Appeal No. A117-30-08757
Lower Court No. CI 14-01-88873

THE COURT OF APPEAL OF MANITOBA
WINNIPEG

BETWEEN:

KEVIN RICHARD KISILOWSKY

Appellant (!'-pplicant)
(Applicant) Appellant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA

Respondent (Respondent)
(Respondent) Respondent

Appellant

FACTUM OF THE APPLICA:N'f KEVIN RICHARD KISILOWSKY

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PART 1: INTRODUCTION AND OVERVIEW

I. This is an appeal of the November 21, 2016, judgment of the Honourable Madam Justice Simonsen dismissing the Applicant's claim for relief from the government of Manitoba's revocation of his license (the "License") to solemnize marriages (the "Judgment")'. Mr. Kisilowsky's License was revoked in 2004 by the Respondent because his religious beliefs do not permit him to perform a same-sex wedding ceremony (the "Decision").

2. Prior to the judgment in *Vogel v. Canada (Attorney General)*[2] (which legalized same-sex marriage in Manitoba) the Applicant used his Licence to solemnize weddings from time to time, in conjunction with his Christian ministry to bikers and fringe members of society, and did so without government impediment. Immediately following *Vogel,* the Respondent instituted a policy that required all marriage commissioners to solemnize same-sex marriages or surrender their licenses. The Applicant, who provided no services to the public at large and did not advertise his services, refused to surrender his License and it was revoked by the Respondent.

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[1] Judgment indexed as *Kisilowsky* v. *Her lvlajesty the Queen,* 2016 MBQB 224 (the "Judgment"). **[BOA Tab** 7]

[2] [2004] M.J. No. 418 (Man. Q.B.) *[Vogel].* **[BOA Tab 17]**

3. The Applicant's legal challenge of the revocation of his License pursuant to s. 2(a) of the *Canadian Charter of Rights and Freedoms* was heard on September 8, 2016. In dismissing Mr. Kisilowksy's Application, Justice Simonsen found the following, *inter alia:*

a. That the revocation of Mr. Kisilowsky's License did not infringe his *Charter* rights under s. 2(a);[3]

b. That the revocation of Mr. Kisilowsky's License was proper because it was in the "the public interest";[4]

c. That Mr. Kisilowsky was bound by the *Charter* because he was implementing a government program, and was not permitted to decide whether or not to exercise the use of his License;[5]

d. That the Decision was reasonable because it "is a proportionate balancing of the *Charter* rights that are at play", namely Mr. Kisilowsky's "rights under s. 2(a) and the rights under s. 15 of those wishing to marry"[6]; and

e. That if the Applicant wishes to have his beliefs accommodated he can start his own denomination and apply for a clergy marriage license pursuant to which his beliefs would be protected, or alternatively he could apply for a temporary

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[3] Judgment, para. 28. **[BOA Tab 7]**
[4] Judgment, para. 22. **[BOA Tab** 7]
[5] Judgment, para. 21. **[BOA Tab 7]**
[6] Judgment, para. 29. **[BOA Tab** 7]

one-time license[7]; and that both of these are reasonable accommodations in the context of the removal of his License.

PART 2: CONCISE SUMMARY OF MATERIAL FACTS

4. Prior to the 2004 decision in *Vogel,* the Office of Vital Statistics ("Vital Statistics") had two lists for those licensed to solemnize marriages: a private and a public list. The general public had access to the public list, but there remained a private list of marriage commissioners who did not want, for whatever reason, their names published on the first list (the "Private List").[8] Mr. Kisilowsky states he was informed by Vital Statistics that his name would be placed on the Private List due to his religious beliefs and his stated intention to only solemnize Christian wedding ceremonies, as opposed to ceremonies for those of different faiths or non-religious ceremonies. In October 2003, when Mr. Kisilowsky obtained his License same-sex marriage was not legal in Canada.

5. At the hearing of this matter on September 8, 2016, the Respondent finally and fully admitted to the existence of the Private List, despite the fact that it had previously specifically denied its existence in its written materials to the Comt. The Respondent also admitted that it did away with the Private List following *Vogel.*[9]

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[7] Judgment, paras. 39, 40, 44. **[BOA Tab** 7]
[8] Transcript of Hearing before the Honourable Madam Justice Simonsen September 8, 2016 (the "Transcript of Hearing"), pp. 19, 20; p. 111 lines 14-18.
[9] Brief of the Respondent, para. 8; Transcript of Hearing, p. 57, lines I4-19.

6. The presence of a public list, distinct from the Private List, effectively created a kind of "single entry point system" in Manitoba, whereby a couple who desired to be married was matched with a marriage commissioner who had chosen to be available on the public list. The single-entry point system was proposed by the Saskatchewan Court of Appeal [10] as an effective way in a free society to balance the competing interests of gay marriage applicants and religious marriage commissioners who objected to performing a same-sex marriage. The Saskatchewan Comt of Appeal noted that with a single-ent1y point system there never needed to be any hurt feelings about accommodation for anyone involved. [11]

7. Mr. Kisilowsky was never approached by a same-sex couple with a request to perf01m a wedding, and would never be so approached if the Private List would continue to exist, therefore there was no clash ofs. 2(a) religious ands. 15 equality rights. Prior to 2004, couples seeking marriage, of whatever religion or persuasion were successfully mar'ied without accessing the Private List. Those on the Private List, like Mr. Kisilowsky, were able to utilize the License for the purposes that they obtained it. For Mr. Kisilowksy, that use was in the context of his unique ministry with people who do not want organized religion, such as bikers, but nevertheless wanted a Christian mal1'iage ceremony.

