

CIVIL MARRIAGE COMMISSIONERS IN THE PROVINCE OF SASKATCHEWAN:  
RELIGIOUS FREEDOM AND PUBLIC SERVICE

By

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A Thesis Submitted to the Faculty of

MCGILL UNIVERSITY

In Partial Fulfilment of the  
Requirements of the Degree of

MASTER OF ARTS

June 2009

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## ACKNOWLEDGEMENTS

This thesis would not have been possible without the support and contributions of many people. I wish to thank Professor Dan Cere for his invaluable input and time, and for sparking my interest in the interaction of religion, law and public policy. Thank you to my father, John Harwood, for his attention to detail and assistance with proofreading numerous drafts and my mother, Rae Harwood, for her logistical help. Thank you as well to Dr. Janet Epp Buckingham for her expert advice in the area of Canadian religious freedom jurisprudence. I wish to acknowledge the many others who have contributed to this work in various ways: Bill and Nicole Klinck; Jay Dorey; Dr. Don Buckingham; and the personnel of the McGill University Library, City of Ottawa Library, and University of Ottawa Library. Special thanks also to Manon Laliberté for her translation assistance. And the biggest thanks of all to my amazing wife, Triscilla, who has patiently supported me through this endeavour. This work is dedicated to Triscilla and our beautiful daughter, Clara, who waited just until her daddy finished this thesis before coming into the world. SDG.

## **ABSTRACT**

This thesis attempts to address the issue of religious freedom and public service by specifically examining the policy implemented by the Government of Saskatchewan towards its civil marriage commissioners in 2004. This work takes a critical look at four key aspects: first, reasonable accommodation – its history, its application in the Canadian context and the academic debates pertaining to religious accommodation; second, the policymaking process employed by the Province of Saskatchewan; third, Canadian jurisprudence on freedom of religion cases; and finally, contemporary academic approaches to the role of religion in the public sphere. Taken together, these issues suggest that the contemporary shift in understanding and applying norms of reasonable accommodation, in conjunction with the current judicial trend to assign religious belief to the private sphere, reinforces the notion that the religious rights of private citizens are limited when they assume a public role.

## **RÉSUMÉ**

Cette thèse examine la question de la liberté de religion et la fonction publique, en analysant spécifiquement la politique mise en place par le Gouvernement de la Saskatchewan vis-à-vis les commissaires aux mariages civils en 2004. Cet ouvrage jette un regard critique sur quatre aspects principaux: le premier, l'accommodement raisonnable - son histoire, son application dans le contexte canadien et les débats académiques liés à l'accommodement religieux; le deuxième, le processus d'élaboration des politiques utilisé par la province de la Saskatchewan; le troisième, la jurisprudence canadienne sur la liberté de religion; et finalement, les approches académiques contemporaines vis-à-vis le rôle de la religion dans la sphère publique. Ensemble, ces enjeux suggèrent que le changement contemporain dans la compréhension et l'application des normes d'accommodement raisonnable, en conjonction avec la tendance judiciaire actuelle d'assigner des croyances religieuses à la sphère publique, renforcent la notion que les droits religieux des citoyens privés sont limités lorsqu'ils adoptent un rôle public.

## Chapter 1: Introduction

### 1.1 Contextual Background

#### 1.1.1 Same-sex Marriage in Canada

In 2003, the British Columbia Court of Appeal and the Ontario Court of Appeal handed down precedent-setting decisions declaring that the restriction of marriage to that of one man and one woman discriminates against same-sex couples wishing to marry. On May 1, 2003 in *Barbeau v. British Columbia (Attorney General)*, Justice Prowse of the B.C. Court of Appeal wrote, “I conclude that there is a common law bar to same-sex marriage; that it contravenes s. 15 of the Charter; and that it cannot be justified under s. 1 of the Charter. I would grant the declaratory relief set forth at para. 158, *infra*, and reformulate the common law definition of marriage to mean ‘the lawful union of two persons to the exclusion of all others’.”<sup>1</sup> On June 10, 2003 in *Halpern v. Canada*, Ontario Chief Justice McMurtry of the Ontario Court of Appeal issued a similar decision, redefining the common law definition of marriage as “the voluntary union of for life of two persons to the exclusion of all others.”<sup>2</sup>

The following month, on July 17, 2003, the federal government launched a constitutional reference to the Supreme Court of Canada concerning a draft bill redefining civil marriage along the lines of the B.C. and Ontario appellate courts. The

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<sup>1</sup> *Barbeau v. British Columbia* (2003), 42 R.F.L. (5th) 341; (2003), 107 C.R.R. (2d) 51; (2003), 15 B.C.L.R. (4th) 226, at paragraph 7.

<sup>2</sup> *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161; (2003), 225 D.L.R. (4th) 529; (2003), 36 R.F.L. (5th) 127; (2003), 106 C.R.R. (2d) 329; (2003), 172 O.A.C. 276, at paragraph 156.

reference sought the Court's decision on the jurisdiction of Parliament in redefining marriage in Canada, and whether such an action would align with the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> One question put before the Court read, "Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?"<sup>4</sup> The Supreme Court heard interventions on the reference on October 6<sup>th</sup> and 7<sup>th</sup>, 2004, and issued its decision on December 9<sup>th</sup> of the same year.

### 1.1.2 Marriage Commissioners in Saskatchewan

On November 5, 2004, in *N.W. v. Canada (Attorney General)*, the Saskatchewan Court of Queen's Bench released a decision requiring a marriage license issuer to provide a marriage license to a same-sex couple. Saskatchewan's Marriage Unit, which oversees the solemnization of marriages in the province, issued a letter to provincial marriage commissioners on November 1, 2004, two days before the Court began hearing the case and only four days before the ruling was handed down. The November 1<sup>st</sup> letter explains:

Five same-sex couples have launched a court challenge in Saskatchewan seeking a change in the law to allow for same sex marriage. The court application is set to be heard in the Court of Queen's Bench on or about November 3, 2004.

If the court challenge is unsuccessful, you can continue to perform and process marriages in the same manner as you do now. However, if the court challenge is successful, then changes will be necessary.

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<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Hereinafter referred to as "*Charter*").

<sup>4</sup> *Reference re: Same-Sex Marriage*, [2004] 3 S.C.R. 698; (2004), 246 D.L.R. (4th) 193; (2004), 12 R.F.L. (6th) 153; (2004), 125 C.R.R. (2d) 122. (Hereinafter referred to *Reference re: Same-Sex Marriage*)

If the court challenge is successful, it will have province-wide implications. As a government official, you would be required to perform same-sex marriages in Saskatchewan. If you have any questions or concerns, please contact our office.<sup>5</sup>

Marriage License Issuers in Saskatchewan received a similar letter explaining the requirement to provide marriage licenses to same-sex couples should the court challenge be successful.

On the same date, a third letter was issued to “Ecclesiastical Authorities” outlining the potential changes to marriage solemnization practices in Saskatchewan, but included the added notice that, “Your religious group retains the option of either performing or not performing same-sex marriages.”<sup>6</sup>

Not long after the issuance of the letters, Saskatchewan received protests against the decision to legalize same-sex marriage and the requirement on the part of the marriage commissioners to perform marriage solemnizations for same-sex couples who request it. In one case, a religious minister from rural Saskatchewan surrendered his license to perform marriages as a means to protesting the decision taken by the provincial courts and government.<sup>7</sup>

### 1.1.3 Orville Nichols

The most widely publicized instance was the case of Orville Nichols, a marriage commissioner in Saskatchewan since 1983. Nichols filed a complaint with the Human

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<sup>5</sup> Letter to Marriage Commissioners, Saskatchewan Department of Justice, November 1, 2004.

<sup>6</sup> Letter to Ecclesiastical Authorities, Saskatchewan Department of Justice, November 1, 2004.

<sup>7</sup> “Minister refuses to marry same-sex couples”, CBC News, November 8, 2004, [http://www.cbc.ca/canada/saskatchewan/story/2004/11/08/reverend\\_marriage041108.html](http://www.cbc.ca/canada/saskatchewan/story/2004/11/08/reverend_marriage041108.html) (accessed September 25, 2007)



Rights Commission against the government for requiring him to perform same-sex marriages against his religious convictions. Nichols had refused to perform a marriage ceremony for a same-sex couple that approached him.

