

THE QUEEN'S BENCH
WINNIPEG

BETWEEN:

KEVIN RICHARD KISILOWSKY

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF MANITOBA

Respondent

**FACTUM OF THE APPLICANT
KEVIN RICHARD KISILOWSKY**

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

Jay Cameron

#253, 7620 Elbow Drive SW

Calgary AB T2V 1K2

Email: jcameron@jccf.ca

(403) 909-3404

Contents

PART I: THE APPLICANT	3
PART II: FACTS	3
PART III: THE LAW	7
The Charter	7
Section 2(a) and the Supreme Court of Canada.....	8
The Marriage Act.....	9
The Test for Infringement of Section 2(a) Charter rights	10
Duty of State Neutrality and Correctness	12
PART IV: ARGUMENT	13
Accommodating Religious Rights Does Not Infringe the Rights of Same-Sex Couples	13
Does the Decision breach the Charter rights of Mr. Kisilowsky?	15
Would Accommodating Mr. Kisilowsky Engage the <i>Charter</i> Rights of Same-Sex Couples?.....	15
Was the Decision a proportionate balancing of <i>Charter</i> rights with the applicable statutory objectives?.....	16
Accommodation	17
Consideration of Accommodative Options Required in <i>Dichmont</i>	19
<i>Saskatchewan Marriage Reference</i>	21
Religious Beliefs to be Respected in Both the Religious and Civil Realm	22
Marriage Commissioners Not Employees or Civil Servants	24
Temporary Permits.....	26
The Respondent Failed to Balance Competing Rights	27
V: CONCLUSION.....	29
VI: ORDER REQUESTED	30

PART I: THE APPLICANT

1. Kevin Richard Kisilowsky is an individual resident in the town of Stonewall, Manitoba, and earns his living through his renovation business. Mr. Kisilowsky is also a Christian, and is engaged in Christian ministry through, *inter alia*, the House of the Risen Son Ministries in Winnipeg and the Bondslave motorcycle club (the latter being a non-denominational Christian ministry to bikers that exists to “build bridges into relationships using the motorcycle as a tool”). Prior to becoming a Christian, Mr. Kisilowsky was involved in a lifestyle of drug and alcohol addiction. He now ministers to communities with similar issues on the “fringe of society”, including inner-city gang youth, street people, prison inmates and outlaw motorcycle gang members.

(March 12, 2014 Affidavit of Kisilowsky page 1, 2)

(Transcript of Cross Examination on Affidavit, February 29, 2016, pages 4-6)

(Transcript of Cross Examination on Affidavit, February 29, 2016, pages 28-30; 41, 42)

PART II: FACTS

2. Through his ministry efforts, Mr. Kisilowsky periodically encounters people who desire a marriage ceremony with Christian content but who are neither involved, nor inclined to be involved, with an organized church. These couples approach Mr. Kisilowsky specifically because they want a Christian ceremony without organized church involvement. In order to further his ministry to this group, Mr. Kisilowsky contacted the Manitoba Consumer and Corporate Affairs office of Vital Statistics (“Vital Statistics”) in 2003 and inquired as to the process of becoming a marriage commissioner. Mr. Kisilowsky was transparent with Vital Statistics regarding his beliefs. He informed them that, due to his faith, he would be unable to perform non-Christian wedding ceremonies, such as ceremonies for Wiccans,

Hindus, or Muslims. Vital Statistics informed Mr. Kisilowsky that his objections were acceptable and that Vital Statistics would put his name on a “private list” so that he could perform only marriages with Christian content.

(March 12, 2014 Affidavit of Kisilowsky page 3, paragraph 8)

3. At no time has Mr. Kisilowsky sought to make his marriage commissioner services generally available for the public at large, nor has he advertised his services as a marriage commissioner. Instead, he has performed religious ceremonies solely for people in the context of his Christian outreach ministry. Mr. Kisilowsky has never been, and would never be, in a situation where he would field requests or queries from couples outside of his own circle of friends and ministry.

(March 12, 2014 Affidavit of Kisilowsky pages 2, 3)

(Transcript of Cross-Examination on Affidavit, February 29, 2016, pages 5; 28-30)

4. As a consequence of Vital Statistics’ stated intention to accommodate his beliefs, Mr. Kisilowsky applied for a civil marriage commission in September 2003, which was granted the following month, in October 2003. At the time Mr. Kisilowsky received his marriage commission in Manitoba, same-sex marriage was not lawful in Canada.

(March 12, 2014 Affidavit of Kisilowsky page 1,2; Exhibit “A”)

5. When Vital Statistics granted Mr. Kisilowsky his marriage certificate, it was aware that Mr. Kisilowsky was opposed to personally solemnizing a same-sex marriage due to his belief in the authority of the Christian Bible. Mr. Kisilowsky believes that his solemnization of a same-sex marriage would be a sin. The sincerity of this belief has not been challenged.

6. In the case of *Vogel v. Canada (Attorney General)*,¹ Justice Yard declared that the definition of marriage in Manitoba was redefined to be that of “a voluntary union for life of two persons at the exclusion of all others.” On the same day that the decision in *Vogel* was released, September 16, 2004, Vital Statistics notified all marriage commissioners that they were required to perform marriages for same-sex couples, or return their Certificates of Registration to Solemnize Marriages.
7. Mr. Kisilowsky refused this direction, believing that it violated his right to freedom of religion under the *Manitoba Human Rights Code*, and s. 2(a) of the Canadian *Charter of Rights and Freedoms* (the “*Charter*”). Mr. Kisilowsky informed Vital Statistics that he was unable to solemnize a same-sex marriage. By letter dated November 10, 2005, Vital Statistics informed Mr. Kisilowsky that his appointment as a marriage commissioner had been revoked due to his “inability” to perform same-sex marriages (“the “*Decision*”).