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10 *Reference re Constitutional Act, 1978 (Saskatchewan),* 20 I 1 SKCA 3, paras. 85-87 *[Saskatchewan lyfarriage Reference].* **[BOA Tab 9]**

11 *Saskatchewan lyfarriage* Reference, paras. 85-86. **[BOA Tab 9]**

8. The loss of the License was not trivial to Mr. Kisilowsky. He obtained and utilized the License lawfully, and was discriminated against by the Respondent solely on the basis of his religion and conscience. Following the loss of the License he was required to come as a supplicant to the Respondent on a case by case basis, now needing to wait for weeks for a one-time license, for something that he could exercise previously at his discretion. This resulted in Mr. Kisilowsky being unable to perform wedding ceremonies for requesting couples.

PART 3: LIST OF ISSUES AND STANDARD OF REVIEW

9. Pursuant to section 89(a) of *The Court of Queen's Bench Act,*[12] the Court of Appeal has the jurisdiction to determine this appeal.

10. This Appeal raises the following general issues:

a) Whether the Manitoba *Marriage Act* conveys a discretionmy, permissive power in granting private individuals licenses to solemnize marriages, or a mandatory obligation to do so in all circumstances;

b) Whether an unpaid private citizen with a license to solemnize marriages is protected by the *Charter,* or whether the citizen somehow becomes an extension of the state by obtaining a license to solemnize marriages, and thereby loses her or his own *Charter* rights and freedoms; and

[12] CCSM c C280.

Whether the revocation of a license to solemnize man'iages due solely to the license holder's religious beliefs infringes the s. 2(a) rights enumerated in the *Charter of Rights and Freedoms*[13].

11. The specific grounds of appeal are listed below, with the position of the Applicant and the applicable standard of review pertaining to each.

12. **Ground 1 - No Conflict of Rights** The Applicant submits the lower Comt erred in law in concluding that the s. 2(a) *Charter* rights of the Applicant are in conflict with the s. 15 *Charter* rights of prospective same-sex marriage candidates, when there is no evidence such a conflict existed. The Applicant states that the only rights infringed in this matter are his own *Charter* section 2(a) freedom of conscience and religion; there is no clash of rights. In the alternative, if there is a conflict of rights, that conflict was created solely through the actions of the Respondent when it terminated the Private List. The standard of review of this issue is correctness. [14]

13. **Ground 2 - Hierarchy of Rights Impermissible** The Applicant submits that the Honourable Trial Justice erred in law in creating a hierarchy of *Charter* rights, with the s. 15 rights of hypothetical same-sex marriage candidates superseding the rights of all others. Such hierarchy is not lawful, nor is such a conflict necessary in Canada's free and democratic society. In terminating the Private List, the Respondent

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[13] *The Co11stit11tion Act, 1982, Sched11le B to the Canada Act 1982 (UK),* 1982, c 11 (the *"Charter").*

[14] See *Housen v. Nikolaisen,* 2002 SCC 33, 2002, paras. 33-35 *[Ho11sen]* **[BOA Tab 5]**

not only placed a higher value on hypothetically infringed same-sex rights, but created a hierarchy of rights within s. 15 itself, with same-sex rights at the top, and all other equality rights beneath.

14. The Supreme Court of Canada has provided clear direction in the *Reference re Same-Sex Marriage,* stating:

> The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprndence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the Charter and will be of no force or effect under s. 52 of the Constitution Act, 1982. [15]

15. The Respondent's Decision to eliminate the Private List and take away the Applicant's License conflicts with the *Charter,* and should be void. As an error of law, the standard of review on this issue is correctness.

16. **Ground 3 - Wrong Test Applied Re: Policy** The Honourable Justice determined that the "real" issue before her was the Policy of the Respondent that all marriage commissioners must marry all eligible couples (the "Policy"), but then failed to apply the test for determining the validity of a policy. Rather, the Honourable Justice incorrectly applied the test developed in *Dore c. Quebec (Tribunal des professions),* [16] for determining the validity of an administrative

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[15] *Reference re Same-Sex Marriage,* 2004 SCC 79, paras. 52, 53 *[Supreme Court Marriage Reference].* **[BOA Tab 13)**

[16] 20 12 SCC 12 *[Dore].* **[BOA Tab 3)**

decision. It is an error of law to apply the wrong legal test.[17] This error is reviewable on a standard of correctness.