In his complaint against the Department of Justice for Saskatchewan, Nichols “alleged the Department discriminated against him on the basis of his religion in that he was required to perform same-sex marriages as a marriage commissioner.”<sup>8</sup> The Tribunal reviewed the dismissal ordered by the Chief Commissioner and issued a decision finding the dismissal reasonable and declined to direct a further inquiry into Nichols’ complaint.<sup>9</sup>

Nichols’ refusal to perform the marriage ceremony for the same-sex couple also resulted in a complaint against him to the Human Rights Commission by the couple, which was eventually heard by a Tribunal. According to the decision issued by the Tribunal, the couple, M.J. and B.R., had contacted Nichols from a list of provincial marriage commissioners to ask for his services in solemnizing their marriage. Upon learning that they were a same-sex couple, Nichols explained “that he could not perform a same sex marriage because of his religious beliefs but that he would give [them] the name of a marriage commissioner who would perform the marriage for them.”<sup>10</sup> The couple did contact another commissioner who performed their marriage ceremony, but proceeded to file a complaint against Nichols for discrimination. The Tribunal was appointed on September 18, 2006, and issued its decision on May 23, 2008, that Nichols

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<sup>8</sup> *Orville Nichols v. Saskatchewan (Department of Justice)*, October 25, 2006 (Saskatchewan Human Rights Tribunal), at paragraph 1.

<sup>9</sup> *Ibid.*, at paragraph 34.

<sup>10</sup> *M. J. v. Nichols*, May 23, 2008 (Saskatchewan Human Rights Tribunal), at paragraph 39.

should pay a penalty of \$2,500 to the Saskatchewan Human Rights Commissioner for violating the Human Rights Code and cease contravention of the Code.<sup>11</sup>

#### 1.1.4 Outstanding Questions

Nichols' case provides a concrete example of the tension between religious belief and the role of the public official. How do the decisions of the Saskatchewan Department of Justice Marriage Unit and the Saskatchewan Human Rights Tribunal impact the religious freedom rights of individual marriage commissioners if their religious beliefs forbid their participation in same-sex marriages? If public officials are required to conform to this rule, what implications does this have for religious celebrants who assume a public role when they solemnize marriages? Should the provincial government accommodate marriage commissioners who refuse to solemnize same-sex marriages because of sincerely held religious convictions? These difficult questions play a key role in addressing the larger question of what role religion may play in the public sphere and in the lives of public officials in Canada.

### *1.2 The Problem of Religion in Liberal Democracies*

The role of religion in society is an ongoing challenge for liberal democracies. Both religion and law exert comprehensive claims on individuals and communities. In Canada, the rule of law is considered supreme, demanding compliance from every individual within the borders of the State. At the same time, religious belief influences

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<sup>11</sup> Ibid., at paragraph 115.

virtually every aspect of life, shaping both values and action.<sup>12</sup> The tension between the competing claims of religion and law can create a dilemma for individuals in liberal societies. An individual who abides under the rule of law yet maintains religious beliefs that he or she considers authoritative faces the difficult task of balancing these competing authorities. The liberal State, on the other hand, faces the difficult task of deciding how to balance the rule of law with the myriad belief systems contained within its jurisdiction.

For its part, Canada has not constitutionally entrenched the separation of church and state; however, judicial interpretation has accepted an *implicit* separation. At the same time, the constitution emphasizes the obligation to protect religious belief by enshrining the right to freedom of religion and freedom of conscience in the *Canadian Charter of Rights and Freedoms*.<sup>13</sup>

The Canadian courts have long upheld the freedom of each resident to adhere to, and practice religious belief, provided the expression of those beliefs does not harm others. Since *R v Big M Drug Mart Ltd.*,<sup>14</sup> they have underscored the principle that freedom of religion entails “freedom from” as well as “freedom for” religion.<sup>15</sup> The courts have also tended to emphasize the secularity of public institutions in an effort to create common ground for all people. What happens, then, when a religious individual

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<sup>12</sup> Rt. Hon. Beverley McLachlin, PC, Chief Justice of Canada, “Freedom of Religion and the Rule of Law: A Canadian Perspective.” in *Recognizing Religion in a Secular Society*, ed. Douglas Farrow, 12-35 (Montreal, QC: McGill-Queen’s University Press, 2004), 15.

<sup>13</sup> David M. Brown, “Freedom From or Freedom For?: Religion as a Case Study in Defining the Content of Charter Rights.” *University of British Columbia Law Review* 33 (Number 3, 2000): 552.

<sup>14</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; [1985] 60 A.R. 161; (1985), 18 D.L.R. (4th) 321; [1985] 3 W.W.R. 481; (1985), 18 C.C.C. (3d) 385; [1985] 13 C.R.R. 64; (1985), 37 Alta. L.R. (2d) 97. (Hereinafter referred to as *R. v. Big M Drug Mart Ltd.*)

<sup>15</sup> David M. Brown, “Freedom From or Freedom For?” 614.

assumes a public role? What place does religious belief, or its expression, have in the service of a public official? How has Canada dealt with clashes between the standardized norms of public institutions and the specific religious commitments of public officials?

This thesis will engage the broad question by focusing specially on the case of provincial marriage commissioners in Saskatchewan in the years surrounding the introduction of the federal *Civil Marriage Act*, which, for the first time in Canadian history, included same-sex couples within the definition of marriage.<sup>16</sup> During this period, marriage commissioners in British Columbia,<sup>17</sup> Manitoba,<sup>18</sup> and Saskatchewan<sup>19</sup> received letters from their respective governments requiring full participation in any requests to perform same-sex marriages. In each case, marriage commissioners were expected to comply or else resign their commission. These actions raise a number of critical questions: How do these measures impact the religious freedom rights of individual marriage commissioners if their religious beliefs prohibit their participation in same-sex marriages? If public officials are required to conform to this rule, what implications does this have for religious celebrants who assume a public role when they solemnize marriages? Should the provincial government accommodate marriage

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<sup>16</sup> *Civil Marriage Act*, S.C. 2005, c.33

For more information see the legislative summary of Bill C-38: The Civil Marriage Act at: [http://www.parl.gc.ca/common/Bills\\_ls.asp?Parl=38&Ses=1&ls=c38#descriptiontxt](http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=c38#descriptiontxt) (accessed January 13, 2009)

<sup>17</sup>“Private Marriage Commissioners Performing Same Sex Marriage in British Columbia.” Information Note for Penny Ballem, MD, Deputy Minister, British Columbia Ministry of Health Services, November 14, 2003.

<sup>18</sup>Letter to Provincial Marriage Commissioners, Vital Statistics Agency of Manitoba. September 16, 2004.

<sup>19</sup>Letter to Marriage Commissioners, Saskatchewan Department of Justice. November 1, 2004.

commissioners who refuse to solemnize same-sex marriages because of their religious convictions?

This thesis will address these questions through a critical look at four key features of the evolving public conversation on rights, religion and public service:

1. the history and application of the principle of reasonable accommodation in the Canadian context;
2. the treatment of marriage commissioners by the province of Saskatchewan;
3. the relevance of recent Canadian jurisprudence on freedom of religion to this debate on the rights of marriage commissions;
4. the conflicting accounts of religion in the public sphere in contemporary Canadian legal and political theory.

Chapter 2 examines the legal principle of reasonable accommodation and its critical function in evaluating religious reservations of marriage commissioners concerning solemnizing same-sex unions. Reasonable accommodation finds its origins in U.S. labour jurisprudence<sup>20</sup> and was introduced in Canada in the same context.<sup>21</sup> The recent report of the *Consultation Commission on Accommodation Practices Related to*

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<sup>20</sup> See Pamela S. Karlan and George Rutherglen. “Disabilities, Discrimination, and Reasonable Accommodation.” *Duke Law Journal* 46:1 (1996): 1-41. See also Sue A. Krenek, “Beyond Reasonable Accommodation.” *Texas Law Review* 72 (1993-1994): 1969-2014.

<sup>21</sup> See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; (1990), 72 D.L.R. (4th) 417; [1990] 6 W.W.R. 193; (1990), [1991] 33 C.C.E.L. 1; (1990), 12 C.H.R.R. 417; (1990), 76 Alta. L.R. (2d) 97, at section 5, as well as Justice Sopinka’s supplementary opinion.

*Cultural Differences*<sup>22</sup> defines reasonable accommodation as “an arrangement that falls under the legal sphere, more specifically case law, aimed a [*sic*] relaxing the application of a norm or a statute in favour of an individual or a group of people threatened with discrimination for one of the reasons specified in the Charter.”<sup>23</sup>

A brief analysis of scholarship addressing the American roots of accommodation practices highlights the narrowly focused approach legislators and courts in the U.S. have adopted. Beginning with Title VII statutes of the *Civil Rights Act* of 1964, through to the more contemporary *Americans With Disabilities Act* (ADA), American accommodation jurisprudence is focused on mitigating discrimination in a labour context. Historically, the same has been true in Canadian jurisprudence. However, recent legal decisions indicate a shift in how the courts and society at large define and apply reasonable accommodation; that is, a shift away from the boundaries of the labour context.