(March 12, 2014 Affidavit of Kisilowsky page 3; Exhibit “F”)
8. Mr. Kisilowsky understands that same-sex ceremonies must be available to those same-sex couples who wish to marry. Mr. Kisilowsky believes that the rights of same-sex couples to be married can be respected without forcing each and every marriage commissioner in Manitoba to perform such ceremonies, if the performance of such a ceremony would be against his or her conscience.
9. Mr. Kisilowsky is not a licensed minister and has no seminary background. Nor is the House of the Risen Son capable of providing him with the religious authority to marry, as it exists under the authority of the Apostolic Church of Pentecost of Canada, which would require Mr. Kisilowsky to become a licensed minister prior to bestowing this authority on

¹ [2004] M.J. No. 418 (Man. Q.B.) (“*Vogel*”)

him. Becoming a licensed minister requires years of full-time study, years of full-time work, and often both. Mr. Kisilowsky became a marriage commissioner because he could not solemnize marriages as a clergyman or religious official. Nor is he able at this time to attend seminary, as he operates his own business, has a wife and three children, and cannot simply shut down his business for several years in order to obtain a ministerial license. Becoming a licensed minister would also interfere with or undermine his current outreach ministry to bikers.

(Transcript of Cross-Examination of Kisilowsky, February 29, 2016, pages 11-13; 42-43)

10. Due to the revocation of his appointment as a marriage commissioner, Mr. Kisilowsky has been forced to turn away couples who he would otherwise have been capable of marrying, resulting in hardship to them and to Mr. Kisilowsky. Mr. Kisilowsky states that due to the revocation of his certificate, he has been forced to repeatedly apply for a one-time temporary permit (the "Temporary Permit") to solemnize a marriage, which requires the preparation and submission of an application to the Respondent. The response time in obtaining this Temporary Permit is typically six weeks. Due to the wait time, and the fact that many of the candidate couples want to get married within a short time period (often one or two weeks), Mr. Kisilowsky's has been forced to turn away at least four couples who he would have previously been able to marry prior to the Decision. The delay in obtaining the Temporary Permit is an impediment to his ministry by creating uncertainty as to whether it will arrive in time for the ceremony. Prior to the Decision no such hardship existed.

(January 19, 2016 Affidavit of Kisilowsky, pages 2-3)

(Transcript of Cross-Examination on Affidavit of February 29, 2016, pages 16-18)

11. As a result of the Decision, Mr. Kisilowsky applies to this Honourable Court for a declaratory judgment that, pursuant to s. 24(1) of the *Charter*:
- a The Applicant's freedom of conscience and religion, under s. 2(a) of the *Charter*, have been violated by the Respondent, and cannot be justified under s. (1);
 - b The Respondent acted contrary to the *Charter*, contrary to law in violating the fundamental freedom of the Respondent;
 - c The Respondent cease violating the *Charter* s. 2(a) fundamental freedom of the Respondent immediately;
 - d The Respondent is ordered to accommodate the Applicant to the point of undue hardship, and in a manner that recognizes and respects his fundamental *Charter* freedoms of conscience and religion, and allows him to give effect to his sincerely held religious belief;
 - e The Respondent is provided the right to decline such ceremonies that are in violation of, or offensive to, his sincerely held beliefs;
 - f Such further and other relief as this Honourable Court may allow.²

PART III: THE LAW

The Charter

12. Section 2(a) of the *Charter* states:
- Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion.
13. Section 1 of the *Charter* states:

² Notice of Application filed May 29, 2014, pages 4 and 5.

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.

Section 2(a) and the Supreme Court of Canada

14. In *R. v. Big M Drug Mart Ltd.*,³ Justice Dickson famously noted the following in regard to freedom of religion:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".⁴ [emphasis added]

³ [1985] 1 SCR 295 ("*Big M*").

⁴ *Big M*, at paras. 94, 95.

15. In *Reference Re: Same Sex Marriage*,⁵ the Supreme Court emphasized that “the protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence.” The Court explained that:

...it would be for the Provinces, in the exercise of their power over the solemnization of marriage, to legislate in a way that protects the rights of religious officials while providing for solemnization of same-sex marriage. It should also be noted that human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the Charter.⁶

16. The Court went on to say:

If a promulgated statute were to enact compulsion, we conclude that such compulsion would almost certainly run afoul of the Charter guarantee of freedom of religion, given the expansive protection afforded to religion by s. 2(a) of the Charter.⁷

17. In the case at bar, the statute itself does not enact compulsion. The *Marriage Act* speaks only to the appointment of marriage commissioners; it does not compel those appointed to perform a ceremony that would contravene their beliefs. The compulsion arises in the instant case from the Decision itself.

The Marriage Act

18. The version of the Manitoba *Marriage Act*⁸ (the “*Marriage Act*”) in force during the material time in question, from August 1, 2002 to May 28, 2006, contained the following provisions regarding the appointment of marriage commissioners:

Appointment of marriage commissioners

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

⁵ 2004 SCC 79, [2004] 3 S.C.R. 698 (the “*Marriage Reference*”).

