality of state involvement and religion in both situations.<sup>102</sup> The public school is meant to be inclusive and to instill values that students will carry with them beyond school.

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<sup>101</sup> Alternately, the applicant might have made a claim of discrimination based on sex. In *Bird v. Aphetow House Ltd.* (1987), 9 C.H.R.R. D/4531, a human rights adjudicator in Saskatchewan made a finding of discrimination based on sex where an employer dismissed an employee when he learned that she had had an abortion. Although the *Human Rights Code* there expressly defined sex discrimination to include pregnancy and pregnancy-related illness, sex discrimination has since then been broadly defined generally to include pregnancy: *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

<sup>102</sup> See *Fraser v. Canada (Public Services Staff Relations Board)*, [1985] 2 S.C.R. 455; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69. In these freedom of speech cases, the Supreme Court held that public servants are not excluded from

The school is “not solely a public service like the post office, where the pupil would be a ‘user’, but rather...[[an] institution], where future citizens acquire their capacity to choose their own convictions and beliefs.”<sup>103</sup> As a teacher within the learning environment of a public school, Ross had a responsibility as role model to students.<sup>104</sup> His very vocal and public anti-Semitic views impaired his ability to act as a role model of tolerant respectfulness of others. In contrast to Ross’ position as teacher and role model, Moore’s employment as a financial clerk within a government department was closer to the “user” end of the spectrum of a post office than the “instilling values” end of the spectrum of a public school.<sup>105</sup>

### 5. Accommodation

Provincial statutory provisions governing the solemnization of marriage are not uniform regarding who may perform marriage. In Nova Scotia, for example, judges, authorized justices of the peace and authorized clergy can perform civil marriages.<sup>106</sup> In Newfoundland and Labrador, registered members of clergy, provincial court judges and persons appointed as marriage commissioners may perform civil marriages.<sup>107</sup> In Saskatchewan, in addition to religious officials, marriage commissioners may be appointed to perform marriages.<sup>108</sup> In all provinces there are provisions to permit religious officials to solemnize civil marriages.<sup>109</sup>

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fundamental rights and freedoms enjoyed by other citizens although these rights may be curtailed relative to the position and visibility of the public servant.

<sup>103</sup> Taieb, *supra* note 74 at 49. A similar view of the role of schools was expressed by the majority in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 13 [*Trinity Western*]: “Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance.”

<sup>104</sup> Ross, *supra* note 88 at para. 44.

<sup>105</sup> At the “user” end of the spectrum, if a public servant selling stamps directly to the public refuses to serve a purchaser (“user”), the purchaser could experience a sense of inferiority, unworthiness and rejection. If the “user” is unaware of a public servant’s refusal, the “user” is given access to the service and does not experience rejection. Public servants in positions involving direct contact with the public may be subject to greater curtailment of freedom than those in positions not involving direct contact with the public in order to avoid a “user’s” perception and experience of rejection.

<sup>106</sup> *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436, s. 4.

<sup>107</sup> *Solemnization of Marriage Act*, R.S.N.L. 1990, c. S-19, s. 3. Also permitted to perform marriages under s. 10(3) of the *Marriage Act* are the mayors of three cities: St. John’s, Corner Brook and Mount Pearl.

<sup>108</sup> *Marriage Act*, 1995, S.S. 1995, c. M-4.1, s. 3.

<sup>109</sup> *Marriage Act*, R.S.A. 2000, c. M-5, s. 3; *Marriage Act* R.S.B.C. 1996, c. 282, s. 2; *Marriage Act*, C.C.S.M. c. M-50, s. 2; *Marriage Act*, R.S.N.B. 1973, c. M-3, s. 2;

The Supreme Court of Canada has given a firm indication that the *Charter* guarantee of religious freedom will permit religious officials to refuse to perform both civil and religious same-sex marriages on religious grounds. The question that remains is whether public officials should likewise be permitted to refuse to solemnize same-sex marriages conducted for civil as opposed to religious purposes, if same-sex marriage is contrary to their religious beliefs. The answer should depend on whether, in considering the relationship between the state, its representatives and the public, it is appropriate for provinces to accommodate religious belief and if so, in what manner and degree.

### *A. No Accommodation of Religious Beliefs*

Some will argue that it is not at all appropriate to accommodate the religious belief of public officials. Richard Moon, for one, commenting on the educational sphere, is of the view that affirmation of same-sex relationships is a public value embedded in constitutional equality for gays and lesbians and hence teachers employed in public service must be committed to this public value even if it is contrary to personal values.<sup>110</sup> The same argument might be made with respect to public officials who solemnize marriages. Public officials are entitled to hold their religious beliefs but there is no place for them in public service if they cannot affirm in the course of their employment not only the equality of gays and lesbians as persons but also the public value of same-sex relationships.