While little academic material has been published analyzing reasonable accommodation practices for religious belief and expression in the public service, certain contemporary works serve to illuminate the current debate on reasonable accommodation in Canada. A recent report produced by Gérard Bouchard and Charles Taylor examines accommodation practices in the province of Quebec and is the most comprehensive attempt to evaluate the chronology and impact of reasonable accommodation in the Canadian context to date. An analysis of reasonable accommodation in Canada as it

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<sup>22</sup> Hereinafter referred to as the “Bouchard-Taylor Commission”, after the Co-Chairs, Mr. Gérard Bouchard and Mr. Charles Taylor.

<sup>23</sup> Gérard Bouchard and Charles Taylor, eds, *Building the Future: A Time for Reconciliation* (Quebec, QC: Consultation Commission on Accommodation Practices Related to Cultural Differences, March 2008), 289.

relates to religious belief and expression serves as an important initial step in making a critical evaluation of the decision implemented by the Saskatchewan government regarding provincial marriage commissioners. Similarly, understanding how the Canadian courts view reasonable accommodation in the public sphere is essential to answering the key questions surrounding Saskatchewan's decision.

Chapter 3 examines the process used by the policymakers in Saskatchewan to establish the new requirements for provincial marriage commissioners. Government correspondence, briefs, and documents obtained via Freedom of Information requests provide insight into how Saskatchewan arrived at their controversial decision. Canadian legal scholars add their voices to the debate by presenting opposing legal analyses of the marriage commissioner policy in the province. Chapter 3 reviews the salient points of the scholarly debate and offers a critical evaluation of Saskatchewan's decision in light of the reasonable accommodation principles examined in Chapter 2.

Chapter 4 looks at contemporary court decisions on cases pertaining to religious freedom rights. This chapter's analysis provides insight into the prevailing attitude of the courts towards religion in the public sphere, their methodology in making judgments, and what sources shape their final decisions. The key cases that will be discussed include *R. v. Big M Drug Mart Ltd.*, *Zylberberg v. Sudbury Board of Education*,<sup>24</sup> *Canadian Civil Liberties Association v. Ontario (Minister of Education)*,<sup>25</sup> *Chamberlain v. Surrey School*

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<sup>24</sup> *Zylberberg v. Sudbury Board of Education*, (1988), 65 O.R. (2d) 641; (1988), 52 D.L.R. (4th) 577; (1988), [1989] 34 C.R.R. 1; (1988), 29 O.A.C. 23.

<sup>25</sup> *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, (1990), 71 O.R. (2d) 341.

*District No. 36*,<sup>26</sup> *Syndicat Northcrest v. Amselem*,<sup>27</sup> and *Multani v. Commission scolaire Marguerite-Bourgeoys*.<sup>28</sup> As well, the Supreme Court *Reference re: Same-Sex Marriage* directly addresses the issue of religious freedom and the federal civil marriage legislation of the day. The courts face a clear challenge to maintain the difficult balance between religious freedom and the rule of law. Chief Justice Beverley McLachlin of the Supreme Court of Canada describes this challenge: “The courts are, in effect, called upon to carve out a space within the rule of law in which religious commitments and claims to authority – sometimes wholly at odds with legal values and authority – can manifest and flourish.”<sup>29</sup> McLachlin alludes to the core constitutional issue, namely whether current legal and public policy trends are diminishing or expanding the meaning and force of the second section of the *Canadian Charter of Rights and Freedoms*.

Perhaps the most significant testing ground for this debate is the existential dilemma of the public official who holds to sincere religious convictions that impact upon some aspect of his or her public service. How have the courts tended to deal with questions of religious freedom and what impact do those decisions have on public officials who are religious? According to the courts, how do such officials balance the competing claims to authority of their religious beliefs and the obligations of their public office? These questions are pivotal to a critical evaluation of the policy decisions of the

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<sup>26</sup> *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710; (2002), 221 D.L.R. (4th) 156; (2002), 100 C.R.R. (2d) 288; (2002), 46 Admin. L.R. (3d) 1.

<sup>27</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; (2004), 241 D.L.R. (4th) 1; (2004), 121 C.R.R. (2d) 189. (Hereinafter referred to as “*Amselem*”)

<sup>28</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256; (2006), 264 D.L.R. (4th) 577; (2006), 137 C.R.R. (2d) 326; (2006), 38 Admin. L.R. (4e) 159; (2006), 55 C.H.R.R. 463. (Hereinafter referred to as “*Multani*”)

<sup>29</sup> Rt. Hon. Beverley McLachlin, PC, Chief Justice of Canada, “Freedom of Religion and the Rule of Law: A Canadian Perspective.” 31.



province of Saskatchewan. Legal commentators like David M. Brown and Richard Moon have explored evolving conceptions of religious freedom rights in recent court decisions and provide contrasting approaches to the accommodating religious belief in the public sphere. Moon believes individuals who maintain religious beliefs ought to be excluded from public affairs if those beliefs cannot be limited to the private sphere.<sup>30</sup> Brown argues for protection of the rights of public officials to express their religious beliefs.<sup>31</sup> According to Moon, accommodating the religious belief of a public official is only reasonable when those beliefs are exercised in the private sphere alone. In contrast, Brown suggests religion must not be relegated, by the legislature or the courts, into the private sphere alone, even if the religious adherent is a public official.

Chapter 5 completes the evaluation by examining academic debates surrounding the larger issue of the place of religion in the public sphere of a liberal democracy. One of the most important voices in this debate, John Rawls, situates the discussion of the significance of religious beliefs in a theory of “public reason.” The Rawlsian concept of public reason requires that public discourse in a pluralistic democracy employ terms that all reasonable citizens can understand.

Jonathan Chaplin and Robert Audi each present a different response to Rawls’ public reason. Chaplin adapts Rawls’ theory to justify the right of citizens to voice their comprehensive doctrines in the public forum using the explicit religious language of those doctrines. But he also puts the onus on the citizens to articulate the public reasons

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<sup>30</sup> Richard Moon, “Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on *Trinity Western University v. B.C. College of Teachers* and *Chamberlain v. Surrey School Board District 36*,” *Review of Constitutional Studies* 8 (2003): 228-284.

<sup>31</sup> David M. Brown, “Freedom From or Freedom For?” 615.

for any given law or public policy, and to then work with other citizens to discuss the impact.<sup>32</sup> Audi proposes the *principle of secular motivation*, which argues that re-interpreting one's religiously founded convictions into secularly understood arguments is essentially illiberal.<sup>33</sup> Instead, a citizen engaged in political or legal discourse must employ authentically secular reasons for legal or political action that clearly derive from non-religious goals and aspirations. Religiously motivated forms of public reason are deemed illicit.

Iain Benson's discussion of definitions of the "secular" levels an important challenge to the belief that "secularism" provides the common ground necessary for a pluralistic society to function.<sup>34</sup> Benson examines diverse definitions of "secular" and argues that the concept does not necessarily refer to the absence or exclusion of religion. Benson acknowledges the term can be defined in a way that systematically excludes religion, but it also can be employed in another sense as creating space for a variety of reasonable comprehensive belief systems in liberal society, while giving primacy to no one. The place of religion in the lives of public officials in a secular society like Canada will depend on how "secular" is understood.

Benjamin Berger analyzes the interplay between religious conscience and Canadian constitutional law. Engaging Benson's discussion of secularism, Berger dismisses "a-religious secularism" and endorses a mediated pluralistic secularism that

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<sup>32</sup> Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously Based Arguments in Law and Public Policy" *University of British Columbia Law Review* 33/3 (2000): 617-646.

<sup>33</sup> Robert Audi, *Religious Commitment and Secular Reason*. Cambridge University Press: Cambridge, UK, (2000), 87.

<sup>34</sup> Iain Benson, "Notes Towards a (Re)Definition of the 'Secular'." *University of British Columbia Law Review*, Vol 33:3 (2000), 519-549.

employs the language of civic values “that all moral visions – religious and otherwise – must master in order to assume a place in the public sphere.”<sup>35</sup> Berger criticizes those theories of liberalism that demand a stark severance between moral claims and public positions, arguing that they either misunderstand the nature of religious conscience or simply exclude citizens who hold religious beliefs from participation in public life. In his analysis, he concludes that Canadian constitutional law “renders religion” as an essentially individualistic phenomenon, centrally addressed to questions of autonomy and choice, and privacy.<sup>36</sup>

Bruce Ryder describes what he calls “the Canadian conception of equal religious citizenship” which rests upon the inclusive approach to religious neutrality put forward by scholars like Benson and Berger.<sup>37</sup> Ryder praises Canada for fostering a distinctive conception of equal religious citizenship that stands out among developed nations, but warns of its fragility in light of recent legal decisions that appear to impinge on freedom of religion and freedom of conscience rights.

The contributions of these legal and political theorists provide the current Canadian context of intellectual debate for examining the policy decision adopted by the Province of Saskatchewan. The province’s decision to require marriage commissioners’ participation in same-sex marriages inevitably feeds into this larger context of public debate and controversy over the place of religion in the public sphere.

