

Legal Opinion re. Performing Same Sex Marriages 2018

The Life and Mission Agency sought a legal opinion from the church's lawyers with Cassels Brock LLP about whether ministers could be compelled to perform same sex marriages. The legal opinion is below.

Religious officials cannot be compelled to perform marriage ceremonies that contravene their religious beliefs. Civil marriage commissioners, on the other hand, who act as representatives of the government and are charged with solemnizing civil marriages, are not permitted to discriminate on the basis of sexual orientation and must perform same-sex marriage ceremonies, regardless of their privately held religious beliefs. This is consistent with the Supreme Court of Canada's 2004 decision in *Reference Re. Same-Sex Marriage*.

Ontario, Prince Edward Island and the Northwest Territories have enacted legislation that explicitly permits religious officials to refuse to perform, or allow sacred spaces to be used for, marriage ceremonies that do not accord with their religious beliefs, but most Canadian provinces and territories have not enacted legislation on this issue. However, applicable case law across Canada has made clear that it would be unconstitutional to compel religious officials to perform a marriage ceremony that is inconsistent with their religious beliefs.

As such, we believe that the PCC's proposed policy that permits, but does not require, its ministers to perform same-sex marriage ceremonies would be compliant with the applicable human rights legislation across Canada and consistent with the reported case law on this subject.

Analysis

In 2004, the Supreme Court of Canada issued its landmark decision in the *Reference Re. Same-Sex Marriage*. The court held unanimously that proposed federal legislation extending civil marriage to persons of the same sex was consistent with the equality provisions of the *Canadian Charter of Rights and Freedoms* (the "Charter").¹ The decision also stated that the religious freedom guarantee under the Charter was expansive enough to protect religious officials from being compelled by legislation to perform civil or religious same-sex marriages or to use sacred places for such a purpose if doing so would run contrary to their religious beliefs.²

In 2005, in response to the *Reference Re. Same-Sex Marriage*, the federal government enacted the Civil Marriage Act,³ redefining marriage to include same-sex unions. The preamble to the Civil Marriage Act states:

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

In the wake of the *Reference Re. Same-Sex Marriage* and the *Civil Marriage Act*, several provinces enacted legislation explicitly stating that religious officials could not be compelled to perform same-sex marriage ceremonies if doing so would contravene their religious beliefs. In Ontario, both the *Human Rights Code*⁴ and the *Marriage Act*⁵ were amended in 2005 to permit a religious official registered under

s. 20 of the Marriage Act to refuse to perform a marriage ceremony or to allow a sacred place to be used for solemnizing a marriage if doing so would be against the religious official's beliefs or the principles of their religion.

Prince Edward Island's *Marriage Act* was similarly amended in 2005 to permit any person who is authorized to solemnize a marriage under that legislation (including civil marriage commissioners) to refuse to do so if the marriage is not in accordance with the person's religious beliefs.⁶

In 2017, the Northwest Territories enacted a new *Marriage Act* which provides that a registered cleric is not required to solemnize or assist in solemnizing a marriage, or to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, if doing so would be contrary to the cleric's religious beliefs or the doctrines of the religious body to which the cleric belongs.⁷

To date, Ontario, Prince Edward Island and the Northwest Territories are the only jurisdictions in Canada that have enacted legislation on this issue.

However, even in the absence of legislation, case law on this subject confirms that religious officials in Canada, unlike civil marriage commissioners, cannot be compelled to perform marriage ceremonies that contravene their religious beliefs.

In *Smith v. Knights of Columbus*,⁸ a religious group refused to rent a church hall to a same-sex couple for their wedding reception. The British Columbia Human Rights Tribunal noted that "a person, with a sincerely held religious belief, cannot be compelled to act in a manner that conflict[s] with that belief, even if that act is in the public domain."⁹ Although the Tribunal ultimately concluded that the religious group had failed to accommodate the complainants to the point of undue hardship (given that the religious group had entered into a contract with the complainants and refused to reimburse the complainants for their expenses), they "accepted that the Knights could refuse access to the Hall to the complainants because of their core religious beliefs..."¹⁰