On the other hand, if one accepts that equality for gays and lesbians requires affirmation of same-sex relationships as a public value, equality for religious persons requires as a public value an equivalent affirmation of the right to express and exercise dissenting beliefs, provided the rights of others are respected. Neither equality based on sexual orientation nor equality based on religion is absolute.<sup>111</sup> Requiring a religious person whose belief opposes same-sex marriage to act in a manner that constitutes an act of commission against that belief is not a trivial breach of religious freedom. The issue is whether the state as a “neutral intermediary” can achieve its equality interests in respect of both sexual orientation and religion by way of accommodation in the workplace.

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*Marriage Act*, R.S.O. 1990, c. M.3, s. 20(3); *Marriage Act*, R.S.P.E.I. 1988, c. M-3, s. 3; Art. 366 C.C.Q.

<sup>110</sup> R. Moon, “Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on *Trinity Western University v. B.C. College of Teachers* and *Chamberlain v. Surrey School Board District 36*” (2003) 8 Rev. Const. Stud. 228 at 269.

<sup>111</sup> *Trinity Western*, *supra* note 103 at para. 29.



Meaningful equality for religious persons requires at least considering whether accommodation is possible.

### *B. Accommodating Religious Beliefs*

Public servants do not forfeit the right to have and hold religious beliefs and to manifest them. A public servant's religious freedom in the case of same-sex marriage must be balanced against the need for public trust and confidence that the state will treat all its citizens, including gays and lesbians, with dignity and respect. The requirement of a government at the provincial level to solemnize same-sex marriages, which in itself is an affirmation of same-sex relationships, is unequivocal. In determining whether a public official should be permitted to refuse to solemnize a same-sex marriage, assuming a sincerely-held religious belief opposing same-sex relationships, the public servant's position and visibility in relation to the task of solemnization, including the process for same-sex couples to attain civil marriage (which may involve obtaining a license, having a ceremony, and documenting registration) are factors to consider.

Depending on administrative arrangements, a public official may or may not have direct contact with members of the public who request marriage licenses, marriage ceremonies or marriage registration. Same-sex couples appearing at a government office requesting marriage services should expect that they will not experience rejection by being refused service by a state representative whose job it is to serve the public. Where direct contact with the public is necessitated by a government employee at a government office, the state has an obligation to provide a representative who will not be disrespectful of applicants on the basis of prohibited grounds of discrimination, including sexual orientation.

In the *Moore* case, the human rights adjudicator determined that the employee who opposed abortion on religious grounds ought to have voluntarily disqualified herself at the outset from reviewing an applicant's request for abortion funding. Likewise, public officials who have a religious conflict with same-sex marriage have an obligation to disclose their conflict at the outset and disqualify themselves from circumstances of potential conflict before a situation arises. These employees do not make government policy regarding same-sex marriage, but rather carry out government policy. They serve in positions closer to the "user" end of the spectrum (like Moore, a financial aid worker) than the "instilling values" end of the spectrum (like Ross, a public school teacher). If not in direct contact with the public, these

officials are not visible representatives of government. Such factors support a determination that the state has an obligation to accommodate the religious freedom of these employees to the point of undue hardship. In the *Moore* case, public trust and confidence was not undermined by Moore's refusal to issue funding for abortion. Accommodation could be accomplished by reassigning files from one financial aid worker to another. In the case of public officials and same-sex marriage, accommodation can be accomplished by reassigning solemnization duties from one public official to another.<sup>112</sup> Undue hardship would exist if there were no public officials available to meet the public for the purpose of providing a marriage license, ceremony or registration to a same-sex couple other than officials who refused to do so on religious grounds or if there were so few public officials available that reassignment would impose an unreasonable burden on those who had no religious objections.<sup>113</sup>

Government in each province is obliged to ensure a sufficient number of officials are available to perform marriage ceremonies, including same-sex marriage ceremonies. In some instances, public officials such as justices of the peace and marriage commissioners may not be employed by the state but authorized by the state to perform marriages at the request of couples. These public officials, although representing the state in performing a civil function, are not as closely allied with the state as those public servants who are employed by government at a government site. These authorized officials who perform a civil function, but are otherwise independent from the state, are a hybrid between religious officials who, also by statute, perform a civil function and public servants who are employed by government. Since religious officials can refuse to perform same-sex marriages and government employees who cannot perform same-sex marriages on religious grounds ought to be accommodated, it would seem consistent to, and anomalous not to, provide accommodation to the point of undue hardship to this group of public officials who are not government employees. All the same, those public officials who refuse to perform same-sex marriages have a duty to do so only in a manner that is respectful to same-sex couples.<sup>114</sup>

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<sup>112</sup> In *Moore's* case, reassigning files would respect her religious beliefs and at the same time avoid refusing a public service based on religion or sex. In the case of public officials, reassigning duties would respect the religious beliefs of public officials and at the same time avoid refusing a public service based on religion or sexual orientation.