⁶ *Marriage Reference*, at para. 55.

⁷ *Marriage Reference*, at para. 56.

⁸ *Marriage Act*, CCSM c M50.

Fee of marriage commissioners

7(2) A marriage commissioner who solemnizes a ceremony of marriage is entitled to a fee and expenses as prescribed in the regulations to be paid by the parties to the marriage.

19. The Marriage Act draws a distinction between those who are appointed to *perform* or *solemnize* a marriage and those who are appointed as to issue a marriage license. Marriage Commissioners solemnize marriages, but they do not issue marriage licenses. Sections 10 to 17 deal with the issuance of marriage licenses. Sections 10(2) and 17 are of particular import:

10(2) The registrar and each deputy registrar of the Court of Queen's Bench are issuers of marriage licences.

Issuer to pay expenses

17 All expenses incidental to providing licences shall be paid by the issuer of the licences.

20. While a marriage commissioner under the *Marriage Act* has a right to be compensated with a fee paid by the parties being married,⁹ the issuer of a license must pay for all the expenses themselves. The *de facto* issuers of licences under the existing version of the *Marriage Act* were both government employees – the registrar and deputy registrars of the Court of Queen's Bench in Manitoba.¹⁰

The Test for Infringement of Section 2(a) Charter rights

21. The test to determine whether the Decision interferes with Mr. Kisilowsky's freedom of religion was first set out in *Syndicat Northcrest v. Amselem*,¹¹ and recently restated in *Mouvement laïque québécois v. Saguenay (City)*,¹² as follows:

⁹ *Marriage Act*, s. 7(2).

¹⁰ *Marriage Act*, s. 10(2).

¹¹ [2004] 2 S.C.R. 551 ("*Amselem*"), at paras. 56-57.

¹² [2015] 2 SCR 3 ("*Saguenay*"), at para. 86.

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

22. In *Amselem*, at para. 56, Iacobucci J. described the inquiry at the first step of the test as follows:

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

23. Mr. Kisilowsky's unchallenged evidence is that he is a Christian, that he believes the Bible is the inerrant word of God, that marriage is a sacred institution ordained by God as being an exclusive union between one man and one women, that the Bible prohibits homosexuality in both the Old and New Testaments of the Bible, and that he believes it would be a sin for him to assist in a same-sex ceremony. The sincerity of his beliefs has not been challenged by the Respondent. Mr. Kisilowsky meets the test described in *Anselem* for the triggering of section 2(a) rights. The breach is *prima facie* made out, as Mr. Kisilowsky has had his qualifications as a marriage commissioner revoked solely on the basis of his beliefs.

(*Affidavit of Kisilowsky of January 29, 2016*, pages 2 and 3)

Duty of State Neutrality and Correctness

24. In *Saguenay*, the Court applied the correctness standard to the issue of “the scope of the state’s duty of neutrality that flows from freedom of conscience and religion”.¹³ The Court in that case found the matter to be of importance to the legal system, broad and general in scope, and one that needed to be decided in a uniform and consistent manner.¹⁴
25. The Respondent in the case at bar had a duty to be neutral in matters involving freedom of conscience and religion. The Court in the *Marriage Reference* recognized that the issue of same-sex marriage is contentious.¹⁵ In such a circumstance, the role of a neutral government is to ensure that all same-sex couples have the ability to exercise their right to marry, not to ensure that every marriage commissioner is compelled to marry a same-sex couple. The latter is not necessary to bring about the former. The neutral government must also be mindful to protect religious beliefs. In the instant case, the Respondent paid little or no attention to the question of whether Mr. Kisilowsky should continue to be accommodated following the decision in *Vogel*, and instead moved immediately to breach his rights, presumably in the mistaken belief it was required to do so to uphold the new rights created by *Vogel*. For the foregoing reasons, the Decision cannot be said to have been correct.
26. Further, there is nothing in the *Marriage Act* which authorizes the revocation of Mr. Kisilowsky’s marriage commission. Mr. Kisilowsky was accommodated from the time

¹³ *Saguenay*, at paras. 45-51.

¹⁴ Also see *Saguenay*, at para. 47: “Another such case [where the presumption of review on a standard of reasonableness is rebutted] is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal’s area of expertise (*Dunsmuir*, at paras. 55 and 60).”

¹⁵ See generally Question 3 of the *Marriage Reference*.

that he obtained the certificate on the exact same ground that his commission was later revoked.

27. Moreover, Vital Statistics was not operating within the realm of its “specialized expertise” when it revoked Mr. Kisilowsky’s commission, and had no statutory authority on which to base its Decision. The Respondent has not provided an explanation as to what mandate, if any, that Vital Statistics may have had to revoke the certificates of marriage commissioners who were not comfortable with performing a same-sex marriage. Vital Statistic’s apparent path to solve the conflict had been that of accommodation, as it was already accommodating Mr. Kisilowsky. Any deference that might be due Vital Statistics due to its application of the *Marriage Act* is rebutted.¹⁶

PART IV: ARGUMENT

Accommodating Religious Rights Does Not Infringe the Rights of Same-Sex Couples

28. The Respondent is required to exercise its statutory discretion in accordance with the *Charter*.¹⁷ The purpose of the Manitoba *Marriage Act*¹⁸ is to establish the parameters by which a couple may be married in the Province of Manitoba. Section 7(1) (the provision under which Mr. Kisilowsky was authorized) provides for the appointment of marriage commissioners (distinct from the authorization for clergy to solemnize marriages under sections 2-4), and states that any person over the age of 18 may be a marriage

¹⁶ *Doré*, at para. 30. The *Marriage Act* does not operate to terminate commissions on the basis of religious belief. The Respondent cannot be said to have been acting in accordance with any special expertise when it made the Decision.