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<sup>35</sup> Benjamin Berger, “The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State.” *Canadian Journal of Law and Society* 17 (2002), 52.

<sup>36</sup> Benjamin Berger, “Law’s Religion: Rendering Culture.” *Osgoode Hall Law Journal* 45:2 (2007), 277-314.

<sup>37</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship,” in *Law and Religious Pluralism in Canada*, ed. Richard Moon, (Vancouver: UBC Press, 2008), 87-109.

Chapter 6 concludes the argument of the thesis with an effort to address the larger issue of religion in the public sphere. Recent developments in the understanding of what constitutes reasonable accommodation show that a shift has taken place in Canada. Examining the process employed by the Government of Saskatchewan reveals the rationale behind the policy decision and indicates the degree to which concerns about reasonable accommodation were even considered. How Canada's courts treat issues of religious freedom determines the current judicial trajectory of religious accommodation decisions, such as whether marriage commissioners have any grounds for reasonable accommodation requests. Finally, an analysis of the contemporary academic debate over the interface between religious belief and the roles of public officials exposes the weaknesses in Saskatchewan's justification of their marriage commissioner policy. Together these conclusions confirm that the contemporary approach to reasonable accommodation, in conjunction with current judicial trends to assign religious belief to the private sphere, reinforces the notion that the religious rights of private citizens are seriously limited when they assume a public role.

## Chapter 2: Reasonable Accommodation

### 2.1 Introduction

In recent years, debates over reasonable accommodation in Canada have featured prominently in popular media, academic discourse and politics. On February 8, 2007, in the wake of public controversies about the decision of the town of Herouxville, QC to adopt a municipal code setting residency standards that appeared to target Muslims, Quebec Premier Jean Charest established the *Consultation Commission on Accommodation Practices Related to Cultural Differences*.<sup>38</sup> According to the Commission, its mandate was to, “take stock of accommodation practices in Québec; analyse the attendant issues bearing in mind the experience of other societies; conduct an extensive consultation on this topic; and formulate recommendations to the government to ensure that accommodation practices conform to the values of Québec society as a pluralistic, democratic, egalitarian society.”<sup>39</sup>

The establishment of the Bouchard-Taylor Commission occurred at a time when public attention to reasonable accommodation was at an all-time high. Historically, discussions surrounding reasonable accommodation took place almost exclusively in the legal sphere and related specifically to accommodating employees in the workplace. As the Bouchard-Taylor Commission reports, an important shift has taken place in the

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<sup>38</sup> See Québec Government Order-in-Council 95-2007, February 8, 2007. (<http://www.accommodements.qc.ca/commission/decret-en.pdf>)

<sup>39</sup> Bouchard and Taylor, eds, “Building the Future: A Time for Reconciliation,” 17.

understanding and application of reasonable accommodation, one which arguably had a profound impact on the approach taken by the government of Saskatchewan regarding provincial marriage commissioners. Whereas the term has historically pertained to accommodations by a particular employer, for a particular employee, in the labour context, its contemporary interpretation has shifted to refer to the accommodation of religious or ethno-cultural groups by society as a whole. In order to understand this shift, however, it is necessary to understand the history of reasonable accommodation in Canada and how the practice has evolved.

## *2.2 History of Reasonable Accommodation*

### *2.2.1 American Origin*

The legal concept of “reasonable accommodation” has its roots in U.S. labour jurisprudence. The *Civil Rights Act* of 1964, under its Title VII provision, prohibits employers from discriminating against existing or potential employees on the basis of race, colour, religion, sex, or ancestry.<sup>40</sup> This principle was taken further in 1966 when the Equal Employment Opportunity Commission (EEOC) promoted new guidelines pertaining to discrimination against religion, which stated that employers had an obligation to accommodate the religious beliefs of employees, unless they could prove

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<sup>40</sup> Alan D. Schuchman, “The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA” in *Indiana Law Journal*, Vol 73 (1997-1998), 746.

doing so would amount to an undue hardship for the business.<sup>41</sup> While the law did not clearly define what constitutes “undue hardship” and a “reasonable” accommodation, some guidelines were established. Most importantly, “The law allows, absent an intent to discriminate, the use of bona fide occupational qualifications and bona fide seniority and merit systems to permit appropriate deviations from the [prohibited grounds].”<sup>42</sup>

In 1990, the United States Government introduced a new anti-discrimination statute: the *Americans with Disabilities Act* (“ADA”).<sup>43</sup> The ADA builds on the principles of anti-discrimination found in Title VII, but includes provisions that not only require employers to accommodate disabled workers who request it, but classifies *failing* to do so as an act of discrimination in itself.<sup>44</sup> The undue hardship limit is maintained, and while left up to the judgement of the courts, economic impact serves as the primary consideration of what is “undue”. However, the ADA statute includes “a blanket exemption for small employers, apparently assuming they will be less able to accommodate workers with disabilities.”<sup>45</sup>

By way of example, a paraplegic employee who is unable to reach her workstation because of a small set of stairs would require accommodation in order to continue in her job. The principle of reasonable accommodation applies to this type of situation as the employer could make a relatively simple change to a workplace rule or

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<sup>41</sup> Colleen Cacy, “Employer’s Duty of Reasonable Accommodation Under Title VII – *Pinsker v. Joint District No. 28J*” in *Kansas Law Review*, Vol 35 (1985), 584.

<sup>42</sup> Alan D. Schuchman, “The Holy and the Handicapped.” 746-747.

<sup>43</sup> Americans with Disabilities Act of 1990 - ADA - 42 U.S. Code Chapter 126.

<sup>44</sup> Pamela S. Karlan and George Rutherglen, “Disabilities, Discrimination, and Reasonable Accommodation” *Duke Law Journal* 46 (October 1996), 1-41.

<sup>45</sup> Sue A. Krenek, “Beyond Reasonable Accommodation” *Texas Law Review* 72 (1994), 1974.

the physical work environment to allow an employee with a special need to continue their job. A small ramp could be built, the workplace could be moved, etc. On the other hand, a small business located on the third floor of a building with only stairs to reach the workplace might have more trouble accommodating the paraplegic employee if that accommodation would require building an elevator. Such a project might be prohibitively expensive and could place a financial burden on the employer to the point that the business itself might be threatened. In such a case, a judge may decide that it would be beyond the point of undue hardship to require the employer to build an elevator, if that was the only option to accommodate the employee. The undue hardship limit restrains the obligation to accommodate to a “reasonable” point.

The Title VII and ADA statutes provide guidelines and tests to determine whether an accommodation is considered reasonable. Economic implications are considered but, as Krenek explains, Title VII also provides an exception whereby “discrimination will be allowed if it results from a bona fide occupational qualification (or “BFOQ”) whose existence is the result of business necessity.”<sup>46</sup> If accommodating an employee puts them or any other employee in danger, the requirements of Title VII would not apply. A religious employee who requests an exemption from wearing necessary safety equipment need not be accommodated if it puts his/her health and safety at risk. Further, if a particular job legitimately requires an employee to have 20/20 vision, the employer would not be obligated to accommodate a blind applicant.

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<sup>46</sup> Ibid., 1999.



While it is left up to the courts to decide what constitutes a *bona fide* occupational qualification, the exception still amounts to a powerful restraint on the requirement to accommodate. However, case history indicates that, when addressing the accommodation of religious beliefs, the American courts have set the threshold of what is “undue” quite low.<sup>47</sup> Colleen Cacy illustrates this in her examination of the leading religious accommodation case, *Trans World Airlines, Inc. v. Hardison*. Cacy writes, “The Court set forth a new standard for determining undue hardship, by defining that term as any accommodation that requires the employer to incur more than a ‘de minimis’ cost.”<sup>48</sup> Despite this, legal tools such as the BFOQ exception and the undue hardship provision delineate the boundaries of reasonable accommodation and appear to limit its application to the labour context.

### 2.2.2 Canadian Context

In 1985, the Supreme Court of Canada released two decisions that set the precedent for reasonable accommodation in the Canadian context. In *Ontario Human Rights Commission. v. Simpsons-Sears*<sup>49</sup>, referred to as *O’Malley*, the Court upheld the right of a religious employee who asked for an accommodation of her religious beliefs

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<sup>47</sup> See Alan D. Schuchman, “The Holy and the Handicapped.” 764. Schuchman argues that the American courts have set the threshold of what is “undue” markedly lower for religious accommodation than the accommodation of persons with disabilities.

<sup>48</sup> Colleen Cacy, “Employer’s Duty of Reasonable Accommodation Under Title VII – *Pinsker v. Joint District No. 28J*”, 586.