17. **Ground 4 - Private Citizens Not Bound By *Charter*** The Honourable Justice erred in law in finding that Mr. Kisilowsky, an unpaid, private citizen with a license to solemnize marriages, is bound by the *Charter.*

18. A private citizen who receives a discretionary license to do something does not automatically become an arm of the government for the purposes of the *Charter.* Doctors are paid by the state and licensed by the state to implement government health care, yet their conscience rights are recognized and protected by the *Charter.*[18] Similarly, Mr. Kisilowsky, who is not paid by the state, is protected by the *Charter,* not bound by the *Charter.* Further, it was not "in the public interest" for Mr. Kisilowsky's License to be cancelled, as the public is diverse and disagrees widely on the issue of marriage and sexuality. As an error of law, the standard of review on this issue is correctness.

19. **Ground 5 - Licenses Permissive Not Mandatory** The Honourable Justice erred in law in failing to find that the Manitoba *Marriage Act* grants permissive and

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[17] The correct test to determine whether the Policy constitutes an unjustifiable infringement of *Charter* rights is the s. 1 justification analysis: *Greater Vancouver Transportation Authority v. Canadian Fedemtion of Students - British Columbia Component,* 2009 SCC 31, paras. 37; 58; 64-65 *[Greater Vancouver].* **[BOA Tab 4]**

[18] *Carter v. Canada (Attomey General),* 2015 SCC 5, para. 132 [*Carter]* **[BOA Tab 1];** *An Act to amend the Criminal Code and lo make related amendments to other Acts (medical assistance in dying),* SC 2016, c 3.

discretionary authority to solemnize marriages, not a mandatory requirement for licensees to do so.

20. The Respondent exercised its discretion to provide such licenses, and once it does so it must act in accordance with the *Charter* and natural justice. No law requires Mr. Kisilowsky to utilize the License once granted. The Respondent cannot arbitrarily rescind licenses, and it cannot arbitrarily terminate the Private List, if doing so would violate *Charter* rights. Section 7 of the *Act* is permissive, not mandatory. As an error of law, the standard of review on this issue is correctness.

21. **Ground 6 - Impact on Applicant More Than Trivial** The Honourable Justice erred in law in finding that the impact of the removal of the Applicant's license was not more than trivial or insubstantial, and that the Applicant's s. 2(a) *Charter* rights were therefore not infringed.

22. The Respondent stripped Mr. Kisilowsky of his License solely because his religious belief prevented him from solemnizing same sex maniages. Mr. Kisilowsky was content to exercise his *Charters.* 2(a) fundamental freedom, in the context of pe1forming Christian wedding ceremonies for friends and acquaintances in his outreach ministry, while on a Private List. Requiring a marriage commissioner to solemnize a same sex marriage against his/her conscience would infringe religious

freedom under s. 2(a) of the *Charter*.[19] As an error of law, the standard of review on this issue is correctness.

23. **Ground 7.** The Honourable Justice erred in law in concluding that the Respondent had sufficiently accommodated the Applicant's 's s. 2(a) *Charter* rights by inf01ming the Applicant that he could either start his own religious denomination or apply for temporary permits to solemnize marriages on an individual basis.

24. As an error of law, the standard of review on this issue is correctness.

PART 4: ARGUMENT

25. The law pertaining to this appeal is as follows.

26. Section 2(a) of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion.

27. Section 1 of the *Charter* states:

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

28. The Manitoba *Marriage Act* in force during the material time in question, from August 1, 2002 to May 28, 2006, was substantially identical to the version in

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[19] *Saskatchewan Marriage Reference,* para 65. **[BOA Tab 9]**

existence today, and contained the following provisions regarding the appointment ofmall'iage commissioners:

> *Appointment of marriage commissioners*
> 7(1) The minister may appoint any person more than 18 years of age as a maiTiage 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.

No Conflict of Rights

29. The Applicant submits that the only infringement in the matter at bar is that of the Applicant's s. 2(a) *Charter* right. Mr. Kisilowsky lost his License. There are no other infringements in evidence. *Charter* rights are not to be determined in a factual vacuum.[20] The lower Court improperly engaged in hypothesizing about imagined *Charter* violations which did not occur, to justify the violation of Mr. Kisilowsky's rights, which did occur. The Supreme Comt of Canada has stated that attempting to determine a *Charter* question absent proper facts trivializes the *Charter* and results in ill-considered opinions.[21]

30. In the alternative, if a conflict of rights is present, it occurs *only* as a result of the Province of Manitoba arbitrarily terminating the Private List for licensed private marriage commissioners. No conflict need occur in what was formerly, in its

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[20] *Supreme Court Jvfarriage Reference,* para, 51, citing *lvfacKay v. 1'vfanitoba,* [1989] 2 S.C.R. 357, at p. 361. **[BOA Tab 13]**
[21] *Supreme Court 1'vfarriage Reference,* para. 52. **(BOA Tab 13]**

essential elements, a single-entry point system, until the Respondent terminated the Private List.

31. Mr. Kisilowsky obtained his License in a regulatory environment which included a Private List for those who did not wish to be on the public list of commissioners. The Province of Manitoba had an accommodative provision for those persons who, for whatever reason, wished to hold their Licenses privately. That accommodative provision was appropriate and reasonable, respecting the principles of a free society.