¹⁷ *Doré v. Barreau du Québec*, [2012] 1 SCR 395 (“*Dore*”) at paras. 7, 43-45, 54-58; *Loyola High School v. Quebec (Attorney General)*, [2015] 1 SCR 613 (“*Loyla*”) at paras. 35, 38, 39.

¹⁸ *Marriage Act*, CCSM c M50, version in force between May 2002 and August 2006 (the “*Marriage Act*”).

commissioner.¹⁹ While he was a marriage commissioner, Mr. Kisilowsky met a specific and unique need in Manitoba by providing Christian ceremonies, usually on short notice, to couples who had no interest in church or organized religion, and who had no relationship with a clergyman appointed under ss. 2 and 3 of the *Marriage Act*. Mr. Kisilowsky is not clergy, does not aspire to be clergy, and cannot become clergy without enduring the hardship of not earning a livelihood for a period of several years. He also believes that his outreach ministry to bikers would be negatively impacted if he were denominationally accredited as clergy.

29. The proper approach to assessing the *Charter* issue in this case should follow the approach taken in both *Loyola* and *Dore*. The questions for this Honourable Court to determine therefore are:
- a Does the Decision breach the Charter rights of Mr. Kisilowsky?
 - b Would accommodating Mr. Kisilowsky's religious beliefs engage the *Charter* rights of same-sex couples?
 - c In assessing the impact of the relevant *Charter* protections in context, was the Decision a proportionate balancing of *Charter* rights with the applicable statutory objectives?
30. The Applicant submits that the answers to the above questions are as follows:
- a The Decision breaches the Applicant's Charter rights;
 - b Accommodating Mr. Kisilowsky does not engage the *Charter* rights of same-sex couples because it is not necessary to compel every marriage commissioner in Manitoba to

¹⁹ *Marriage Act*, s. 7(1) The minister may appoint any person more than 18 years of age as a marriage commissioner for the province or any part thereof specified by the minister and the person may solemnize ceremonies of marriage in accordance with the tenor of the appointment.

- perform same-sex ceremonies in order to ensure that same-sex couples have access to wedding ceremonies;
- c The Respondent failed to properly respect his *Charter* rights in the context of the applicable statutory objective in the *Marriage Act*.

Does the Decision breach the Charter rights of Mr. Kisilowsky?

31. The Decision revoked Mr. Kisilowsky’s commission exclusively on the basis of his religious convictions, which is unreasonable, unnecessary, and capricious. The Respondent was aware of Mr. Kisilowsky’s beliefs when it appointed him as a marriage commissioner. The sincerity of Mr. Kisilowsky’s convictions are not in dispute in this case. Mr. Kisilowsky’s rights under s. 2(a) of the *Charter* have been breached.²⁰

Would Accommodating Mr. Kisilowsky Engage the Charter Rights of Same-Sex Couples?

32. In 2003, when the Crown made Mr. Kisilowsky a marriage commissioner, the Crown determined that it was acceptable for Mr. Kisilowsky to perform exclusively Christian wedding ceremonies. Mr. Kisilowsky’s evidence is that he was informed his name would be placed on a private list, such that he received no requests or queries from members of the public at large. There is no evidence that Mr. Kisilowsky ever had to inform potential marriage applicants that he could not perform their ceremony due to his religious beliefs. Since Mr. Kisilowsky cannot be said to have infringed the *Charter* rights of Wiccans (or

²⁰ In the *Saskatchewan Marriage Reference* (as defined below), the Court of Appeal noted, “In light of the very broad interpretation the Supreme Court has placed on s. 2(a) of the Charter, I conclude that the religious freedom of marriage commissioners would be infringed in such circumstances [being compelled to perform same-sex marriages against their will]. As noted above, the Court said, in *R. v. Big M Drug Mart Ltd.*, at p. 337, that freedom of religion means, among other things, “no one is to be forced to act in a way contrary to his beliefs” and, in *Syndicat Northcrest v. Amselem*, at para. 56, that “a practice or belief, having a nexus with religion, which calls for a particular line of conduct” can operate as the foundation of a s. 2(a) claim. Given this view of s. 2(a), it follows that s. 2(a) freedoms are implicated if a marriage commissioner is obliged to perform a ceremony contrary to his or her religious beliefs. [clarification added].

any other non-Christian applicant) to get married by only performing Christian ceremonies, it is apparent that Mr. Kisilowsky cannot be said to have infringed same-sex couples' rights to be married, either.

33. The Supreme Court of Canada has said that the mere recognition of the equality rights of one group cannot constitute the violation of another group's *Charter* right.²¹ The Respondent contends that the mere recognition of Mr. Kisilowsky's religious rights violates the rights of same-sex persons to marry. This reasoning was rejected in the *Marriage Reference*.