<sup>49</sup> *Ontario Human Rights Commission. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; (1985), 52 O.R. (2d) 799; (1985), 23 D.L.R. (4th) 321; (1985), [1986] 9 C.C.E.L. 185; (1985), [1986] 17 Admin. L.R. 89; (1985), 7 C.H.R.R. 3102 • (1985), 12 O.A.C. 241.

that prohibited her from working on Saturday. The Court adopted the American doctrine of reasonable accommodation including the provision that prohibits what the Supreme Court of Canada calls “adverse effect discrimination.” According to *O’Malley*, adverse effect discrimination:

arises where an employer for genuine business reasons adopts a rule or standard which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.<sup>50</sup>

The Supreme Court decided that an employer is obliged to take reasonable steps to accommodate religious employees up to the point of undue hardship: that is, to a point that does not result in “undue interference in the operation of the employer’s business and without undue expense to the employer.”<sup>51</sup>

In a second human-rights case, *Bhinder v. CN*,<sup>52</sup> the Court introduced the BFOQ rule into Canadian reasonable accommodation jurisprudence. In this case, Mr. Bhinder lost an appeal of CN Rail’s decision to terminate his employment because he was unable to comply with the company’s mandatory hard-hat rule. As a practicing Sikh, Mr. Bhinder was required to wear a turban at all times. In this case, his employer was not required to accommodate his religious beliefs if the expression of those beliefs put him or others at risk of injury or death.

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<sup>50</sup> *Ontario Human Rights Commission v. Simpsons-Sears*, at paragraph 18.

<sup>51</sup> *Ibid.*, at paragraph 23.

<sup>52</sup> *Bhinder v. CN*, [1985] 2 S.C.R. 561; (1985), 23 D.L.R. (4th) 481; (1985), [1986] 9 C.C.E.L. 135; (1985), [1986] 17 Admin. L.R. 111; (1985), 7 C.H.R.R. 3093.

In their analysis of the decision, Day and Brodsky explain the ruling of the majority:

A majority of the Court held in *Bhinder* that the employer could only be required to establish that a BFOQ, such as the hard hat rule, was reasonably necessary on an occupation-wide basis, not an individual employee basis. The Court held further that once a BFOQ defence was made out on this basis no duty to accommodate individual employees could be imposed on the employer.<sup>53</sup>

Canada's highest court set out the reach of reasonable accommodation in *O'Malley*, but proceeded to limit its application with a generous interpretation of the BFOQ tests in *Bhinder*. Day and Brodsky level this criticism:

The combined effect of *O'Malley* and *Bhinder* seemed to be that human rights law recognized a duty to accommodate, except where there was an explicit statutory BFOQ. An explicit BFOQ would relieve the employer of any duty to accommodate. Subsequent to its release, *Bhinder* was widely criticized for undercutting the duty to accommodate recognized in *O'Malley*.<sup>54</sup>

The Supreme Court resolved this ambiguity in *Central Alberta Dairy Pool v. Alberta* by explicitly overturning their decision in *Bhinder*.<sup>55</sup> In its place, the majority articulated a bifurcated approach outlining how the BFOQ defense applies to cases of direct discrimination versus cases of adverse effect discrimination. In later decisions, the Supreme Court set out clear tests to determine what constitutes undue hardship, bona fide occupational qualifications, and reasonable accommodation.

In the *Meiorin* decision, the Court outlined the following three-step test:

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<sup>53</sup> Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" *Canadian Bar Review* 75 (1996), 438.

<sup>54</sup> *Ibid*, 439.

<sup>55</sup> See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; (1990), 72 D.L.R. (4th) 417; [1990] 6 W.W.R. 193; (1990), [1991] 33 C.C.E.L. 1; (1990), 12 C.H.R.R. 417; (1990), 76 Alta. L.R. (2d) 97.

First, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose. Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.<sup>56</sup>

The Court set out the test in the context of a case involving a female firefighter who was dismissed by the B.C. government for failing to meet a newly established aerobic standard. An arbitrator designated to hear a grievance brought forward by the dismissed employee's union found that the new aerobic standard was not physiologically attainable for most women, nor was it necessary for a firefighter to effectively and safely to his or her job.<sup>57</sup> Based on that evidence, the arbitrator found that the government discriminated against the claimant. Supreme Court applied their three-step test and upheld the decision and remedy laid out by the arbitrator. The *Meiorin* test has been central to reasonable accommodation jurisprudence since its introduction. It was born out of the labour context and looks at concrete, measurable factors to determine whether accommodation is necessary.

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<sup>56</sup> See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; (1999), 176 D.L.R. (4th) 1; [1999] 10 W.W.R. 1; (1999), 46 C.C.E.L. (2d) 206; (1999), 68 C.R.R. (2d) 1; (1999), 35 C.H.R.R. 257; (1999), 66 B.C.L.R. (3d) 253. (Hereinafter referred to as *Meiorin*)

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

### *2.3 Redefining Reasonable Accommodation*

In recent years, however, the public meaning of the concept of “reasonable accommodation” has undergone a profound shift. Historically, the term has been limited to the labour context and what accommodations might be necessary in a particular situation, by a particular employer, for a particular employee or group of employees. Recently, the interpretation of the term has shifted to refer to the accommodation of religious or ethno-cultural groups by society as a whole. This “social accommodation” is fundamentally different than the “workplace accommodation” that has defined reasonable accommodation from its inception.<sup>58</sup>

The federal government has recognized this trend. A briefing note from the Department of Canadian Heritage to the Secretary of State for Multiculturalism explains the shift:

There has been an evolution in the use of [Reasonable Accommodation] from a strictly legal context to a social debate centred on multiculturalism and how society interacts with certain ethnocultural minorities in light of increasing diversity. Particularly, over the past year, a number of major events or “flash points” (which have grown in intensity over the past four months) have led to this shift. While the media is using the term “reasonable accommodation” in a new way, it should be noted that this debate has extended beyond the confines of the term, touching on issues related to multiculturalism policy, the Charter of Rights

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<sup>58</sup> The term “social accommodation” is unique to this thesis. For its use here, “social accommodation” refers to the accommodation of religious or ethno-cultural groups by society as a whole. This is distinct from the traditional understanding of reasonable accommodation, which was originally a legal tool within the labour or workplace context. For greater clarity, the term “workplace accommodation” may be used in reference to the traditional understanding of reasonable accommodation.

“Social accommodation” is closely related to the outworking of multiculturalism policy in society, and therefore can be specifically or broadly applied. “Workplace accommodation” has traditionally been specifically applied to particular situations in a labour context.

and Freedoms, racism, inclusion, a sense of belonging, and even security in a post-9/11 world.<sup>59</sup>

The note goes on to give examples of the key events that have marked the debate on reasonable accommodation. These examples, however, pertain to the newly evolved understanding of the term, and not the historical understanding, rooted in the labour context.

### 2.3.1 Four Periods of Evolution

The Bouchard-Taylor Commission's report examines the history of the public debate on reasonable accommodation and presents a chronology of the shift in understanding of reasonable accommodation. The report will be explored in more detail below; however, its chronology warrants attention here for the context it provides.

Using a span from 1985 through 2008, it identifies four key periods that illustrate the evolution of reasonable accommodation from its historical labour roots to its current broad social application. The Commission named the four periods: *Antecedent*, *The Intensification of Controversy*, *A Time of Turmoil*, and *A Period of Calm*.

The first period — Antecedent — spans December 1985 to April 2002. The report notes that the reasonable accommodation cases included in this period involve reasonable accommodation in the historic legal sense:

In each case, legal or quasi-legal bodies were involved, i.e. the Commission des droits de la personne et des droits de la jeunesse, the Québec Human Rights Tribunal, the Montréal Municipal Court, the Superior Court of Québec, the Federal Court of Appeal, and the Supreme Court of Canada. Generally speaking, public opinion discovered during this period the new legal obligations stemming

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<sup>59</sup>“Reasonable Accommodation”, Information Note for the Honourable Jason Kenney, Department of Canadian Heritage, Multiculturalism and Human Rights Branch, Fall 2007.

from changes in jurisprudence and the coming into force of the charters, without any striking controversy arising over the validity of accommodation practices.<sup>60</sup>

The second period — The Intensification of Controversy — spanned May 2002 to February 2006:

This second period marks a turning point in debate on accommodation. It began with the announcement of the Superior Court of Québec judgment concerning the wearing of the kirpan, which had a significant impact on public opinion. Debate surrounding the application of sharia, especially in Ontario, also largely fuelled the controversy.... What began as local cases became veritable “affairs” whose legal developments society monitored closely. Another novelty was the emergence of topics of dispute such as debate on Christmas trees and Jewish buses, which are not a form of reasonable accommodation and which were not named as such (it was only later that the abusive extension of the concept arose).<sup>61</sup>

This summary clearly shows the shift of the treatment of reasonable accommodation from the historical, or literal, sense to reasonable accommodation in the societal sense. Rather than addressing concrete issues, such as removing physical barriers so that a wheelchair-bound employee can access his or her work area, social accommodation attempts to grapple with the broader issues of social recognition and integration. Observers may have thought this shift temporary, but the third and fourth periods intensified this trend and seemed to indicate that this new emphasis on “social accommodation” was here to stay.

