

**IN THE SUPREME COURT OF CANADA**

**IN THE MATTER OF SECTION 53 OF  
THE SUPREME COURT ACT, R.S.C. 1985, C. S-26**

**IN THE MATTER OF A REFERENCE BY THE GOVERNOR IN COUNCIL  
CONCERNING THE PROPOSAL FOR AN ACT RESPECTING CERTAIN  
ASPECTS OF LEGAL CAPACITY FOR MARRIAGE FOR CIVIL PURPOSES,  
AS SET OUT IN ORDER IN COUNCIL P.C. 2003-1055,  
DATED THE 16<sup>TH</sup> DAY OF JULY, 2003**

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### **Introduction and Overview**

1. OCCB intervenes on the third question in this Reference. It relates to the solemnization of marriage, which is a provincial responsibility under Section 92 (12) of the *Constitution Act*, 1867.
2. Civil law and religious law interpenetrate to a unique degree in the solemnization of marriage. The existing dual regime in the common law provinces has respected religious pluralism while accomplishing the goals of the state. This dual regime was sheltered from *Charter* challenge by the common law definition of marriage. This shelter would now be removed by the proposed legislation.
3. The introduction of predictable conflict between civil and religious law respecting solemnization poses a challenge to modern liberalism, the philosophical basis of Canada, at its ambiguous core. The ambiguity concerns the role of pluralism and the nature of equality in a liberal democracy. In the relatively narrow area of religious freedom respecting the solemnization of marriage, is it the role of pluralism to enable meaningful religious diversity or co-existence among different belief systems, as the OCCB submits, or is it to promote or coerce ideological conformity<sup>1</sup> to a particular view of a competing *Charter* right?

### **PART I – STATEMENT OF FACTS**

4. The OCCB is a regional conference of Catholic bishops. According to the 2001 Census, Catholics form the largest denomination in Ontario with about 3.9 million adherents.<sup>2</sup>
5. There are hundreds of churches throughout Ontario in which marriages are solemnized by Roman Catholic priests and deacons and priests of the Eastern Rite who are authorized to do so under the *Marriage Act* R.S.O 1990, c.M.3. Although precise statistics are not

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<sup>1</sup> *Lavigne v. OPSEU* [1991] 2 S.C.R. 211 at 343 per McLachlin J.

<sup>2</sup> *Affidavit of Thomas J. Reilly, Ibid.*, at para. 4.

available, it is fair to say that most of the religious weddings that occur in Ontario are Catholic (in the last ten years estimated at well over 100,000 marriages).<sup>3</sup>

6. Catholic priests and deacons who officiate at marriage ceremonies act in a dual role, civil and religious.<sup>4</sup>

### **The Civil Role**

7. Like other provinces, through the *Marriage Act* the Province of Ontario enables a minister of a recognized religion to become registered to act as an *ad hoc* civil servant in solemnizing a marriage.<sup>5</sup>
8. The diocesan bishop applies for a certificate of registration for each priest attesting that he is validly ordained.<sup>6</sup> If it appears to the Ontario Minister of Consumer and Business Services that a person has been ordained or appointed according to the rites and usages of the religious body to which he or she belongs, the Minister issues a certificate with a particular registration number. It is valid for the life of the priest and is only cancelled if he does not comply with the regulations, his bishop indicates that he is no longer a resident or a priest in good standing with the diocese, or he is deceased.<sup>7</sup>
9. The Province requires persons who solemnize marriages to ensure that they do not marry minors without parental consent or persons lacking in capacity to marry.<sup>8</sup> Each parish is required to obtain and maintain a civil register of marriages.<sup>9</sup> Ontario also permits priests to solemnize a marriage without a licence by using the publication of banns alternative.<sup>10</sup>

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<sup>3</sup> *Affidavit of Thomas J. Reilly, Ibid.*, at para. 5.

<sup>4</sup> *Affidavit of Reverend Brian D. Clough*, sworn November 26<sup>th</sup>, 2003, Motion Record, Tab 3, at para. 4.

<sup>5</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 5. *Marriage Act*, MRS. 1990, c. M.3, s. 20 – Ontario legislation is similar to the legislation of other provinces. See also *British Columbia Marriage Act*, s. 2; *Alberta Marriage Act*, s. 4; *Saskatchewan Marriage Act*, s. 5; *Manitoba Marriage Act*, s. 3; *New Brunswick Marriage Act*, s. 4; *Nova Scotia Marriage Act*, s. 5; *PEI Marriage Act*, s. 4; *Newfoundland Marriage Act*, s. 4; *Yukon Marriage Act*, s. 2; *Northwest Territories and Nunavut Marriage Acts*, s. 2.

<sup>6</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 6.

<sup>7</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at paras. 7 and 8 and *Ontario Marriage Act*, at s. 20(3), s. 22(2).