32. Without consultation, notice or process, the Respondent abrnptly terminated the Private List, and sought to compel all private individuals with a License to many same-sex couples. Prior to that, a person could perform one ceremony a year, or a hundred, or none. Mr. Kisilowsky could perform services for those in his ministry, such as "bikers", who trusted him and wanted his private services. He enjoyed the freedom to perform services for no one, if he found no opportunity or need to do so.

33. In determining that it would terminate the Private List and place Mr. Kisilowsky's name on the public list, the Respondent consciously chose to cease accommodation of Mr. Kisilowsky's *Charter* s. 2(a) freedom. But for the Respondent's actions, both the legal right of same-sex couples to marry, and Mr. Kisilowsky's *Charter* freedoms, could have been properly delineated and

accommodated.[22] The actions of the Respondent in terminating the Private List were arbitrary, unreasonable and discriminatory.

34. The only reason that the Province of Manitoba terminated the Private List is because it has chosen to place a higher value on same-sex rights than on any other rights. The Respondent argues that it aims to compel everyone with a license to many same-sex couples. But at no point did the Respondent seek to compel evelyone with a license to many Bahai couples, or Hindu couples, or Muslim, Christian or atheist couples. The Respondent has elevated the right to obtain a same-sex wedding ceremony over and above the right to obtain a Hindu, Christian, Muslim or non-religious ceremony.

Hierarchy of Rights Impermissible

35. There can be no hierarchy of rights in Canadian law. Manitoba's Decision has created an imbalance, resulting in state oppression of *Charters.* 2(a) rights in favour of other "more important" rights, by the deliberate removal of the accommodation which existed prior to the Decision.

36. No assessment of a government policy will be effective or acceptable if tainted with the hierarchical approach embraced by the lower Court in this case.[23] The

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[22] *Supreme Court Marriage Reference,* para. 52. **[BOA Tab 13]**

[23] *Saskatchewan Marriage Reference,* para. **66[BOA Tab 9];** *Trinity Western University v. Law Society of British Columbia,* 2016 BCCA 423, 2016 Carswel!BC 3008, para. 164 *[TWUv. LSBC,* 2016 BCCA 423] **[BOA Tab 16];** *Supreme Court Afarriage* Reference, para. 50 **[BOA Tab 13];**

requirement to engage in a balancing exercise of rights has not changed.[24] A proper balancing of *Charter* rights:

> ... goes beyond simply considering the competing rights engaged and choosing to give greater effect to one or the other, with either course of action being equally reasonable. Rather, the nature and degree of the detrimental impact of the statutory decision on the rights engaged must be considered.[25]

37. It is impo1tant to note that the "language of 'offense and hmt' is not helpful in balancing competing rights".[26] There is no right to not be offended.[27] The fact that Mr. Kisilowsky retained his License, or that his name was on the Private List, does not infringe anyone's *Charter* rights. A robust analysis must move beyond an assessment of hmt feelings, especially hypothetical hmt feelings, and engage in an objective delineation of rights with an eye to accommodating both. It is clear that the Respondent failed to engage in a balancing exercise when it terminated the Private List and gave an ultimatum to all ma1Tiage commissioners: marry same-sex couples or hand in your licenses.

Wrong Test Applied Re: Policy

38. The lower Court found that the "real issue" was the Policy implemented by Vital Statistics, requiring all marriage commissioners to either solemnize same-sex

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Trinity Western University v. College of Teachers (British Columbia), 2001 SCC 31, para 31 *[TWUv. BCC1]* **[BOA Tab 15].**

[24] *TWUv. LSBC,* 2016 BCCA 423, para. 158 **[BOA Tab 16]**

[25] *TWUv. LSBC,* 2016 BCCA 423, para. 166. **[BOA Tab 16]**

[26] *TWU* v. *LSBC,* 2016 BCCA 423, para. 189. **[BOA Tab 16]**

[27] *TWU v. LSBC,* 2016 BCCA 423, para. 188. **[BOA Tab 16]**

marriages or hand in their licences.[28] The lower Comt also found that the proper analytical framework for determining the constitutionality of this policy is the *Charter* s. 1 justification analysis.[29] However, the Comt then applied the wrong legal analysis, that of *Dore,* which is reserved exclusively for reviewing administrative decisions with *Charter* implicatons. This is an error of law.

39. If a hue conflict of *Charter* rights occurs as a result of a government policy, then the rights must be balanced through as. 1 justification analysis.[30]

40. The lower Comt should have used the "delineation and reconciliation of rights" analysis, because the *Charter* rights implicated by the Policy were not in conflict, based on the facts of this case. Alternatively, the lower Court should have balanced competing *Charter* rights under the s. 1 justification analysis, if there were rights were in conflict.[31] The Applicant has included as. 1 analysis of the Policy as an addendum hereto in the event this Honourable Comt desires submissions on this

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[28] Judgment, para. 18. **[BOA Tab 7]**

[29] The Policy cannot be assessed in a factual vacuum - the lower Court failed to consider the termination of the Private List in conjunction with the Policy.