The span from March 2006 to June 2007 is labelled by the Commission *A Time of Turmoil*. They suggest that the proliferation of accommodation cases reported in the media during this short period reflects the increasingly active role played by the media in discussing questions of accommodation:

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<sup>60</sup> Bouchard and Taylor, eds, “Building the Future: A Time for Reconciliation,” 48.

<sup>61</sup> *Ibid.*, 50.

The term accommodation entered public discourse and from then on became a hackneyed expression. Another phenomenon is noteworthy: topics of controversy previously focused essentially on the problem of religion's place in public space and the accommodation of minority religious practices. From that point onward, debate encompassed the much broader question of the integration of the immigrant population and minorities.<sup>62</sup>

As the term reasonable accommodation moved into the sphere of popular discourse, it lost its distinct connection to the labour context from which it originated. Rather, it began to be applied to any situation in which a member of a perceived majority was required to make or tolerate a social adjustment for the benefit of a member of a visible minority group. Since there are no clear tests, criteria or guidelines for social accommodation as exist for reasonable accommodation in the labour context, the debate becomes increasingly muddled.

Whereas the third period marks the rapid popularization of "social accommodation," the Commission identifies the fourth and final period as *A Period of Calm*.<sup>63</sup> The Commission measures the debate by its coverage in the media and notes that "during this nine-month period, the media reported only eight cases or affairs, three of them outside Québec."<sup>64</sup> The timing of this calm coincided with the beginning of the Commission's mandate. The Commission suggests, "It appears *a posteriori* that the establishment of the Commission calmed things down."<sup>65</sup> It may be that the media turned its collective attention towards the work of the Commission as it engaged the people of Quebec in a public conversation on accommodation. On the other hand, one

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<sup>62</sup> Ibid., 53.

<sup>63</sup> Ibid., 59.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.



could argue that the fact reasonable accommodation cases ceased to be “news” indicates that the “social accommodation” definition of reasonable accommodation displaced the historical definition as the default. In either case, this period of calm marks the final stage in a rapid evolution of the public understanding of reasonable accommodation.

### 2.3.2 *Multani v. Commission scolaire Marguerite-Bourgeoys*

The case that first marked the recent evolution in the understanding of accommodation was a March 2006 Supreme Court ruling on the case of a Sikh student who sought permission to wear his ceremonial dagger – a *kirpan* – in his school. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, the principles of reasonable accommodation were applied to a situation *outside* of a labour context. The Court held that the decision of the commissioners on the school board council to prohibit Gurbaj Multani from wearing the ceremonial *kirpan* on school grounds infringed his freedom of religion rights. The Superior Court of Quebec had outlined conditions that would allow Multani to wear the *kirpan* at school.<sup>66</sup> The conditions were considered reasonable, and Grenier J. granted a motion authorizing Multani to wear the dagger, provided he complied with the conditions.<sup>67</sup> However, the Court of Appeal overturned the decision, concluding that “allowing the *kirpan* to be worn, even under certain conditions, would oblige the school board to reduce its safety standards and would result in undue

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<sup>66</sup> Shaheen Shariff, “Balancing Competing Rights: A Stakeholder Model for Democratic Schools.” *Canadian Journal of Education* 29 (2006), 483.

<sup>67</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, at paragraph 8.

hardship.”<sup>68</sup> As Shaheen Shariff highlights, “Although the court agreed that such a decision impaired the students' religious rights under Section 2(a) of the Canadian Charter, and s. 3 of Quebec Charter of Human Rights and Freedoms, it held that the ban was justified under Section 1 of the Canadian Charter as a reasonable limit on Gurbaj's constitutional rights.”<sup>69</sup> This decision received heavy criticism from legal scholars and academics.<sup>70</sup> The Supreme Court of Canada overturned the ruling of the Court of Appeal, and declared the ban instated by the school commission to be null and void.<sup>71</sup> The Supreme Court’s decision aligned with that of Superior Court; however, it did not reinstate the conditions set out by Grenier J. since the student in question no longer attended the school.<sup>72</sup>

Though they delivered contrary decisions, the two lower courts employed the language and principles of reasonable accommodation. The Supreme Court followed the same approach in giving its decision. This landmark case illustrates the shift from reasonable accommodation as a concept of labour jurisprudence to reasonable accommodation as a social concept. The *Multani* case has been called “the great catalyst for the contemporary popularization of the term ‘reasonable accommodation,’ and in particular its association with religious groups...”<sup>73</sup> This contemporary expansion of

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<sup>68</sup> Ibid., at paragraph 12.

<sup>69</sup> Shaheen Shariff, “Balancing Competing Rights.” 483.

<sup>70</sup> See Paul Clarke, “Religion, public education and the Charter. Where do we go now?” *McGill Journal of Education* 40 (Winter 2005): 351-381; See also William J. Smith, “Balancing security and human rights: Quebec schools between past and future.” *Education & Law Journal* 14 (2004): 99-136.

<sup>71</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, at paragraph 82.

<sup>72</sup> Ibid.

<sup>73</sup> Yasmeen Abu-Laban and Baha Abu-Lahan, “Reasonable Accommodation in a Global Village,” *Policy Options* (September 2007), 30.

reasonable accommodation changes the way in which society views the application of accommodation principles, and presents some specific challenges. One of the primary difficulties stems from the resulting ambiguity when reasonable accommodation is unhinged from its historical workplace context. Whereas reasonable accommodation in the workplace has clear criteria for its application, “social accommodation” does not. Whereas reasonable accommodation in the workplace requires measurable characteristics that can be easily observed, “social accommodation” is far more difficult to define.

In the *Multani* case, the decision handed down by the Court of Appeal employed the undue hardship exception to justify why the school board’s appeal should be allowed. It is interesting to note that the reasoning behind using the exception is fairly nebulous. Lemelin J. argued that “the kirpan is a dangerous object, that the conditions imposed by Grenier J. did not eliminate every risk, but merely delayed access to the object, and that the concerns expressed by the school board were not merely hypothetical... that allowing the kirpan to be worn, even under certain conditions, would oblige the school board to reduce its safety standards,”<sup>74</sup> thus justifying the undue hardship exception. However, she did not reference specific, measurable indicators. Rather, she approached the issue by deciding whether or not the concerns of the board were “hypothetical.” Historically, undue hardship in workplace accommodations has been determined using measurable factors such as financial considerations, the impact it would have on human resources, etc. Changing reasonable accommodation to mean the “social accommodation” of any

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<sup>74</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, at paragraph 12.

particular group muddies the reasonable accommodation debate by detaching any concrete indicators useful for assessing reasonableness.

#### *2.4 Bouchard-Taylor Commission*

The Bouchard-Taylor Commission's report confirms the shift from the historical understanding and application of reasonable accommodation to the notion of social accommodation or, to use their terminology, "concerted adjustment." In their introduction, the authors explain that they could have approached their mandate using either a broad or narrow definition of reasonable accommodation. They write:

The narrower sense would consist in confining the Commission's deliberations to the strictly legal dimension of reasonable accommodation. This notion, which stems from jurisprudence in the realm of labour, indicates a form of arrangement or relaxation aimed at ensuring respect for the right to equality, in particular in combating the so-called indirect discrimination, which, following the strict application of an institutional standard, infringes an individual's right to equality. In general language, the meaning of the concept has gone beyond this legal definition and encompasses all forms of arrangements allowed by managers in public or private institutions in respect of students, patients, customers, and so on.

The second approach to the Commission's mandate would be to perceive the debate on reasonable accommodation as the symptom of a more basic problem concerning the sociocultural integration model established in Québec since the 1970s. This perspective calls for a review of interculturalism, secularism and the theme of Québec identity. We decided to follow the second course in order to grasp the problem at its source and from all angles, with particular emphasis on its economic and social dimensions. The school-to-work transition and professional recognition, access to decent living conditions and the fight against discrimination are indeed essential conditions for the cultural integration of all citizens into Québec society.<sup>75</sup>

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<sup>75</sup> Bouchard and Taylor, eds, "Building the Future: A Time for Reconciliation." 7-8.

The first approach described by the Commission, the narrow approach, looks at reasonable accommodation using its historical definition and application. The second, broad approach involves using a view of reasonable accommodation described in this thesis as “social accommodation.” Examining the economic and social dimensions of cultural integration goes far beyond the scope of the historical legal tests for what constituted a reasonable accommodation in any given situation. In the broad social approach, it becomes impossible to create any useful criteria or tests for what is reasonable. Reasonable accommodation in this context risks controversy if it is inequitably or inconsistently applied in the absence of clear criteria of what is reasonable or what amounts to undue hardship.