<sup>8</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 9 and *Ontario Marriage Act*, s. 5(2), 7.

<sup>9</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 11 and *Ontario Marriage Act*, s. 28(1).

<sup>10</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 14 and *Ontario Marriage Act*, s. 4.

The priest must register all marriages with the Registrar.<sup>11</sup> Religious authorities are subject to penalties if certain provisions of the legislation have been contravened.<sup>12</sup>

### **The Religious Role**

10. Apart from the demands of civil law, Catholic priests and deacons must also comply with the legislation on marriage contained in the Code of Canon Law of the Catholic Church, being the internal law of the Church, as well as any local directives put in place by the diocesan bishop.<sup>13</sup> In the Catholic understanding, marriage is a sacrament.
11. In the usual sequence of events the priest conducts the prenuptial investigation to determine that the parties meet the requirements of civil and canon law. This includes age, freedom from impediments, mental capacity, consent and their marital status, and the absence of religious impediments. Local bishops usually stipulate that the couple participate in a marriage preparation course approved by the Church and that spiritual preparation be made. The priest ensures that necessary civil arrangements are made i.e. a marriage licence or banns publication. He conducts the wedding ceremony and thereby solemnizes the marriage. He makes the necessary records under civil law and also in the Catholic register of marriage that must be kept in each parish.<sup>14</sup>

### **The Use of Church Property**

12. Church property includes churches as well as associated facilities and grounds. There are a number of churches that have large parish halls most of which are under the church or attached to it. Some of them have commercial kitchens and are used for many purposes including banquets and wedding receptions.<sup>15</sup>
13. The *Code of Canon Law* of the Catholic Church distinguishes between a “sacred place,” such as a church, and other property.

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<sup>11</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 12 and R.R.O. 1990, Reg. 738, s. 2.

<sup>12</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at Para. 15 and *Ontario Marriage Act*, s. 35(2).

<sup>13</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 16.

<sup>14</sup> *Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 18.

<sup>15</sup> *Supplementary Affidavit of Reverend Brian D. Clough*, sworn May 6<sup>th</sup>, 2004, at para. 3.

“In a sacred place only those things are to be permitted which serve to exercise or promote worship, piety and religion. Anything out of harmony with the holiness of the place is forbidden. The Ordinary [being the bishop] may however, for individual cases, permit other uses, provided they are not contrary to the sacred character of the place.”<sup>16</sup>

14. Consequently the Bishop could not authorize the use of a church for the celebration of a same-sex marriage because doing so would be contrary to the sacred character of the place. There could be no lawful celebration of a same-sex union in a Catholic church, even if it were authorized civilly.<sup>17</sup> Such a celebration would lead to its violation or desecration.<sup>18</sup> A parish hall is Church property. Even though it is not a sacred place under canon law, it is to be treated with similar respect in relation to the activities in it.<sup>19</sup>

### Church Discipline

15. There are Catholic priests who disagree publicly with the teachings of the Church on same-sex marriage and homosexual conduct. They are subject to Church discipline and may have their authority, or “faculties”, to preach and to celebrate the sacraments including marriage withdrawn by the Bishop. The faculties of Fr. Timothy Ryan SFM, who swore a dissenting affidavit in the *Halpern* case, were removed.<sup>20</sup>
16. It is not unreasonable to predict that those who favour same-sex marriage will continue to exert legal and political pressure to achieve their goal,<sup>21</sup> which is essentially the universal “celebration” of same-sex marriage:

“With celebration, however, many more people will be involved. There will be activity that involves the homosexual, the state and society generally. Homosexuality will be celebrated (opponents will say flaunted) in a public way. Society in general will be involved in a greater sense than with compassion and

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<sup>16</sup> *Supplementary Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 4.

<sup>17</sup> *Supplementary Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 6.

<sup>18</sup> *Supplementary Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 7.

<sup>19</sup> *Supplementary Affidavit of Reverend Brian D. Clough, Ibid.*, at para. 9.

<sup>20</sup> *Supplementary Affidavit of Rev. Brian D. Clough, ibid*, paras. 2-4.

<sup>21</sup> This concern is expressed in the affidavits of Ernest Caparros, para. 19; Rabbi Novak, paras. 14-19; Craig Gay, para. 15 filed in *Halpern*.

condonation...Without celebration, the symbolic and public legal inclusion of the group and its members will not be attained”.<sup>22</sup>

17. The Catholic Church and its representatives have been strong opponents of same-sex marriage. There are members and former members of the Church who advocate same-sex marriage including some priests. The OCCB is concerned that the proposed legislation could be used to attempt to force the Catholic Church or its officials to (a) solemnize same-sex marriages; (b) perform civil marriages for same-sex couples; (c) censor the Church’s teachings regarding marriage; and (d) permit activities or events on Church property or compel access for same-sex couples to programs and services relating to marriage, all of which would tend to cause the Church to appear to condone same-sex marriage. It is not an acceptable solution to require civil solemnization responsibilities to be withdrawn from religious officials and organizations not supporting the new definition.