[30] *Saskatchewan lvlarriage Reference,* paras. 57 and 66 **[BOA Tab 9];** *Multani c. Jvlarguerite-Bourgeoys (Commission sco/aire),* 2006 SCC 6, para. 26 *[Multani]* **[BOA Tab 10].** The analysis that must be followed to determine if a limitation is justified under s. 1 in the context of competing rights is described in paragraph 68 of the *Saskatchewan Jvlarriage Reference:* "The first requirement is that the objective of the impugned law be of sufficient impoltance to warrant overriding a *Charter* right or freedom. The second requirement involves the satisfaction of a form of "proportionality" test. Three factors are considered in determining if a law is proportional in this sense: (a) the particulars of the law must be rationally connected to its objective, (b) the law must impair the right or freedom in question as minimally as possible, and (c) there must be an overall proportionality between the deleterious effects of the law and its object."

[31] *Greater Vancouver,* para. 87. **[BOA Tab 4]**

point. The etl'or of the lower Court can only be remedied by this Honourable Appellate Court exercising its discretion to perform the proper analysis as a comt of first instance.[32]

Private Citizens Not Bound By Charter

41. The lower Comt found that the Applicant was bound by the *Charter,* not protected by it.[33] The Applicant submits that this finding is an error of law, because the *Charter* does not apply to private individuals; it applies to government.

42. The form Mr. Kisilowsky filled out in 2003 to obtain the License was titled "Application for private marriage commissioner".[34] Despite repeated references to Mr. Kisilowsky as a "civil marriage commissioner" by both the Respondent and the lower Comt in the Judgment, the words "civil marriage commissioner" appear nowhere in the *Act.* The title "civil marriage commissioner" appears to be terminology created by the Respondent for the purposes of this case. This terminology was improperly adopted by the lower Court. The Respondent presumably created this nonexistent term or title to buttress its argument that Mr. Kisilowsky is a government actor.

43. Mr. Kisilowsky is a private individual. He rnns his own private construction business, and eains his own private income. He is engaged in private and informal

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[32] *R. v. J. (K.R.),* 2016 SCC 31, para. 59. [**BOA Tab 11**]
[33] Judgment, para. 21. [**BOA Tab 7**]
[34] See Exhibit "G" ofHarlos Affidavit and Transcript, p. 13, line 30.

religious ministry, without formal accreditation or ce11ification as a pastor, minister or other religious official. He has never been paid by the state to solemnize marriages. He has no contract of employment with the state, and never had any obligation to perform a wedding. The state never once called Mr. Kisilowsky and instructed him to marry anyone, anywhere, at any time. Mr. Kisilowsky always decided when and where and how to utilize the License.

44. Individuals performing a service, such as solemnizing marriage, pursuant to a state license, do not lose their *Charter* rights. In a recent analogous circumstance, the Supreme Coml of Canada recognized doctors' s. 2(a) rights to refuse to pm1icipate in physician-assisted suicide (now called "medical assistance in dying," or "MAID"). In striking down the s. l4 ands. 241(b) prohibitions in the *Criminal Code* against euthanasia and assisted-suicide, the Supreme Court was careful to recognize the rights of conscience and religion of physicians to refuse to pm1icipate in MAID. The Coutl stated:

> In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note - as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* - that a physician's decision to pm1icipate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulato1y response to this judgment. Rather, we

> underline that the *Charter* rights of patients and physicians will need to be reconciled.[35]

45. Bill C-14, Medical Assistance in Dying, received royal assent on June 17, 2016. In regard to religious and conscience rights of medical practitioners, the Federal Justice Minister has noted:

> The decriminalization of medical assistance in dying will lead to requests to healthcare providers to provide assistance that would be contrary to some healthcare providers' conscience or religious beliefs. Freedom of conscience and religion are protected from government interference by paragraph 2(a) of the Charter. Nothing in the Bill compels healthcare providers to provide such assistance or could otherwise impact their paragraph 2(a) rights.[36] [Emphasis added]

46. The provision of health care is largely a public, not a private, service in Canada. Only 30% of doctors wish to be involved in the provision of MAID,[37] yet the rights of the other 70% not to be involved in MAID have been recognized; nothing compels unwilling physicians to participate in MAID.

47. In addition to being licensed and regulated by the state, doctors are paid by the state. Yet doctors' *Charter* rights not to participate in an available service of the health care system have been recognized by the Federal government and the Supreme Court of Canada.

48. Unlike a doctor, Mr. Kisilowsky was not paid by the state whilst he had his License. He was not answerable to a state employer, boss or professional body. If

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[35] *Carter*, para. 132. **[BOA Tab 1]**
[36] [http://www.justice.gc.ca/eng/rp-pr/other-autre/ad-am/p4.htm1#p4]
[37] See, for example: http://news.nationalpost.com/news/canada/0826-na-assisted-death and http://news.nationalpost.com/news/canada/0429-na-opting-out

doctors are protected by the *Charter,* rather than being bound by it, this is even more tlue for Mr. Kisilowsky.