<sup>113</sup> See *Ryder*, *supra* note 74 at 191, where the same view is expressed.

<sup>114</sup> According to a British Columbia Human Rights Tribunal decision, a Roman Catholic organization was entitled to refuse to rent its premises to a same-sex couple for their wedding reception on the basis that doing so would represent condonation of an act

### C. Provincial Responses

Three provinces – Newfoundland, Manitoba and Saskatchewan – do not accommodate the religious beliefs of their public officials and require them to resign their positions if they are unwilling to perform same-sex marriages. Human rights complaints have been filed by officials in Manitoba and Saskatchewan to challenge this requirement.

In Ontario and Quebec, thousands of same-sex couples were married before the decision of the Supreme Court in the *Reference* was rendered.<sup>115</sup> The right of same-sex couples to be married was respected and seemingly, in those two provinces, public officials were not required to resign if they were unwilling to solemnize same-sex marriages. After the *Reference*, Ontario amended its marriage legislation to incorporate the right of religious officials to refuse to solemnize marriages contrary to their religious beliefs<sup>116</sup> but there was no corresponding amendment made allowing public officials to refuse, such as clerks of local municipalities who are authorized by regulation to solemnize marriages.<sup>117</sup> Apparently, however, local municipalities in Ontario are, without legislation, accommodating the religious beliefs of these employees.<sup>118</sup> Likewise, in Nova Scotia, there does not appear to have been a requirement made for public officials to resign their positions if unwilling to perform same-sex marriages. From this, we might infer that in these three provinces - Ontario, Quebec and Nova Scotia - there is an adequate number of public officials willing to perform same-sex marriages and the religious beliefs of public officials are being accommodated.

In British Columbia, as in Ontario and Quebec, same-sex couples were married before the Supreme Court's *Reference* decision was rendered.<sup>119</sup> Reportedly, in that province there was initially a directive from government advising marriage commissioners to resign if unwilling to perform same-sex marriages.<sup>120</sup> A subsequent report, however,

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contrary to the organization's core religious beliefs. The organization was faulted nonetheless for how it handled the refusal and was ordered to compensate the complainants for injury to dignity, feelings and self-respect: *Smith v. Knights of Columbus*, 2005 BCHRT 544.

<sup>115</sup> *Supra* note 1 at para. 67.

<sup>116</sup> *Marriage Act*, R.S.O. 1990, c. M.3, s. 20(6) as am. by S.O. 2005, c. 5, s. 39(3). A similar amendment was made to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 18.1(1) as am. by S.O. 2005 c. 5, s. 32(11).

<sup>117</sup> O. Reg. 285/04, s. 1.

<sup>118</sup> "Avert Same-sex Hassles" Editorial *Toronto Star* (28 February 2005) A18.

<sup>119</sup> *Supra* note 1 at para. 67.

<sup>120</sup> "Commissioners Told to Perform Same-sex Weddings or Quit" CBC News

indicates that marriage commissioners may refuse, provided they refer same-sex couples to other commissioners who will perform the marriage.<sup>121</sup> The latter position is a form of accommodation which apparently some commissioners were unable to accept and therefore did resign.<sup>122</sup>

In the case of New Brunswick, accommodation of the religious beliefs of public officials may be mandated by statute. On June 29, 2005 New Brunswick gave second reading to legislation amending the provincial *Marriage Act*. The amendment reads:

12.1 Notwithstanding any other Act, a person who is authorized to solemnize marriage under this Act may refuse to solemnize a marriage that is not in accordance with that person's religious beliefs.

12.2 The Minister of Justice may appoint such deputy clerks under subsection 69(1) of the Judicature Act as the Minister considers necessary to ensure that there is adequate access to the service of solemnization of marriage in each judicial district.<sup>123</sup>

Similarly, in the case of Prince Edward Island, a recent amendment to the *Marriage Act* reads:

11.1 For greater certainty, a person who is authorized to solemnize a marriage under this Act may refuse to solemnize a marriage that is not in accordance with that person's religious beliefs.<sup>124</sup>

Interestingly, New Brunswick and Prince Edward island have both chosen to employ in their legislation the words "solemnize" and "solemnization" which carry with them from the *Constitution Act, 1867* the full range of powers associated with marriage, including issuing licenses, performing ceremonies and effecting registration, thereby eliminating any uncertainty regarding the scope of duties a public official may refuse to carry out in relation to same-sex marriage.