## **PART II – POINTS IN ISSUE**

18. In the relatively narrow area of religious freedom respecting the solemnization of marriage, is it the role of pluralism in a liberal democracy like Canada to enable meaningful religious diversity, as the OCCB submits, or is it to promote or coerce ideological conformity<sup>23</sup> with a particular view of the demands of a competing *Charter* right?

## **PART III - ARGUMENT**

19. The OCCB agrees with the Attorney General of Canada that: “A decision by a religious official to perform or not to perform a marriage ceremony, based upon religious beliefs and conscience about marriage, is at the core of religious freedom” (AGC Factum, para. 74). There is, however, no law, statutory or judge-made, that unequivocally declares this religious freedom to be so protected.

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<sup>22</sup> Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2000-2001), 32 Ottawa L. Rev. 235, at paras 1,29, 30.

<sup>23</sup> *Lavigne v. OPSEU* [1991] 2 S.C.R. 211 at 343 per McLachlin J.

20. In fact, a credible argument can be fashioned that would reach the opposite conclusion on the law as it now stands, given that: (1) this Court has not yet resolved the ambiguity at the core of liberalism in Canada concerning the proper understanding of pluralism; (2) officials may be compelled by principles of administrative law to perform their civil functions despite personal conscience; (3) the conduct v. belief distinction may be used to reject religious freedom claims by religious officials in respect of the solemnization of same-sex marriages; (4) courts have not in fact tended to defer to the decisions of religious organizations on permitted beliefs and practices; and (5) provincial human rights legislation may be used to obtain access to services and properties of religious organizations and to compel religious officials to solemnize same-sex marriages.
21. The AGC's assertion that: "Religious officials who believe marriage should only embrace opposite-sex unions remain free to refuse to solemnize any other unions" (AGC Factum, para. 67), is a mere hope. The AGC's argument glosses over the fact that in all of Canada other than Quebec religious marriage is simultaneously civil marriage. This is the fact that exposes the current solemnization regime to *Charter* challenge. The proposed change in the law could become the pretext for the civil aspect of marriage solemnization to displace or override the religious aspect. OCCB submits that this is not a legitimate legislative purpose or result in a pluralist liberal democracy.

### **The Ambiguous Meaning of Pluralism in Canada**

22. As noted, civil law and religious law interpenetrate to a unique degree in respect of the solemnization of marriage. Until now the dual regime in the common law provinces has taken a truly pluralistic approach, respecting religion while accomplishing the goals of the state. This dual regime was sheltered from *Charter* challenge by virtue of the common law definition of marriage. This shelter would now be removed by the proposed legislation.
23. The proposed legislation would introduce predictable conflict between civil and religious law. This conflict would pose a challenge to modern liberalism, the philosophical basis of Canada, at its ambiguous core. The ambiguity concerns the role of pluralism in a

liberal democracy. Recent thinking about pluralism and the nature of democratic liberalism suggests that there are two basic approaches. Prof. John Gray notes:

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.

The predominant liberal view of toleration sees it as a means to a universal civilization. If we give up this view, and welcome a world that contains many ways of life and regimes, we will have to think afresh about human rights and democratic government. We will refashion these inheritances to serve a different liberal philosophy.<sup>24</sup>

24. The opposite view can be seen in the work of some advocates of same-sex marriage including Professor MacDougall. He argues in legitimate liberal terms that: "Religious ideology cannot be used to determine what people who are not of that religion can do or how they should lead their lives".<sup>25</sup> To this, however, he adds a darker qualifying note that identifies a coercive intent:

In my opinion, it should not even be used to judge those who are of that religious persuasion. Even children being raised in a particular religious tradition should not be exposed to ideology that excludes and refuses to accommodate homosexuality in their education. The state has an interest in all education of the young and this ideal should prevail.<sup>26</sup>

25. Prof. Gray's approach is supported conceptually by academics<sup>27</sup>. It is supported by human rights legislation in Canada permitting groups with religious and other distinctions to preferentially hire members.<sup>28</sup>

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<sup>24</sup> John Gray, Two Faces of Liberalism (2000), The New Press, p. 105.

<sup>25</sup> Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2000-2001) 32 Ottawa L. Rev. 235 at para. 15.

<sup>26</sup> *Ibid* at note 63. and see "A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse - The Cases of Chamberlain and Trinity Western" (2002), 35 U.B.C. L. Rev. 511; "The Separation of Church and State" Destabilising Traditional Religion-based Legal Norms on Sexuality" (2003), 36 U.B.C.L Rev. 1-27.