In *J. (M.) v. Nichols*,¹¹ a civil marriage commissioner was refused to marry a same-sex couple on the grounds that doing so would conflict with his religious beliefs. The couple brought an application in the Saskatchewan Human Rights Tribunal and successful in obtaining an order that the commissioner had discriminated against them and a further order for compensation. The decision was upheld on appeal. The court noted that the Supreme Court's decision in the *Reference Re. Same-Sex Marriage* was distinguishable as it dealt with the rights of religious officials to refuse to perform marriage ceremonies that contravened their beliefs, and did not address the rights of civil marriage commissioners to refuse to perform marriage ceremonies based on their personal religious beliefs. The court stated:

73 ... Mr. Nichols, in his capacity as a marriage commissioner acting as government, is not entitled to discriminate, regardless of his private beliefs. Mr. Nichols was wrong to believe he could follow a private policy, not authorized by *The Marriage Act*, which had the effect of discriminating against M.J.

74 ... I am sympathetic to the argument that a public official acting as government is at the same time an individual whose religious views demand respect. However, a public official has a far greater duty to ensure that s/he respects the law and the rule of law. A marriage commissioner is, to the public, a representative of the state. She or he

is expected by the public to enforce, observe and honour the laws binding his or her actions. If a marriage commissioner cannot do that, she or he cannot hold that position.¹²

In *Reference Re. Constitutional Act, 1978*,¹³ the Saskatchewan Court of Appeal rejected amendments to the province's *Marriage Act* that would have allowed civil marriage commissioners to refuse to perform same-sex marriages on the grounds that such a law would be unconstitutional. In reaching that conclusion, the court distinguished between civil marriage commissioners and religious officials, both of whom could register to perform marriages under the province's *Marriage Act*, noting that only the latter had the right to refuse to solemnize same-sex marriages on religious grounds given that religious officials perform a religious ceremony and not a government service.¹⁴

In *Dichmont v. Newfoundland and Labrador*,¹⁵ a former civil marriage commissioner brought a human rights complaint alleging that the government's refusal to permit her to continue to serve as a marriage commissioner unless she was prepared to perform same-sex marriage ceremonies was discriminatory. On judicial review, the court cited *Nichols* for the proposition that civil marriage commissioners, unlike religious officials, perform a public service and could not discriminate in the provision of that service, regardless of their private religious beliefs.¹⁶

Most recently, in *Kisilowsky v. Manitoba*,¹⁷ a former marriage commissioner brought a complaint to the Manitoba Human Rights Commission on the same grounds as the complainant in *Dichmont*, and was unsuccessful in obtaining an order that the province's policy requiring all civil marriage commissioners to perform same-sex marriages was discriminatory. On appeal to the Manitoba Court of Appeal, the court confirmed that only religious officials and not civil marriage commissioners could refuse to perform same-sex marriage ceremonies on religious grounds. The court also noted that the applicant could have registered to perform marriages as a religious official, in which case he would have been permitted to refuse to solemnize same sex marriages.¹⁸

Conclusion

The law is clear that a religious official, unlike a civil marriage commissioner, cannot be compelled to perform a marriage ceremony that is inconsistent with his or her religious beliefs. On that basis, we do not believe that the PCC's proposed policy permitting its ministers to refuse to perform same-sex marriage ceremonies would expose the PCC or its ministers to liability on the basis of discrimination, or on any other ground.

References for the Legal Opinion

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

² *Reference Re. Same-Sex Marriage* at paras. 56-60.

³ S.C. 2005, c. 33.

⁴ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 18.1(1).

⁵ *Marriage Act*, R.S.O. 1990, c. M.3, s. 20(6).

⁶ *Marriage Act*, R.S.P.E.I. 1988, c. M-3, s. 11.1.

⁷ *Marriage Act*, S.N.W.T. 2017, c. 2, s. 28.

⁸ 2005 BC H RT 544 ["Smith"].

⁹ *Smith* at para. 113.

¹⁰ *Smith* at para. 120.

¹¹ 2009 SKQB 299 ("Nichols").

¹² Nichols at paras. 73-74.

¹³ 2011 SKCA 3 ["*Marriage Commissioners Reference*"].

¹⁴ *Marriage Commissioners Reference* at paras. 5, 12

¹⁵ 2015 NLTD(G) 14 ["*Dichmont*"].

¹⁶ *Dichmont* at paras. 88-89.

¹⁷ 2018 MBCA 10 ["Kisilowsky"].

¹⁸ Kisilowsky at paras. 88, 92.