Was the Decision a proportionate balancing of *Charter* rights with the applicable statutory objectives?

34. The Supreme Court of Canada in *TWU v. BCCT* found that "any potential conflict [of rights] should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict of interest in this case."²² As mentioned above, in the scenario of the case at bar (where Mr. Kisilowsky's name is on a private list), equality rights and religious freedom rights were not in a conflict "in reality". If the Applicant is wrong on this point, and the Court finds that a balancing of equality and religious rights does need to take place, the Applicant submits that there is no evidence same-sex couples would have any difficulty locating a marriage commissioner in Manitoba. Mr. Kisilowsky served a niche "market" (heterosexual couples who want nothing to do with organized church, yet want a Christian ceremony). There is no reason that his beliefs, and the interests of same-sex couples, should ever collide. However, Mr.

²¹ *Marriage Reference*, para. 46.

²² 2001 SCC 31, para 29.

Kisilowsky has lost his commission due to his religious beliefs, and as such is disproportionately impaired by the Decision.

Accommodation

35. The *Charter* guarantees Mr. Kisilowsky's right to freedom of conscience and religion except to such limits as are justifiable in a free and democratic society. However, the Respondent has already established that it is neither justifiable nor necessary to infringe Mr. Kisilowsky's religious rights in the circumstances at bar. If it were "justifiable" to infringe Mr. Kisilowsky's rights, he presumably never would have obtained a marriage certificate in the first place.
36. Vital Statistics originally granted Mr. Kisilowsky his marriage certificate while recognizing that he could not, and would not, perform civil marriage ceremonies that violated his Christian faith.²³ The Respondent was aware that Mr. Kisilowsky was never going to be the type of civil marriage commissioner who would be available to perform a ceremony for any and every couple that wanted to marry. The Respondent granted Mr. Kisilowsky his marriage certificate anyway. In doing so, the Respondent recognized Mr. Kisilowsky's right to only perform Christian wedding ceremonies, necessarily excluding some candidates (Wiccans, Hindus, Muslims, atheists, for example) on the grounds of conscience, irrespective of the right of such individuals to marry. To prevent a conflict, the Respondent agreed to place Mr. Kisilowsky's name on a separate list that was not accessible to the public. As a consequence, there is no evidence to suggest that Mr. Kisilowsky infringed the rights of any Wiccan, Hindu, atheist or Muslim couples by

²³ *March 12, 2014 Affidavit of Kisilowsky* page 2, paragraph 8

demurring to solemnize their unions. Neither the legality of Wiccans to marry nor Mr. Kisilowsky's religious rights were in conflict.

37. Similarly, there is no evidence to show that same-sex couples' right to marry was ever in conflict with Mr. Kisilowsky's freedom of religion.
38. There is no hierarchy of *Charter* rights.²⁴ If rights do conflict the correct approach is to reconcile "the rights through accommodation if possible, by case-by-case balancing: *Deganaïs*".²⁵ As noted by the Court in *R. v. N.S.*, "the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values has been to respect the individual's religious belief and accommodate it if at all possible."²⁶
39. To demand that all marriage commissioners abandon their personal faith and practice – effectively denying their right to their section 2(a) *Charter* rights – while fully protecting same-sex couples' rights to have a ceremony performed by any marriage commissioner in the province, creates an impermissible hierarchy of rights, and fails to achieve the obvious accommodation that is possible.
40. The Respondent initially recognized Mr. Kisilowsky's right to perform only Christian solemnizations based on his religious beliefs. There is no evidence of any negative impact on any member of the public that is caused by Mr. Kisilowsky's beliefs. It is therefore illogical for the Respondent to admit that Mr. Kisilowsky is not required to marry Wiccans, but then insist that Mr. Kisilowsky must marry same-sex couples.
41. The Respondent's accommodation of Mr. Kisilowsky is one of the primary ways in which the case at bar is readily distinguishable from the Saskatchewan case of *Marriage*

²⁴ *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 at para. 137.

²⁵ *R. v. N.S.*, [2012] 3 SCR 726 ("R. v. N.S.") at para. 52.

²⁶ *Ibid.*, at para. 54.

Commissioners Appointed Under The Marriage Act (Re).²⁷ In that case, Saskatchewan considered an amendment that would permit marriage commissioners to inform applicants that they were refusing to perform same-sex marriages on the basis of conscience. No such circumstance exists in the case at bar. From the time that Mr. Kisilowsky contacted Vital Statistics, he was informed that his rights would be accommodated. It is apparent that his rights were accommodated until the Decision. In the case at bar, there is no evident conflict between Mr. Kisilowsky's religious beliefs and the s. 15(1) equality rights of others under the *Charter*. Finally, Mr. Kisilowsky does not seek the Court's intervention to permit him to inform same-sex couples that he will not marry them. Mr. Kisilowsky has dealt, and continues to deal, only with the target demographic of his ministry as he did prior to the Decision.

Consideration of Accommodative Options Required in *Dichmont*

42. In the case of *Dichmont v. Newfoundland and Labrador (Government Services and Lands) ("Dichmont")*,²⁸ the Court considered a circumstance substantially the same as the present case. The complainant in that case, initially before the Newfoundland Human Rights Commission, had resigned her marriage commission due to the requirement that she solemnize same-sex marriages, contrary to her religion and conscience. As in the present case, in *Dichmont* there was no evidence of a denial of service, and the Appellant was not disputing the right of same-sex couples to marry.²⁹ The Court on appeal overturned the decision of the Commission as being unreasonable, in part due to the failure to consider and implement the accommodative options available.