<sup>27</sup> See Charles Taylor, "Shared and Divergent Values" in Watts and Brown, eds. Options for a New Canada (1991) p. 53, p. 69; Multiculturalism (1994) pp. 38, 41,42,43. He argues that a "politics of difference," or the "politics

26. Prof. Gray's approach is implicit in the decision of this Court in *Trinity Western*.<sup>29</sup> In essence the Court held that Trinity Western could enforce its mores within its own voluntary community, even though it would in part be discharging a public function in educating teachers for the public schools of British Columbia.
27. Support for Prof. Gray's approach is also seen in the reasoning of Gonthier and Bastarache, JJ., dissenting in *Chamberlain v. Surrey District School No. 36*:
- Surely a person's s. 2(a) or s. 2(b) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person's s. 15 rights, just like a person's s. 15 rights cannot be trumped by s. 2(a) or 2(b) rights. In such cases, there is a need for reasonable accommodation or balancing.<sup>30</sup>
28. Prof. MacDougall's viewpoint is shared by other academics.<sup>31</sup>

### **There is a Need for a Principle of Reasonable Accommodation**

29. Meaningful pluralism is the only way to reconcile freedom of religion and other *Charter* values in respect of the solemnization of marriage. This must have a functional dimension and a spatial dimension.

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of recognition" in a modern liberal democracy should permit, if not encourage group rights. See John D. Whyte, "Is the Private Sector Affected by the *Charter*?" In Righting the Balance: Canada's New Equity Rights, L. Smith, ed., The Canadian Human Rights Reporter Inc., p. 145 at pp 174-179. He argues the legitimacy of group rights in a liberal democracy and cautions against over-playing the individual rights aspects of the *Charter*. See Alvin J. Esau: "Islands of Exclusivity": Religious Organizations and Employment Discrimination" (2000), 33 U.B.C. L.R. 719. He argues that religious groups, even illiberal ones, should have a "zone of liberty" to enforce their own life styles and norms (p.827). See Michael Ignatieff, "The Rights Revolution" (2000), p. 72-74 and Ch.5 (p.113-141 especially pp 122-123). He argues for state neutrality in dealing with divergent but lawful ways of living.

<sup>28</sup> See for example, s.24 of the *Ontario Human Rights Code* and the national survey in Esau, *supra* at note 27.

<sup>29</sup> [2001] 1 S.C.R. 772 ("*Trinity Western*"). In particular, paras. 34-36. Professors Whyte and Taylor (*supra* note 27) point out that Canada's tradition is one of accommodation – live and let live: In the *Reference re Quebec Secession* [1998] 2 S.C.R. 212, the Supreme Court of Canada identified "the accommodation of minorities" (para. 48) and "the protection of minorities" (para. 79) as a general, underlying or "defining" (para. 49) principle of our Constitution.

<sup>30</sup> [2002] S.C.J. No. 87 at para. 132. It is worth observing that religious equality is included within s. 15.

<sup>31</sup> Will Kymlika, Politics in the Vernacular (2001), pp 9, 22-23. He argues that liberals should be sceptical of internal restrictions that are inconsistent with general human rights; See also Ayelet Shachar, Multicultural Jurisdictions (2001), pp 117-118. She argues that a condition of the state recognition or accommodation of religious groups should be accompanied by a requirement that the general human rights regime in society should apply within religious groups.

30. In the functional dimension, where a religious official solemnizes marriages with a civil effect, freedom of religion must be interpreted to protect the religious official's right to do so consistent with the teachings of his or her religious organization. This also applies to the incidents of the solemnization of marriage, including marriage preparation courses, counselling and celebration. Accordingly, in context of the solemnization of marriage, freedom of religion under s. 2 (a) of the *Charter* and the protection of religious equality in s. 15 should protect a religious official who, in the course of carrying out a religious function, discharges ancillary or incidental civil duties, from being compelled to perform those civil duties outside of the religious function. This reasoning applies by analogy to the spatial dimension.
31. The spatial dimension is necessary in order to recognize the freedom of religious organizations to operate in a manner consistent with religious teachings in their own space, which consists not only of sacred space but incidental space such as grounds and ancillary support and social facilities.
32. The need for clarification of the proper reach of s. 2(a) of the *Charter* is illustrated by the potential mischief in the lines of argument that are sketched out below.

### **Supporting Lines of Judicial Reasoning**

33. There are some lines of judicial reasoning that, taken together, would appear to lend support to an effort by a same-sex couple to compel a religious official to solemnize a same-sex marriage despite the religious official's own views or those of the religious organization, and despite the apparently broad definition of freedom of religion given by Chief Justice Dickson in *R. v. Big M Drug Mart*.

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 beliefs by worship and practice or by teaching and dissemination.<sup>32</sup>

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<sup>32</sup> [1985] 1 S.C.R. 295 at 336 ("*Big M*").