#### 2.4.1 Reasonable Accommodation and Concerted Adjustment

For the purposes of their report, the Bouchard-Taylor Commission distinguishes between “reasonable accommodation” and what they call “concerted adjustment.” Reasonable accommodation is defined according to its narrow legal application.<sup>76</sup> Concerted adjustment is less formal than reasonable accommodation. The parties involved pursue a compromise through negotiations rather than opting for the legal route of reasonable accommodation.<sup>77</sup> Shaheen Shariff proposes a similar approach in her Stakeholder Model for Canadian schools. Shariff’s model gives a practical example of the principles behind the Bouchard-Taylor Commission’s concerted adjustment. The

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<sup>76</sup> Ibid., 63.

<sup>77</sup> Ibid., 19.

intent of the Stakeholder Model is to ensure “that policy makers take into consideration the broad range of stakeholder rights and interests and incorporate the weighing and balancing process that judges use when they apply Section 1 of the *Charter*.”<sup>78</sup> The Stakeholder Model consists of three steps:

- Step 1: Identify all stakeholders and their significant arguments;
- Step 2: Validate key concerns by matching and weighing similar competing arguments to determine which claims carry greater weight;
- Step 3: Ensure minimal impairment of infringed stakeholder rights.<sup>79</sup>

Shariff argues that policy makers who employ these basic steps will be able to make non-arbitrary and constitutionally aligned decisions that guarantee “that those who give up their rights find the experience as painless and non-intrusive as possible.”<sup>80</sup> The Bouchard-Taylor report adopts a similar model in its approach to religion and public institutions. The Commission favours the use of concerted adjustment to settle accommodation requests at the outset, suggesting that more formal legal appeals to reasonable accommodation should be used as a last resort.<sup>81</sup>

According to the Commission, reasonable accommodation and concerted adjustment are two distinct options available to citizens involved in accommodation requests. However, it is possible that the distinction is not as clear for the public as it is for the Commission. As suggested earlier in this chapter, the distinction may be more properly made between workplace accommodation and social accommodation.

Concerted adjustment, in the opinion of the Commission, “Is inherent in the life of a

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<sup>78</sup> Shaheen Shariff, “Balancing Competing Rights.” 480-481.

<sup>79</sup> *Ibid.*, 181.

<sup>80</sup> *Ibid.*

<sup>81</sup> Bouchard and Taylor, eds, “Building the Future: A Time for Reconciliation.” 65.

diversified, pluralist society” and precedes and exceeds reasonable accommodation.<sup>82</sup> If the contemporary shift in understanding of reasonable accommodation described earlier has, in fact, taken place, the lines between concerted adjustment (non-legal) and reasonable accommodation (legal) may be blurred for the average citizen. Both options may simply be perceived as different terms for the same thing: a call for society as a whole to accommodate specific accommodation requests, that is, social accommodation.

#### 2.4.2 Rigid versus Open Secularism

The Commission’s report also examines the concept of secularism in the context of the broader discussion about reasonable accommodation. They describe a continuum that has “rigid secularism” on one end and “open secularism” on the other. The authors define the two extremes in the following manner:

A more rigid form of secularism allows for greater restriction of the free exercise of religion in the name of a certain interpretation of State neutrality and the separation of political and religious powers, while open secularism defends a model centred on the protection of freedom of conscience and religion and a more flexible conception of State neutrality.<sup>83</sup>

Rigid secularism as described by the Commission is akin to what Iain Benson calls “religiously exclusive secularism.”<sup>84</sup> This type of secularism is defined by its total exclusion of religious belief from State actors, institutions, and policies. By contrast, open secularism aligns with Benson’s “religiously inclusive” definition of the secular,

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid., 137.

<sup>84</sup> Iain Benson, “The Context for Diversity and Accommodation in the Democratic State: The Need for a Re-evaluation of Current Approaches in Canada.” *Canadian Bar Association National Conference – St John’s, Newfoundland* (August 13-15, 2006).

which gives equal standing to a plurality of moral positions, irrespective of whether they are religiously based or not.<sup>85</sup> The Commission concludes that open secularism provides the best context for reasonable accommodation to thrive.<sup>86</sup>

### 2.4.3 Public versus Private

Similarly, the Commission engages the distinction between what is public and private. In their hearings, the co-chairs discerned an ambiguity in how these terms are applied to questions of religious freedom. In their abridged report, they write:

The argument that ‘religion must remain in the private sphere’ was often cited by the proponents of secularism. While at first sight it seems clear, this statement is not quite as clear as we may think. Indeed, ‘public’ can be understood in at least two separate ways. According to the first meaning, what is public relates to the State and its common institutions, i.e. ‘public institutions.’ According to the second meaning, what is public is open or accessible to everyone, i.e. ‘places of public use,’ for example, a ‘garden open to the public.’

The first meaning concurs with the secular principle of the neutrality of the State with respect to religion. According to this first meaning, it is therefore accurate to confirm that religion must be ‘private.’ However, it does not go without saying that secularism demands of religion that it be absent from public space in the broad sense. In point of fact, religions already occupy this space and, pursuant to the charters, religious groups and the faithful have the freedom to publicly display their beliefs.

Confusion arises when these two ways of understanding the distinction between what is public and private intersect. This is true, for example, when we ask whether students and teachers may display their religious affiliation in the school. If a public institution must be neutral, are the individuals who frequent it subject to this obligation of neutrality?<sup>87</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Bouchard and Taylor, eds, “Building the Future: A Time for Reconciliation.” 141.

<sup>87</sup> Gérard Bouchard and Charles Taylor, eds, “Building the Future: A Time for Reconciliation” (Abridged Report) *Consultation Commission on Accommodation Practices Related to Cultural Differences* (March 2008), 43-44.



The ambiguity created by the intersection of these two concepts of the public is addressed in later chapters, but warrants brief attention in the context of the reasonable accommodation debate. The Commission highlights a problem with the language and logic employed by those discussing the proper place of religion in a liberal democratic state. The public-private dichotomy features prominently in any debate over religious freedoms and reasonable accommodation, but the meanings behind the terms are not entirely clear. How are “public” and “private” understood? Should religious belief be limited to the private sphere, or is there a place for religion in the public sphere? If the answer to the latter is yes, the question becomes: what is the “public sphere?” Is it the formal sphere of the State, or a public space that is open to all? The response to these critical concerns will, in large part, determine the position one takes on reasonable accommodation and religious freedom issues.<sup>88</sup>

#### 2.4.4 Subjective Conception of Religious Freedom

The Bouchard-Taylor report recognizes that defining religious freedom hinges on the problem of defining religion. In their report, the Commission cites the conception of religion articulated by the Supreme Court of Canada in their decision in *Syndicat Northcrest v. Amselem*. Justice Iacobucci, writing for the majority, defines religion as follows:

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<sup>88</sup> It is to these questions that political theorists such as John Rawls, Iain Benson and Benjamin Berger address themselves – a discussion taken up in the fifth chapter of this thesis.

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>89</sup>

Through *Amselem*, the court removed the obligation to demonstrate the objectivity of a plaintiff's religious beliefs, replacing it instead with, as the Commission writes, "the criterion of the sincerity of the belief."<sup>90</sup> This subjective conception of religious freedom is an advantage, according to the Commission, for two reasons. First, "[i]t enables the courts to avoid acting as the interpreters of religious dogma." Second, it regards freedom of religion as an "aspect" of what the Commission calls the "broader category of freedom of conscience."<sup>91</sup> The report still acknowledges that there are inherent risks to the subjective conception, but argues that the courts and front-line decision makers have the necessary tools and processes to navigate those risks.

As it pertains to reasonable accommodation, the Commission is confident that the benefits of the subjective conception of religious freedom outweigh the potential risks. In response to the risks, they write: "The courts can always reject an accommodation request for religious reasons because it engenders excessive costs, compromises the institutions' mission, or infringes other people's rights. To rely on personal beliefs rather than religious dogmas does not mean that a request, which, in a specific context, is unreasonable, cannot be refused."<sup>92</sup>

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<sup>89</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; (2004), 241 D.L.R. (4th) 1; (2004), 121 C.R.R. (2d) 189, at paragraph 39.

<sup>90</sup> Bouchard and Taylor, eds, "Building the Future: A Time for Reconciliation." 176.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 177.