49. Finally, the lower Court found that it was proper for the Applicant's License to be cancelled because it was in the "public interest."[38]

50. The public is divided on issues of marriage and sexuality. The duty of the state is to be neutral. The public interest is not served when the state takes sides in a societal debate, as the Respondent has. The lawful role of the state is to protect the rights of its citizens (even unpopular ones) in a free and democratic society. In *Loyola High School v. Quebec (Attorney General),*[39] the Court stated that "the pursuit of secular_values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."4° Freedom and reasonable accommodation, such as existed prior to the Decision, is in the public interest. The wholesale removal of accommodation by terminating the Private List is against the public interest.[41]

Licenses Permissive Not Mandatory

51. Section 7 of the *Act* states that a person who is licensed as a marriage commissioner "may solemnize ceremonies of marriage in accordance with the tenor of the appointment." The "tenor of the appointment" under which Mr. Kisilowsky

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[38] Judgment, para. 22. **[BOA Tab 7]**
[39] 2015 SCC 12 *[Loyola].* **[BOA Tab 8]**
[40] *Loyola,* para. 43. **[BOA Tab 8]**
[41] *TWU v. LSBC,* 2016 BCCA 423, paras. 165, 185, and 192. **[BOA Tab 16]**

obtained the License was one in which he was a "private marriage commissioner" on a "Private List." The use of the License in the "tenor of the appointment" was permissive, not mandatory. Mr. Kisilowsky was not required to do anything with his License. The *Act* states that he *"may* solemnize ceremonies of marriage in accordance with the tenor of his appointment." [Emphasis added]

52. Mr. Kisilowsky did not become a "civil servant" simply by vittue of his obtaining a licence to solemnize weddings. Mr. Kisilowsky was not entitled to a salary, but was entitled to be paid fees.[42] The Manitoba *Civil Service Act"* in force at the time the Policy was implemented contains the following provision:

> **Definitions**
>
> s. 1 **"civil service"** ... does not include:
>
> ...
>
> **(e) any person paid by fees.** [Emphasis added]

Impact on Mr. Kisilowsky More Than Trivial

53. The learned Trial Judge found that Mr. Kisilowsky's freedom of religion was not infringed in a manner that was more than trivial or insubstantial, and therefore that the s. 2(a) *Charter* rights of Mr. Kisilowsky were not engaged.[44] This is an error in law.

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[42] *Marriage Act,* section 7(2).
[43] *The Civil Service Act,* CCSM c C110.
[44] Judgment, para. 28. **[BOA Tab** 7]

54. The Policy, coupled with the termination of the Private List, forced Mr. Kisilowsky to choose between adherence to his sincerely-held religious belief or losing his License. It is not trivial to be forced to choose between adhering to a religious belief or participating in society.[45] Aside from being deeply offensive, such a choice is antithetical to pluralism and has no place in a free and democratic society.[46]

CONCLUSION

55. When same-sex marriage became legal in Manitoba in 2004, it was incumbent on the Province to properly delineate and balance the rights of private marriage commissioners and same-sex couples. The Respondent, far from entering into an accommodative analysis, chose to end the accommodative Private List, thereby compelling all licensed private persons to perform solemnizations, even if doing so would violate the sincerely held religious beliefs of said individuals. Not only was the Decision unreasonable in this regard, it was discriminatory and served no practical or proper purpose. Nothing required the Respondent, in carrying out its

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[45] *Saskatchewan Marriage Reference,* paras. 64-65 **[BOA Tab** 9]. Also see *TWU v LSBC,* 2016 BCCA 423, para. 169 **[BOA Tab 16]** where it was found that it was an infringement of s. 2(a) to compel a choice between following one's conscience and obtaining a law degree; and see Multani, para. 40, where it was found to be an infringement to compel a student to choose between adhering to his religious beliefs or attending a public school.

[46] *TWU v. LSBC,* 2016 BCCA 423, para. 193. **[BOA Tab 16]**

objective of ensuring same-sex couples were able to be legally married, to trample on the consciences of the private licensed individuals such as Mr. Kisilowsky.

56. The Applicant respectfully requests the following relief:

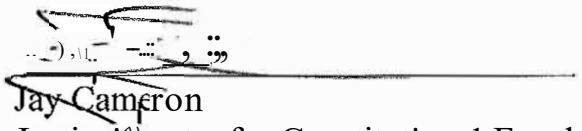
a. that the Judgment of the Lower Court be reversed;

b. that a declaration issue to the effect that the Respondent infringed Mr. Kisilowsky's s. 2(a) *Charter* rights;

c. an Order to reinstate the License of the Applicant;

d. an Order for costs in favour of the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of June, 2017.



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ADDENDUM: Section 1 Analysis of the Policy

1. If the objective of the Policy (coupled with the termination of the Private List) is to ensure access to marriage solemnization services for same-sex couples in a non-discriminatory manner, this objective is achieved at the expense of Mr. Kisilowsky's *Charters.* 2(a) rights. The Applicant submits that the Policy is not justified under s. 1 of the *Charter* because it is not a proportionate means of achieving the objective. The Policy is not rationally connected to the objective, it does not minimally impair the Applicant's freedom of religion, and the salutaly effects upon the equality rights of same-sex couples wishing to many are not propo1tionate to the high degree of deleterious effects upon the s. 2(a) rights of the Applicant.