34. Despite this broad and compelling articulation of the protection afforded by s. 2(a), subsequent jurisprudence has limited the scope of the right of freedom of religion.<sup>33</sup>

### **Public Officials Are Subject to Administrative Law**

35. Religious officials who are licensed and registered to solemnize marriages under provincial legislation may be considered to be public officials with important public duties. As a matter of ordinary administrative law principles, public officials may be required to perform their public duties by an order of the Court in the nature of *mandamus*.<sup>34</sup> There are no cases that excuse a public official from performing public duties for personal religious or other reasons. Religious officials could be thus exposed to court orders coercing them to perform same-sex marriages despite their religious views and the views of their religious group.
36. Some public officials have sought to be exempted from performing public duties because of their religious beliefs. For example, Constable David Packer refused to patrol outside the Morgentaler abortion clinic in Toronto because abortion was contrary to his beliefs as a Roman Catholic. He was convicted of disobeying an order without lawful excuse under the *Police Act* and appealed to the Ontario Police Commission on whether he had a lawful excuse for refusing the duty.<sup>35</sup>
37. Constable Packer argued that the order contravened his right to freedom of religion. While the Commission held that the *Charter* applied, it concluded that there was no

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<sup>33</sup> David M. Brown, "Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights" (2000), 33 U.B.C. L. Rev. 551 at 565.

<sup>34</sup> The remedy of *mandamus* is used to compel a public official to perform its legal duties. See *Holmberg v. Sault Ste. Marie Public Utilities Commission*, [1966] 2 O.R. 675 (Ont. C.A.); *Brokman v. Hamilton Civic Hospital*, [1973] 1 O.R. 204; and *Karavos v. City of Toronto*, [1948] 3 D.L.R. 294 (Ont. C.A.). *Mandamus* will not be granted to an applicant unless there is (1) a legal right to have the duty performed, (2) the applicant is owed the duty, (3) the performance of the duty is due, and (4) the public official has refused a demand that it perform the duty. See also P.P. Craig, *Administrative Law*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1994 at 526 to 529; D.P. Jones & A.S. de Villars, *Principles of Administrative Law*, 3<sup>rd</sup> ed. (Edmonton: Carswell, 1999) at 569 to 573.

<sup>35</sup> *Constable David Packer v. Metropolitan Toronto Police Force* (February 15, 1990) Ontario Police Commission Reasons.

- breach of section 2(a) of the *Charter* and that even if there was such a breach, it would be justified under section 1.<sup>36</sup>
38. The Commission dismissed Packer’s appeal stating that "a constable's duty is owed to the law and must be performed without regard to conscience."<sup>37</sup> The OCCB fears a similar approach respecting religious officials and the solemnization of marriage.
39. Modern life raises many issues of conscience for professionals who are discharging public or quasi-public functions. Consider, for example, nurses and doctors confronted by a demand for an abortion, a pharmacist confronted by a demand for a “morning after” pill, conscientious objection in a wartime situation including a refusal to abuse prisoners, or a justice of the peace or marriage commissioner confronted by a request to perform a same-sex marriage, contrary to personal conscience. It is simply unreasonable and contrary to the philosophy of meaningful pluralism to impose a blanket rule that religious individuals must put aside their religious beliefs when they enter the public sphere.<sup>38</sup>
40. But the difficulties experienced by individuals primarily discharging public duties should not be an impediment to an *ad hoc* protection for religious officials and organizations solemnizing marriages, since they are primarily engaged in carrying out a religious function with an ancillary or incidental civil respect. It is critical for the Court to make this clear.

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<sup>36</sup> *Ibid.*, at 6.

<sup>37</sup> *Ibid.*, at 8.

<sup>38</sup> Cf Robert Wintemute, “Religion vs. Sexual Orientation: A Clash of Human Rights?” (2002), 1 *Journal of Law and Equality* 125 at p. 141. To require such a divestiture of religious beliefs but not other beliefs gives a priority of place in the public to those citizens whose convictions are animated by atheistic or agnostic beliefs: a result that is manifestly unfair and that has been rejected by this Court in *Chamberlain* when it upheld the reasoning on this point by Justice McKenzie of the British Columbia Court of Appeal. The argument that “a proper understanding of the nature of Canadian society requires a religiously *inclusive* understanding of the secular” was endorsed by the Court in *Chamberlain*: Iain T. Benson “Notes Towards a (Re) Definition of the ‘Secular’” 33 *U.B.C. L. R.* (2000) 519-549. Iain T. Benson, “Considering Secularism” in Douglas Farrow, ed. *Religion within a Secular Society* (Montreal: McGill/Queen’s Press, 2004) pp. 83-98 (forthcoming).