In Alberta, prior to the Supreme Court's decision in the *Reference*, the provincial government opposed same-sex marriage. Since the decision, the Premier of the province stated that marriage commissioners

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Vancouver (21 January 2004), online: <[http://www.cbc.ca/story/bc\\_samesex/2004/01/21.html](http://www.cbc.ca/story/bc_samesex/2004/01/21.html)>.

<sup>121</sup> See Clark, *supra* note 12 at A5.

<sup>122</sup> *Ibid.*

<sup>123</sup> Bill 76, *An Act to Amend the Marriage Act*, 2d Sess., 55th Leg., New Brunswick, 2005.

<sup>124</sup> *An Act to Amend the Marriage Act*, S.P.E.I. 2005, c. 12.

would not be forced to perform marriage against their beliefs and that legislation would be enacted to protect the rights of Albertans “whether religious or non-religious” to express beliefs upholding the traditional definition of marriage although no such legislation has yet been enacted.<sup>125</sup> Presumably, even in the absence of legislation, accommodation would occur in this province.

In sum, in the course of meeting the needs of same-sex couples for marriage, most provinces favour accommodating the religious beliefs of their public officials.<sup>126</sup> In Manitoba and Saskatchewan, the issue awaits the adjudication of human rights complaints that have been filed in those provinces because there is no accommodation of religious belief. The outcome of those complaints will no doubt be of interest to public officials in Newfoundland who have also had to resign for their refusal to perform same-sex marriages.

## 6. Conclusion

Solemnization of marriage belongs jurisdictionally to the provinces. Each province must deal with solemnization as it deems appropriate mindful of human rights and *Charter* obligations to all citizens. One of the strengths of the *Charter* is that it supports “tolerance of divergent beliefs,” which is “a hallmark of a democratic society.”<sup>127</sup> In Canada, tolerance means we will allow all individuals to participate in society with the least possible interference with personal characteristics that we have held to be worthy of protection.

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<sup>125</sup> S. Deveau, “Alberta to Recognize Same-sex Marriage” *The Globe and Mail* (12 July 2005) online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20050712.wgaymarriage0712/B>>.

<sup>126</sup> In October 2006 it was reported that the federal government was considering new legislation called the *Defence of Religions Act* to protect public officials who refuse to perform same-sex marriages, and also to protect people who criticize homosexuality or refuse to do business with gay rights organizations; see J. Ibbitson, B. Curry and B. Laghi, “Tories Plan to Protect Same-Sex Opponents: If Government loses bid to Reopen Debate, Defence of Religions Act is Next Option” *The Globe and Mail* (October 4, 2006) A. Within twenty-four hours, however, the Prime Minister appeared to deny that there would be such a move; see B. Cheadle, “Harper Denies Plan to Protect Gay-Marriage Opponents” *The [Halifax] Chronicle Herald* (October 5, 2006) A5. Clearly, the federal government would have no jurisdiction to enact legislation directed at solemnization of marriage by public officials. In any event, in situations where rights involving sexual orientation and religion may conflict, human rights tribunals and the courts are available and well-suited to balance the rights of the parties in light of particular circumstances.

<sup>127</sup> *Trinity Western*, *supra* note 103 at para. 36.

Tolerance implies disagreement and requires accommodation.<sup>128</sup> In the case of same-sex marriage, accommodation to the point of undue hardship means respecting the rights and interests of both same-sex couples and religious persons since both are subject to personal characteristics that are unchangeable or can be changed only at great personal cost. Change is often incremental in nature as it was for equality based on sexual orientation in Canada. Accommodation of religious belief is an appropriate response during this period of change as Canada transitions from the historical and familiar definition of marriage as the union of one man and one woman to the new and inclusive definition of marriage as the union of two persons.

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<sup>128</sup> As Steven Smith notes, "...disagreement is a prerequisite for the possibility of tolerance: it would be odd to say that you 'tolerate' an idea that in fact you find wholly unobjectionable:" S. Smith, "Toleration and Liberal Commitments" University of San Diego Public Law and Legal Theory Research Paper Series, Working Paper 4 (2004), online: <[http://law.bepress.com/sandieg\\_olwps/pllt/art4](http://law.bepress.com/sandieg_olwps/pllt/art4)> at 7.