²⁷ 2011 SKCA 3 ("*Saskatchewan Marriage Reference*").

²⁸ 2015 CanLII 4857 (NL SCTD).

²⁹ *Ibid*, at para. 93.

43. The Court in *Dichmont* distinguished three Saskatchewan cases³⁰ involving marriage commissioner who were not able to solemnize same-sex unions due to religious or conscience rights. The Court noted the dissimilarities between the Saskatchewan cases, and noted that the decisions were not binding on the Court in Newfoundland.
44. In the *Nichols* case, the marriage commissioner was the subject of a complaint by a same-sex couple that he had refused to perform a marriage for on religious reasons. Nichols appealed the decision against him to the Saskatchewan Court of Queen’s Bench.³¹ The court on appeal “upheld the tribunal decision on the basis of two principles: first that there should not be discrimination in the provision of a government service in respect of citizens seeking service; and second, that it was not the duty of citizens to accommodate the religious beliefs of public officials.”³²
45. In distinguishing the decision in *Nichols*, the Court in *Dichmont* stated the following:

These cases were cited, presumably, to underscore the reasonableness of the decision of the Commission in this case, although, as noted above, they were not cited as part of the reason for dismissing the complaint. I was asked to consider that if the decisions from Saskatchewan reached a similar conclusion, then a decision to dismiss must be reasonable.

...First, while the three decisions of the Human Rights Tribunal noted above bear very closely on the decision before me, they are not binding on this court.

Second, there was no discussion in any of the three of the duty to accommodate, particularly on the part of the government which administers the regime. Each of the cases turned solely on the question of whether discrimination in respect of sexual orientation was present by permitting marriage commissioners to refuse to perform marriages for same-sex couples. There was no consideration of alternate administrative mechanisms wherein marriage commissioners could be assigned cases by a central authority, thereby accommodating their beliefs, without discrimination towards those seeking service.

³⁰ *Nichols v. Saskatchewan (2006)*, CHRR 06-887 (“*Nichols*”); *Bjerland v. Saskatchewan (2006)*, CHRR 06-888; and *Goertzen v. Saskatchewan (2006)*, CHRR 06-889.

³¹ *Nichols v. M.J.*, 2009 SKQB 299 (CanLII).

³² *Dichmont*, at para. 89.

Third, in the *Nichols* case in the Saskatchewan Court of Queen’s Bench, there had been, admitted by the marriage commissioner *Nichols*, a denial of service based on sexual orientation. This is quite different from the instant case, where there has been no denial of service, and the Applicant clearly agrees that same-sex couples have the right to receive service on a non-discriminatory basis.

46. In the present case, the Decision was made without the Respondent making, or even considering, the accommodation of Mr. Kisilowsky’s beliefs. This failure is all the more glaring because Mr. Kisilowsky had previously been accommodated, until the Decision.
47. The Court in *Dichmont* also referenced the single-entry point system as an accommodative option, whereby a central authority assigns marriage commissioners to petitioning couples. Both of these options (single entry point and private list) were available to the Respondent, and both were either ignored or not considered.

Saskatchewan Marriage Reference

48. The Court of Appeal in the *Saskatchewan Marriage Reference* noted the accommodative potential of the single-entry point system, and noted that such a system had been implemented to accommodate the religious rights of marriage commissioners in Toronto.³³

The Court stated the following:

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

³³ *Saskatchewan Marriage Reference*, at para. 87.

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

Mr. Megaw conceded and accepted that this sort of system did in fact represent a less restrictive means of achieving the objectives of the *Grandfathering Option* and the *Comprehensive Option*. None of the other participants in the hearing suggested otherwise or expressed concern that such an approach would be impractical, overly costly, or administratively unworkable. Further, we were advised by counsel for Egale that in Ontario, or in Toronto at least, a system along these lines is presently in place and operating.³⁴

49. There is no apparent reason why the single-entry point system could not be implemented in Manitoba. Such a system would fulfill the Respondent's duty to accommodate the religious rights of marriage commissioners without obviously impacting the legal rights of members of any group in society to get married. In a pluralistic society such as Canada, such accommodation is not only the model to strive for, it is required by the *Charter*.

Religious Beliefs to be Respected in Both the Religious and Civil Realm

50. Persons performing a service, such as marriage, pursuant to a state license do not lose their *Charter* rights. In the third question of the *Marriage Reference*, the Supreme Court dealt

³⁴ Saskatchewan Marriage Reference, at paras. 85-87.

with the question of whether “the freedom of religion guaranteed by s. 2(a) of the Charter protects religious officials from being compelled to perform same-sex marriages contrary to their beliefs?” The guarantee was found to be “broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages contrary to their religious beliefs.”³⁵ While Mr. Kisilowsky is not a clergyman, he is an individual performing marriage ceremonies exclusively with Christian content, in accordance with his religious beliefs. The Province of Manitoba made him a commissioner on this basis, and recognized his right to operate in accordance with his Christian beliefs.