### **The Distinction Between Conduct and Belief**

41. In an effort to balance the rights of individuals to be protected from discrimination under s. 15(1) of the *Charter* and to enjoy freedom of religion under s. 2(a), this Court established a major distinction between "belief" and "conduct" in *Trinity Western*.<sup>39</sup>
42. At the heart of the appeal was the issue of how to reconcile the religious freedom of individuals wishing to attend Trinity Western with equality concerns for students in British Columbia's public school system. The majority stated that:
- ...any potential conflict 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 in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.<sup>40</sup>
43. The Court concluded that the proper place to draw a line was between belief and conduct:
- The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that trained teachers at TWU foster discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.<sup>41</sup>
44. This limitation on the right under s. 2(a), as expressed in *Big M*, to "manifest religious belief by worship and practice or by teaching and dissemination"<sup>42</sup> sits uncomfortably with this Court's longstanding position that:
- A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.<sup>43</sup>
45. By placing certain religious conduct, as opposed to belief, beyond the protective sphere provided by s. 2(a), the Court may have weakened the freedom of religion guarantee.

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<sup>39</sup> [2001] 1 S.C.R. 772 .

<sup>40</sup> *Ibid.*, at para 29.

<sup>41</sup> *Ibid.*, at para 36.

<sup>42</sup> *Big M*, *supra* note 19 at 336.

<sup>43</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877.

The danger of this approach was noted by Gonthier and Bastarache, JJ., dissenting in *Chamberlain*:

... nothing in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, or the existing s. 15 case law speaks to a constitutionally enforced inability of Canadian citizens to morally disapprove of homosexual behaviour or relationships: it is a feeble notion of pluralism that transforms "tolerance" into "mandated approval or acceptance". In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity: there is a potential for a collision of dignities. Surely a person's s. 2(a) or s. 2(b) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person's s. 15 rights, just like a person's s. 15 rights cannot be trumped by s. 2(a) or 2(b) rights. In such cases, there is a need for reasonable accommodation or balancing.<sup>44</sup>

46. While courts may be apt to recognize the right to hold beliefs, they may well be encouraged by the Court's approach in *Trinity Western* to be cautious in recognizing the right to act on those beliefs. This supports an argument that religious officials, in terms of their civil functions, could be compelled to perform marriages that are contrary to their religious beliefs.

### **Judicial Intervention in the Internal Affairs of Religious Organizations**

47. Courts in Canada have barely hesitated to intervene in the internal affairs of religious organizations, applying administrative law principles to reinstate ministers and reinstate excommunicated members.<sup>45</sup>
48. In *Davis v. United Church of Canada*,<sup>46</sup> two ministers applied for judicial review of the procedures which had been followed by the Church in dealing with allegations of sexual harassment made against the ministers. The Court examined the United Church Manual and concluded that the rules of natural justice were breached by the Church. It quashed the decision of the Church, prohibited the Church from further proceedings and restored

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<sup>44</sup> *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87 at para. 132.

<sup>45</sup> See M.H. Oglivie, *Religious Institutions and the Law in Canada* (2d) – 2003 (page 217-221 and pp. 301-315). Canadian courts have sought to ensure that ecclesiastical law in the form of canon law, articles of incorporation, by-laws, manuals or similar constating documents have been properly followed and that the basic rules of natural justice have been observed.

<sup>46</sup> (1992), 8 OR (3d) 75.

responsibilities and privileges to the ministers. In support of its decision, the Court relied on numerous cases that justified judicial intervention in the internal management of churches. For example, the Ontario Court of Appeal stated in *McCaw v. United Church of Canada* that:

The civil courts are properly reluctant to interfere with the internal affairs of a church, but they will do so to ensure that a member of a church is not treated unfairly. A fortiori they ought to interfere if a member of a church is treated unlawfully.

...

It does not seem to me that this court would be interfering unduly with the internal affairs of the church if it declared that the removal of Mr. McCaw's name from the rolls of Presbytery and Conference was unlawful and directed that his name be restored. By such an order this court is not telling the church how to run its affairs; it is simply passing upon the legality of certain of its actions and putting Mr. McCaw in the position with respect to Presbytery and Conference which he would have been in had it not been for their illegal action.<sup>47</sup>

49. This Court applied the rules of natural justice to a private religious association. *Lakeside Colony of Hutterite Brethren v. Hofer*<sup>48</sup> concerned the expulsion of several members of the Lakeside Hutterite Colony. The Court stated that it would intervene on the question of membership in a religious organization, where a property right or civil right turns on the question of membership. *Lakeside Colony*, however, could be seen as not a case about property rights, but rather the entitlement to membership in a religious organization. Indeed, as stated by Professor M.H. Ogilvie: "the distinction [between doctrinal decisions and decisions regarding property rights or civil rights] may be difficult to draw because doctrine, polity and discipline frequently impact on issues of property and civil rights, particularly when ecclesiastical and civil standards conflict."<sup>49</sup>
50. This abundance of case law demonstrates the apparent willingness of courts to intervene in the internal affairs of religious organizations. This leads to a legitimate concern that courts will not respect decisions made by religious officials or rely on organizations to

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<sup>47</sup> *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 at 489 (Ont. C.A.).