Rational Connection:

2. The Respondent must show, on a balance of probabilities, that the Policy is rationally connected to the objective, possessing a causal connection, on the basis of reason or logic, between requiring all marriage commissioners (including private marriage commissioners like the Applicant) to solemnize same-sex ma11'iages, and ensuring access to solemnization services for same-sex couples. This requirement prevents limitations being imposed on rights arbitrarily.[47]

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[47] *Hul/erian Brethren of Wilson Colony v. Alberta,* 2009 SCC 37, para. 48 *[Hutterian Brethren]* **[BOA Tab 6];** *RJR-lvlacDonald Inc. v. Canada,* [1995] 3 S.C.R. 199, para. 153 *[RJR-lvlacDonaldj.* **[BOA Tab 12]**

3. The Respondent had no obligation, under *Charter* s. 15 or otherwise, to abolish the Private List of private marriage commissioners, or to compel all individuals on the Private List to solemnize same-sex marriages. Requiring all private marriage commissioners on the Private List to hand in their licences if unable due to conscience to solemnize same-sex marriages is not rationally connected to ensuring that all same-sex couples have ready and non-discriminatory access to solemnization services.

4. There is no rational or factual basis for claiming that the Applicant's retention of his License while on the Private List will somehow limit the equality rights of same-sex couples, but that issuing Mr. Kisilowsky repeated and unlimited temporary permits will not.

Minimal Impairment:

5. In order to be demonstrably justified under s. 1, the Policy may only minimally impair the s. 2(a) rights of the Applicant. The Policy must be carefully tailored to impair the Applicant's rights no more than is necessary to achieve the objective. If there are less drastic means that are equally effective in achieving the objective, then the Policy is not minimally impairing.[48] Correlatively, if a more

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[48] *RJR-MacDonald,* paras. 95-96; *Hutterian Brethren,* paras. 53-55. **[BOA Tab 12]**

reasonable accommodative measure is available, it must be utilized.[49] The Private List was reasonable accommodation.

6. The *ex post facto* accommodation suggested by the Respondent is for Mr. Kisilowsky to stati his own denomination, or undergo years of study to become a formally ordained minister, or repeatedly apply for temporaty one-time permits. The issuance of temporaty permits to the Applicant does nothing to more effectively achieve the objective of providing equal, non-discriminatory access to marriage solemnization services for same-sex couples than permitting the Applicant to keep his licence and stay on the Private List. Either way, Mr. Kisilowsky is not going to solemnize a same-sex marriage. And either way, Mr. Kisilowsky will not be asked by same-sex couples to perform wedding ceremonies.

7. Absolute prohibitions, such as prohibiting the Applicant from keeping his License and abolishing the Private List, will rarely be minimally impairing.[50] Rather, allowing the Applicant to keep his Licence, *but with the restriction that he cannot and will not be put on the publicly-accessible list,* is an accommodative measure that is reasonable and minimally impairing in light of the objective. There is no evidence in this case that would demonstrate that allowing the Applicant to retain his Licence

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[49] *Jvlultani,* para. 52. **[BOA Tab 10)**
so *lvlultani,* para 67. **[BOA Tab 10]**

and remain on the Private List creates disparity in the services provided to same-sex couples.

8. The Respondent has also suggested that the Applicant has a second accommodative measure available to him, namely, that he can obtain 25 signatures to register a religious congregation and then solemnize marriages as a religious official. Such a measure is certainly not minimally impairing.[51]

9. More importantly, however, is that such a technical measure is, itself, discriminatory. It is not reasonable or justified in a free and democratic society to rescind the Applicant's License because of his beliefs, and without a factual context where same-sex equality rights are actually violated. Private marriage commissioners are diverse individuals. To suggest that the Applicant cannot be licensed to solemnize marriages while still adhering to his religious beliefs betrays pluralism and perpetuates the same sort of disadvantage and exclusion for Mr. Kisilowsky as the Policy purports to rectify for same-sex couples. The Respondent's proposed accommodative measures assume the conflict between religious freedom and equality is a zero-sum game, in which equality can only be achieved through the destruction of religious freedom. A truly pluralistic and free society can navigate the

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[51] The House of the Risen Son is incapable of providing the Applicant with the religious authority to marry, as it exists under the authority of the Apostolic Church of Pentecost of Canada, which would require the Applicant to become a licenced minister prior to bestowing this authority on him. The Applicant is not a licenced minister and has no seminary background. Becoming a licenced minister requires years of full-time study, years of full-time work, and often both. *Transcript of Cross-Examination of Kisilowsky, FebrumJ1 29, 2016,* pages 11-13; 42-43.

tension between competing rights and produce a much better outcome. Indeed, as the BC Court of Appeal recently observed:

> A society that does not admit of and accommodate differences cannot be a free and democratic society - one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. ... [A] well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.[52] [Emphasis added]

Deleterious Effects versus Salutary Effects:

10. The final stage of the s. 1 justification analysis considers the overall proportionality of the impugned government policy. The benefits, or salutary effects, of the Policy must outweigh the deleterious effects on the infringed right.[53] This is the stage at which the degree of harm that has been caused to the infringed right is acknowledged and compared to the amount of harm that is, ostensibly, prevented by the Policy. Lastly, the deleterious effects may be general, specific, or both.[54]

11. The deleterious effects of the Policy on freedom of religion outweigh the salutary effects. First, the discrimination against the Applicant impacts his personal dignity and opp01tunity in a free society. Second, the Applicant has been forced to

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[52] *TWUv LSBC,* 2016 BCCA 423, para 193. **[BOA Tab 16]**

[53] *Dagenais v, Canadian Broadcasting Co11J,* [1994] 3 S.C.R, 835, para. 96 *[Dagenais].* **[BOA Tab 2]**

[54] *Thomson Newspapers Co. v. Canada (Attomey General),* [1998] 1 S.C.R. 877 at para. 125 *[Thomson Newspapers].* **[BOA Tab 14]** More recently, the Supreme Court has stated that the overall proportionality part of the analysis "allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society": *R. v. J. (K.R.),* para. 79. **[BOA Tab 11]**

turn away couples he would othe1wise have married, resulting in hardship to both couple and Applicant. The response time in obtaining the Tempora1y Permit can vmy, but is typically six weeks. Due to the wait time, and the fact that many of the candidate couples in the Applicant's outreach ministty want to get married within a short time period (often one or two weeks), the Applicant has been forced to turn away couples whom he would otherwise have been able to many prior to the Policy. The delay in obtaining the Tempormy Permit is an impediment to the Applicant's ministry and creates a barrier for couples seeking to have him marry them. It creates uncertainty as to whether Mr. Kisilowsky will obtain the Temporaty Permit, and whether it will arrive in time for the ceremony. Futiher, there is no guarantee that a Temporary Permit will even be issued. No such hardship existed prior to the imposition of the Policy. The Respondent has arbitrarily compelled Mr. Kisilowsky to go through an onerous, unnecessmy and unpredictable process simply because he is adhering to his religious beliefs.[55] This is discriminato1y.

12. These harms to the rights of the Applicant must be weighed against the purported benefits of the Policy. The Respondent claims the Policy has a specific benefit on the access to solemnization services for same-sex couples, thereby imparting a salutmy effect on equality rights. There was no evidence before the

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[55] *JanumJ' 19, 2016 Affidavit of Kisilowsky,* pages 2-3; *Transcript of Cross-Examination on Affidm·it of FebmWJ' 29, 2016,* pages 16-18.

lower Court, or this Comi, to support the contention that the Policy provides any greater or better access to marriage solemnization than under the prior system of public and Private Lists. The Respondent also claims there is a general benefit imparted to the LGBT community through the knowledge that no religious person with an objection to same-sex marriage is permitted to be a private marriage commissioner, even if they are on a Private List.[56] This alleged "benefit" presupposes that Canada is not a free, diverse and pluralistic society in which citizens are expected to accept the fact that not evelyone agrees on issues. It is at great cost that the power of the government is harnessed to implement such notions: it results inevitably in an increasingly less neutral state that, tramples on pluralism and diversity.

13. Any concern the Respondent may have regarding the message conveyed by allowing the Applicant his License and the existence of the Private List is illusmy.[57] Licensing the Applicant is not an endorsement of his beliefs.[58] Regarding this line of reasoning the BC Court of Appeal stated as follows:

> In a diverse and pluralistic society, this argument must be treated with considerable caution. If regulat01y approval is to be denied based on the state's fear of being seen to endorse the beliefs of the institution or individual seeking a licence, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question. State neutrality is essential in a secular, pluralistic

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[56] Transcript of Hearing, p. 106, lines 30-34; p. 109, lines 4-15.
[57] *TWU v LSBC,* 2016 BCCA 423, para. 181. **[BOA Tab 16]**
[58] *TWUv LSBC,* 2016 BCCA 423, para. 183. **[BOA Tab 16]**

> society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act,* S.C. 2005, c. 33 itself, which expressly recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".[59] [Emphasis added]

14. The salutmy effects of the Policy on the equality rights of same-sex couples, if they even exist, are minimal. The deleterious effects on the freedom of religion of the Applicant are substantial, and grounded in fact. The Applicant has a right to hold his beliefs, and act on his beliefs in the public sphere unless disproportionate harm is caused to the rights of others.[60]

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[59] *TWU v LSBC,* 2016 BCCA 423, paras. 184-185. **[BOA Tab 16]**
[60] *TWU v LSBC,* 2016 BCCA 423, para. 190. **[BOA Tab 16]**

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5	*Housen v. Nikolaisen,* 2002 SCC 33
6	*Hutterian Brethren a/Wilson Colony v. Alberta,* 2009 SCC 37
7	*Kisilowsky v. Her Majesty the Queen,* 2016 MBQB 224
8	*Loyola High School v. Quebec (Attorney General),* 2015 SCC 12
9	*Marriage Commissioners Appointed Under The Marriage Act (Re),* 2011 SKCA 3
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