51. In a recent analogous circumstance, the Supreme Court of Canada recognized doctors’ section 2(a) rights to refuse to participate in physician-assisted suicide (now called “medical assistance in dying,” or “MAID”). In striking down the s. 14 and s. 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 participate in MAID. The Court 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 participate 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 regulatory response to this judgment. Rather, we underline that the Charter rights of patients and physicians will need to be reconciled.³⁶

³⁵ *Marriage Reference*, at para. 60.

³⁶ *Carter v. Canada*, [2015] 1 SCR 331 (“*Carter*”), at para. 132.

52. 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.³⁷ [emphasis added]

53. 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,³⁸ yet the rights of the other 70% not to be involved in MAID have been recognized; nothing compels unwilling physicians to participate in MAID.
54. In the case at bar, virtually every marriage commissioner in Manitoba is willing to, and does, perform ceremonies that solemnize same-sex marriage. The Respondent was already accommodating Mr. Kisilowsky's beliefs in 2004. It could easily have continued to do so without impacting the interests of others.

Marriage Commissioners Not Employees or Civil Servants

55. Marriage commissioners are also members of the public, entitled to receive a commission if they meet the legislative requirements. They are individuals who, like Mr. Kisilowsky, applied to Vital Statistics for a license to perform wedding ceremonies. Under the existing *Marriage Act* at the material time, marriage commissioners were entitled to charge a small fee set by the regulations. Pursuant to the then-*Forms, Fees and Expenses Regulation*³⁹

³⁷ [<http://www.justice.gc.ca/eng/rp-pr/other-autre/ad-am/p4.html#p4>]

³⁸ See, for example: <http://news.nationalpost.com/news/canada/0826-na-assisted-death> and <http://news.nationalpost.com/news/canada/0429-na-opting-out>

³⁹ Man Reg 346/88.

for a non-civil servant marriage commissioner, such as Mr. Kisilowsky, was \$15, and reasonable travel expenses.⁴⁰

56. Mr. Kisilowsky did not become a “civil servant” simply by virtue of his obtaining a license to solemnize weddings. The *Civil Service Act*⁴¹ in force at the time of the Decision contains the following provision:

Definitions

s. 1 "**civil service**" means the employees of the government in positions, appointments, or employments, now existing or hereafter created, including the members of any agency of the government to whom, or the employees of any agency of the government to whom, any provision of this Act has been declared to apply under subsection (2), or both such members and such employees, but does not include:

(e) **any person paid by fees.**

57. Mr. Kisilowsky was entitled to be paid by fees pursuant to the *Marriage Act*. He was not a civil servant but rather a private individual with a license who was able to charge a fee for his services.⁴² It is clear that Mr. Kisilowsky had some discretion, even apart from his 2(a) *Charter* right, to determine when and how he would use his license. For example, it was in Mr. Kisilowsky’s sole discretion, not the Respondent’s, whether he would utilize his license at all. The Respondent appears to have taken the position that every individual with a license was required to be available to whoever inquired, as though a marriage commissioner was contractually obligated to provide a service on behalf of the Crown. That is not the case. Section 7(1) of the *Marriage Act* is permissive, not mandatory:

7(1) The minister may appoint any person more than 18 years of age as a marriage commissioner for the province or any part thereof specified by the

⁴⁰ *Ibid*, s. (1).

⁴¹ *The Civil Service Act*, CCSM c C110

⁴² Civil servants are required to remit any fees received whatsoever for deposit to the Consolidated Fund – see *Marriage Forms, Fees and Expenses Regulation*, Man Reg 209/2004, s. 2(3) and (4).

minister and the person **may** solemnize ceremonies of marriage in accordance with the tenor of the appointment.

Temporary Permits

48. The Respondent revoked Mr. Kisilowsky's license because he could not solemnize a same-sex marriage, and states that accommodating Mr. Kisilowsky would breach the rights of same-sex couples. However, the Respondent permits Mr. Kisilowsky to obtain a Temporary Permit authorizing him to marry one couple at a time. The revocation of Mr. Kisilowsky's commission, combined with the permission to marry one couple at a time, is nonsensical. There is no rational connection between the Decision and the presumed goal of protecting the legal rights of same-sex couples. Indeed, neither the revocation of Mr. Kisilowsky's commission nor the issuance of Temporary Permits affects the rights of same-sex couples at all.
49. Moreover, by repeatedly issuing Mr. Kisilowsky a Temporary Permit the Respondent has acknowledged the folly and unlawfulness of the Decision. Every single Temporary Permit Mr. Kisilowsky applies for is for a heterosexual couple. Mr. Kisilowsky is never going to apply for a Temporary Permit to marry a same-sex couple, or to perform a non-Christian ceremony. The Respondent is aware that Mr. Kisilowsky will never ask for a Temporary Permit, other than for a ceremony with Christian content. The Respondent now issues licenses on a one-time or temporary basis to license Mr. Kisilowsky to do exactly the same thing he was doing prior to the Decision. The conduct of the Respondent in this regard is unmistakable evidence that the Decision was neither rationally connected nor necessary to protect the legal rights of other individuals or groups.