<sup>48</sup> [1992] 3 S.C.R. 165 ("*Lakeside Colony*").

<sup>49</sup> M.H. Ogilvie, *supra* at 218.

refuse to perform same-sex marriages when doing so would conflict with their religious beliefs or the beliefs of their religious organization.

### **Individual Rights and Group Rights**

51. *Charter* jurisprudence has taken a highly individualistic approach to freedom of religion and has tended to discount the interests of religious groups. This approach is also reflected in the wording of the third question in this Reference.
52. The individual focus and secular nature of *Charter* jurisprudence has informed the breadth of the protection afforded under s. 2(a) of the *Charter*. In *Big M*, Justice Dickson associated religious freedom with "the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation." He considered freedom of conscience to be fundamental because it accords with the ability of "each citizen to make free and informed decisions" and with "basic beliefs about human worth and dignity."<sup>50</sup> He stated in *R. v. Edwards Books and Art Ltd.* that the purpose of s. 2(a) is to permit people to make personal choices about religion and not have a sense of duty thrust upon them by the broader community:

The purpose of section 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being. These beliefs in turn govern one's conduct in practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened.<sup>51</sup>

53. The implication that the Court will analyze the nature of the religious belief or practice at issue, in order to determine whether it is reasonably threatened or important, has significant implications for the free-functioning of religious groups.

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<sup>50</sup> *Big M*, *supra* note 19 at 346. The Supreme Court of Canada stated in *Public Service Employee Relations Act (Alberta) Ref.*, [1987] 1 S.C.R. 313 that the *Charter* essentially protects individual rather than group rights:

While some provisions in the Constitution involve groups, such as section 93 of the *Constitution Act, 1867* protecting denominational schools and section 25 of the *Charter* referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess.

<sup>51</sup> [1986] 2 S.C.R. 713 at 759.

54. In certain contexts, particularly those involving hierarchical religions, the notion of "profoundly personal beliefs" oversimplifies and perhaps misunderstands the nature of the religious belief and religious practice. In hierarchical religious organizations, a member is expected to adhere to the religious practices and beliefs given by religious authority. Membership is voluntary.
55. Even where a broad definition of freedom of religion is advanced, Justice Dickson's conception of religious freedom has the potential effect of unduly restricting it. In *R. v. Videoflicks*, Tarnopolsky J.A. wrote that freedom of religion:
- also includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed not from the majority's perspective of the concept of religion, but in terms of the roles the practices and beliefs assume in the religion of the individual or group concerned.<sup>52</sup>
56. Although this passage requires that the tenets of religious faith be approached from the perspective of the religious believer, it nonetheless invites courts to judge the importance of, or the centrality of, certain beliefs and practices.
57. Wilson J. did this in *R. v. Jones* in stating that, "legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion."<sup>53</sup> In other words, in her view, the Court can assess and determine what aspects of religion are trivial or insubstantial. This may be inevitable, but it must be done with substantially judicial diffidence, more, for example, than was shown in the following case.
58. In *Hall v. Powers*,<sup>54</sup> the principal of a Catholic high school protected by s. 93(1) of the *Constitution Act*, 1867, forbade a student from bringing his same-sex romantic partner to the prom. Evidence was tendered in the form of an affidavit from the responsible bishop that outlined the teachings of the Church with respect to homosexuality. The uncontradicted evidence was that the organizational nature of Roman Catholicism gives

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<sup>52</sup> (1984), 14 D.L.R. (4<sup>th</sup>) 10 at 36 (Ont. C.A.).

<sup>53</sup> [1986] 2 S.C.R. 284.

<sup>54</sup> (2002), 59 O.R. (3d) 423 (Ont. Sup. Ct.).

authority to the bishop to pronounce upon the valid interpretation and application of Church doctrine and practice within the diocese.

59. In dismissing the evidence of the bishop and bringing his own views of a democratic norm (as if the Catholic Church were a democracy) to bear upon the determination of Roman Catholic views about same-sex liaisons, MacKinnon J stated:

...There is no evidence of a single position within the Catholic faith community about what constitutes the most appropriate pastoral response to this issue. Although the Catechism states that "homosexual acts are intrinsically disordered", the material before me demonstrates a significant range of Catholic opinion both on what constitutes a homosexual act and also on whether only homosexual genital contact is prohibited or whether other kinds of physical acts are also prohibited. ...It is not the task of a civil court to direct the principal, the Board, the Roman Catholic Church or its members, or indeed any member of the public as to what his or her religious beliefs ought to be... But I find that Mr. Hall is entitled in this court to question the correctness of the statement in the defendant's materials that Catholic teachings and Board policy in fact proscribe "homosexual behaviour" and a "homosexual lifestyle" so as to justify prohibiting Mr. Hall from attending his prom with Mr. Dumond.<sup>55</sup>

60. The apparent willingness of Canadian courts to assess and countermand religiously-based decisions and practices weakens the s. 2(a) guarantee of religious freedom, and the Section 15 guarantee to religious equality and justifies concerns that similar reasoning might be applied to the solemnization of marriage.