The Respondent Failed to Balance Competing Rights

50. Mr. Kisilowsky's accommodation did not infringe the rights of any other group in Manitoba, as his name was to have been placed on a private list. However, if the Court finds that s. 15 equality rights were engaged, the Respondent was required to balance the competing rights. In assessing whether it should continue to accommodate Mr. Kisilowsky, the Respondent was required to balance the statutory objective of governing access to marriage, once the *Vogel* decision changed the common law definition of marriage, against the infringement on Mr. Kisilowsky's *Charter* s. 2(a) rights.
51. The *Vogel* decision was issued on September 16, 2004. That same day, the Respondent issued a letter to all marriage commissioners in Manitoba (the "September 16 Letter") announcing that all marriage commissioners act on behalf of the Province of Manitoba,
- ...and as such are expected to comply with the changes in the law. In the event you are opposed to performing marriages for same-sex couples, please return your Certificate of Registration to Solemnize Marriages so we may cancel your registration and remove your name from our listings.
(*Affidavit of Kisilowsky of March 12, 2014*, para. 11, Exhibit "B")
52. During cross examination of the Respondent's Affiant, Linda Harlos, on November 27, 2014, counsel for the Applicant attempted to ascertain what balancing of rights the Respondent engaged in prior to sending the September 16 Letter. It appeared that the Respondent had not engaged in any balancing of rights, or even contemplated such an exercise, prior to issuing the September 16 Letter. Ms. Harlos and her counsel objected numerous times to this line of questioning, resulting in the filing of an action to compel answers to questions and undertakings [*Transcript of Questioning of Linda Harlos of November 27, 2014* generally].

53. On September 15, 2015, the Respondent relented and provided answers to the questions it initially refused to answer without the necessity of a Court hearing (the “Responses”). The Responses are curt and far from expansive, but they contain sufficient information to ascertain that prior to the Decision:
- a. The Respondent took no steps to ascertain how many marriage commissioners would refuse to perform same-sex marriages, or whether there were marriage commissioners who would object to performing same-sex marriages based on grounds of conscience and religion. The Respondent made the Decision regardless of how many marriage commissioners would be effected (Responses 1, 2 and 3);
 - b. The Respondent’s primary concern in making the Decision was that same-sex couples would not suffer from discrimination (Response 4);
 - c. Manitoba decided the existing accommodations for religious persons (the provisions for clergy under the *Marriage Act*) were sufficient accommodation, and people such as Mr. Kisilowsky did not need to be accommodated (Response 6);
 - d. The Decision was made shortly after the Respondent learned of the verdict in *Vogel*, the same having occurred instantaneously as the Respondent had staff in Court on September 16, 2004, before the Honourable Judge Yard (Responses 7c and 8c);
 - e. Manitoba did not consider and does not use the “single point entry system” (whereby applicants for marriage are assigned marriage commissioners) in use in other provinces (Responses 7 l and m);
 - f. Manitoba claims it considered the possibility of keeping marriage commissioners with a religious objection to performing same-sex marriage names on a separate list, and rejected this idea (Response 7o);

- g. The Respondent claims that having Mr. Kisilowsky reinstated as a marriage commissioner would violate the rights of others (Response 13).
54. It is apparent from the Responses that the Respondent performed a cursory balancing at best, or no balancing, at worst. The Decision appears to have been made in an exceedingly short period of time, with little if any deliberation. In *Carter*, the Court stated that the competing *Charter* rights would have to be reconciled. In the present case no reconciliation or balancing appears to have occurred.
55. If there indeed was a balancing of rights, and there is no evidence to substantiate such an exercise except for the bald assertion of the Respondent, then the balancing was not proportionate.
- V: CONCLUSION**
56. The decision infringes the Applicants' *Charter* rights, purportedly for the purpose of protecting the right of same-sex couples to marry. There is no evidence, however, that the rights of the latter have been, or ever would be, infringed if Mr. Kisilowsky's section 2(a) *Charter* rights were accommodated. It is submitted the Respondent is left without compelling excuse or lawful reason for its refusal to accommodate Mr. Kisilowsky. The Respondent may not find Mr. Kisilowsky's beliefs palatable, or reflecting majority sentiment, but this is irrelevant.
57. In making the Decision apply to every marriage commissioner in Manitoba, including Mr. Kisilowsky, the Respondent went too far. The Decision is not rationally connected to the goal of facilitating same-sex ceremonies for those who want them, and removed the accommodation which the Respondent had previously provided to Mr. Kisilowsky in compliance with s. 2(a) of the *Charter*.

VI: ORDER REQUESTED

58. For the reasons set out above, the Applicant seeks an Order:

- a. Declaring the Decision infringed his section 2(a) Charter right, and that said infringement cannot be saved under s. 1;
- b. Reinstating the Applicant as a marriage commissioner in Manitoba with Vital Statistics; and
- c. Granting the Applicant Costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th day of July, 2016.

Jay Cameron
Justice Centre for Constitutional Freedoms
Counsel for the Applicant, Kevin Richard Kisilowsky

SCHEDULE “A”**LIST OF AUTHORITIES**

1. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
2. *Carter v. Canada*, [2015] 1 SCR 331
3. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710
4. *Dichmont v. Newfoundland and Labrador (Government Services and Lands)*, 2015 CanLII 4857 (NL SCTD)*Doré v Barreau du Québec*, 2012 SCC 12
5. *Dunsmuir v New Brunswick*, 2008 SCC 9
6. *R. v. Big M Drugmart Ltd.*, [1985] 1 SCR 295.
7. *Syndicat Northcrest v Amselem*, 2004 SCC 47
8. *Reference Re: Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698
9. *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313
10. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3
11. *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3, 2015 SCC 16
12. *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (Man. Q.B.)