### **Provincial Human Rights Legislation and Access to Services and Facilities**

61. Provincial human rights legislation protects against discrimination by government, private persons and corporations. Typically, an individual is protected against discrimination in access to services and facilities. The prohibited grounds of discrimination are fairly uniform across Canada and include sexual orientation.<sup>56</sup> For example, s. 1 of Ontario's *Human Rights Code* provides:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour,

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<sup>55</sup> *Ibid.*, at para. 23, 31.

<sup>56</sup> Russel W. Zinn & Patricia P. Brethour, *The Law of Human Rights in Canada: Practice and Procedure* (Aurora, Ont.: Canada Law Book, 1996) at 1-1.

ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.<sup>57</sup>

62. Most human rights legislation contains a defence against discrimination in respect of access to services and facilities where it can be shown that there is a *bona fide* justification or qualification for such a denial.<sup>58</sup> British Columbia's *Human Rights Code*, for example, states:

8(1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public...<sup>59</sup>

63. Under the "services" rubric, an individual's access to services and facilities is protected against discrimination where they are "customarily available to the public".<sup>60</sup> In Ontario, however, there is no requirement that services "be customarily available". The Legislature amended the *Code* in 1981, by removing the phrase "to which the public is customarily admitted", thereby showing that it did not intend to insulate the provision of services in a private club from compliance with human rights legislation.<sup>61</sup> By the same reasoning, services provided by religious officials and facilities operated by church organisations would be subject to the *Code*.

64. The Ontario Divisional Court noted but did not address the constitutionality of the absence of the "customarily available" defence in respect of services in the *Human Rights Code*:

The Ontario legislature has provided exemptions and defences in respect of the Code's prohibitions of discriminatory conduct in the areas of housing and employment. The legislature has chosen not to provide any defence in respect of

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<sup>57</sup> R.S.O. 1990, c. H.19, s. 1 ("*Ontario Human Rights Code*").

<sup>58</sup> Canada, British Columbia, Alberta, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland all have defences based on *bona fide* belief or qualification to the protection against discrimination in respect of services within their human rights legislation.

<sup>59</sup> *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8(1) ("*British Columbia Human Rights Code*").

<sup>60</sup> See *U.B.C. v. Berg* [1993] S.C.R. at 353

<sup>61</sup> *Barclay v. Royal Canadian Legion, Branch 12, Tom Markham and Linda Paul* (1997), 31 C.H.R.R. 11.

the Code's prohibition of discrimination with respect to the supply of services, goods and facilities.<sup>62</sup>

65. As a result of the absence of a bona fide defence to discrimination in respect of services in Ontario, there is no express statutory protection against a claim that an individual or organization may violate the human rights legislation by refusing to perform a same-sex marriage solemnization or by denying access to a facility for the celebration of such solemnization. This leaves both religious officials and religious organizations in Ontario open to a human rights complaint under the *Code* in respect of the solemnization of marriage and its incidents.
66. The lines of argument sketched out above show that there is a reasonable basis for doubting whether the current interpretation of freedom of religion under s. 2(a) of the *Charter* is sufficiently robust to provide the protection assumed by the third question, or the protection that religious officials and groups need if the proposed legislative change were to occur.

#### **PART IV - ORDER SOUGHT**

67. The Catholic Bishops of Ontario seek assurances that:
- (a) No Catholic priests or deacons will be obliged to solemnize any marriage in Catholic churches or elsewhere, that is contrary to Church teaching;
  - (b) Catholic dioceses and parishes can deny access to churches and their associated facilities and grounds for the solemnization of same-sex marriages or for related celebrations or events;
  - (c) Catholic dioceses and parishes can deny same-sex couples access to programs and services relating to marriage, including marriage preparation courses.
68. The OCCB submits that this Honourable Court, in the course of its reasons in this Reference, ought to provide an interpretation of s. 2(a) of the *Charter* that obviates these concerns. It is respectfully submitted that such an interpretation is laid out in paras 29-

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<sup>62</sup> *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375 at para. 35.

31, *supra*. In the absence of such an interpretation the OCCB submits that the answer to the third question in this Reference should be in the negative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

May 10, 2004

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**PART V – TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Cited at Paragraphs</b>
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12. *Ontario Marriage Act*, s. 20(1).
13. *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, s. 1
14. *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8(1)
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