### 2.4.5 Religious Signs and Public Officials

In its report, the Bouchard-Taylor Commission also addresses the question of the religious neutrality of public officials. Specifically, the Commission engages the question: “What are the implications of the religious neutrality of the State as regards agents of the State, who represent it and accomplish its duties?”<sup>93</sup> This question is particularly relevant to the issue of the religious freedom of provincial civil marriage commissioners. The Commission chose a narrow approach to the question, examining the wearing of religious signs by public officials. Possible answers to the question range from a general rule applying to all agents of the State, to a more targeted set of guidelines aimed at certain roles. In their view, the Commission suggest the following: “The appearance of neutrality is important, but we do not believe that it warrants a general rule to prohibit agents of the State from wearing religious signs.”<sup>94</sup> Rather, limitations on the religious freedom rights of an individual representing the non-religious State should correspond to the degree to which that individual, as a public officials, exercise coercive power and must have the appearance of impartiality.<sup>95</sup> In their recommendations regarding the wearing of religious signs by government employees, the Commission proposes that:

- judges, Crown prosecutors, police officers, prison guards and the president and vice-president of the National Assembly of Québec be prohibited from doing so;

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<sup>93</sup> Ibid., 149.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid., 151.

- teachers, public servants, health professionals and all other government employees be authorized to do so;<sup>96</sup>

As the coercive powers and authority of an official increase, so do the restrictions on his or her freedom of religion.

This recommendation is particularly relevant to the issue of civil marriage commissioners in Saskatchewan, who, as the next chapter explains, had a general rule applied to them under the auspices of state neutrality. Civil marriage commissioners perform a largely administrative function, akin to the “public servant” category listed in the Commission’s conclusion above; they exercise no coercive function whatsoever. While the issue in the case of the marriage commissioners is not over the wearing of religious signs, the principle inherent in the Commissioner’s recommendation is one of scalable restrictions on religious freedom according to the nature of an official’s role. This principle suggests that not all expressions of religious belief by agents of the State threaten the religious neutrality of the State – a valuable specification of the legal concept of accommodation by the Commission.

## *2.5 Conclusion*

Reasonable accommodation has been adopted to answer question, “What does freedom of religion look like, as protected by the Charter?” However, the way reasonable accommodation has morphed in the social context makes it ineffective to clearly answer that question. Whereas the courts use established tests and criteria when

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<sup>96</sup> Ibid., 271.

addressing the question in the labour context, those tools are not necessarily transferable to the social context.

As citizens begin to see the accommodation of religious rights as an outright threat to the religious neutrality of the public sphere, social accommodation's lack of clear criteria to establish what is "reasonable" is thrust to the forefront of the accommodation debate. Without those clear criteria, or even popular consensus on what constitutes the public sphere, it is unlikely that the contemporary understanding of reasonable accommodation will be able to effectively answer the fundamental question of what freedom of religion looks like in the near future.

The social accommodation debate proves to be problematic for marriage commissioners in Saskatchewan. Without the social accommodation issue in the background, the policy decisions examined in the next chapter may have looked quite different for the few marriage commissioners who asked for accommodation. Policymakers could have addressed religion-based accommodation requests on a case-by-case basis, adopting the scalable rule of restriction on freedom of religion recommended by the Bouchard-Taylor Commission, rather than the general application approach criticized by the Commission in their analysis of the wearing of religious signs.<sup>97</sup>

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<sup>97</sup> See *ibid.*, 149.

## **Chapter 3: Marriage Commissioner Policy in Saskatchewan**

### *3.1 Introduction*

At the heart of the debate surrounding the policy decision made by the government of Saskatchewan are issues related to both process and principles. The chronology presented earlier gives a brief summary of the key events leading to the policy decision, but does not address the decision-making process or the principles that guided the government to its conclusion. It is in understanding the process that one can discern whether the concerns relating to reasonable accommodation were considered and adequately addressed.<sup>98</sup>

This chapter begins by examining another jurisdiction wrestling with the same issue, the province of Manitoba, in order to better understand the context and precedent for Saskatchewan's decision. A critical examination of Saskatchewan's policy development process follows. Finally, the chapter examines the main commentaries on the Saskatchewan case by Canadian legal scholars.

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<sup>98</sup> Research into public policy typically involves a multifaceted approach. This study planned to build on three components. First, there would be a series of interviews with the policymakers or their advisors. Interview resources were prepared and approved by the McGill Research Ethics Board. Second, information on government agencies would be obtained via Access to Information or Freedom of Information requests, which are meant to provide access to government documents and correspondence. Finally, third party information, such as media reports or court documents, would serve to complete the picture of the government's rationale for a particular decision. In Saskatchewan's case, only the latter two options were available. Despite requests for interviews, government representatives declined participation and permission to be referenced in any research. Freedom of Information requests, however, returned many pages of correspondence, internal e-mail exchanges, and briefing documents that provide insight into the process by which the policy decision was adopted.

The policymakers in Saskatchewan saw no need to accommodate the religious convictions of marriage commissioners who maintained that their beliefs prohibited their participation in same-sex marriage ceremonies. The logic of this decision rests upon a particular understanding of religious freedom in the context of public service, one which is debatable in the opinion of some legal scholars.

### *3.2 Policy Development Process*

#### 3.2.1 Other Jurisdictions

On November 5, 2004, Justice Wilson of Saskatchewan Court of Queen's Bench (Family Law Division) issued a decision requiring a marriage license issuer to provide a marriage license to same-sex couples. In her decision, Justice Wilson agreed with the precedent set in *Halpern v. Canada*, basing her decision to grant the appellants' application on the reasons set forth in that case.<sup>99</sup> Neither the Attorney General of Canada, nor the Attorney General for Saskatchewan opposed the applicants, arguing only that they should not be responsible to pay the legal costs.<sup>100</sup> The Attorney General for Saskatchewan had refused to provide marriage licenses to the same-sex couples who requested them, claiming that "it had no choice because the Province has no power to determine the definition of marriage and is required to follow the existing law until it is changed by the federal Parliament or declared unconstitutional by a court in this

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<sup>99</sup> *N.W. v. Canada (Attorney General)*, (2004), 246 D.L.R. (4th) 345; (2004), [2005] 5 W.W.R. 410; (2004), 11 R.F.L. (6th) 162; (2004), 123 C.R.R. (2d) 367; (2004), 255 Sask. R. 298, at paragraph 7.

<sup>100</sup> *Ibid.*, at paragraph 3.

Province.”<sup>101</sup> The Court’s decision effectively achieved the latter, leaving no further impediment for the Province to issue marriage licenses to same-sex couples.

According to e-mail exchanges within the Saskatchewan Department of Justice, formal discussions over the legality of same-sex marriage began in June 2003 following the decision of the Ontario Court of Appeal in *Halpern*. After *Halpern*, Department of Justice officials continued to follow developments in other provinces and at the federal level. In January 2004, the Attorney General of Saskatchewan was given the opportunity to intervene in the Supreme Court’s consideration of the federal Cabinet’s amendment to their *Reference re: Same-sex Marriage*, but had “no desire to intervene.”<sup>102</sup> As the debate continued nationally, Saskatchewan monitored the decisions of other jurisdictions in an effort to evaluate the various approaches before deciding on their own course of action. Tom Irvine, Crown Counsel in Constitutional Law for Saskatchewan Justice, coordinated with Constitutional Law branches in other provinces in an attempt to “get a comprehensive picture of how all the jurisdictions are reacting to the issue of same-sex marriage.”<sup>103</sup> Not surprisingly, officials in Saskatchewan used the precedent set by other jurisdictions to validate and defend their policy for provincial marriage commissioners.

### 3.2.2 Manitoba’s Precedent

Manitoba implemented a policy requiring its marriage commissioners to perform same-sex solemnizations a few months before Saskatchewan issued an identical decision.

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<sup>101</sup> *Ibid.*, at paragraph 9.

<sup>102</sup> Tom Irvine, Crown Counsel, Saskatchewan Justice, e-mail message, January 28, 2004.

<sup>103</sup> Tom Irvine, e-mail message to Madeleine Robertson, September 28, 2005.



In that jurisdiction, as explained by Mr. Stephen Verhaeghe, Access and Privacy Officer for Manitoba, “There was neither discussion nor policy development, as the decision to require provincial marriage commissioners to supply same-sex ceremonies was a consequence of a Queens’ Bench court ruling.”<sup>104</sup> The letter issued by the Province of Manitoba to its marriage commissioners begins with a reference to the September 16, 2004 Court of Queens’ Bench (Family Division) order in the matter of *Vogel et. al. v. The Attorney General of Canada et. al.* declaring a change in the common law definition of marriage in Manitoba to include same-sex couples. In *Vogel et. al.*, Justice Yard heard a complaint from three same-sex couples who were denied marriage licenses by Manitoba’s Vital Statistics Agency. In his decision, Justice Yard issued an order that declared: “The common law definition of marriage in Manitoba is reformulated to be the voluntary union for life of two persons to the exclusion of all others.”<sup>105</sup> According to the ruling, the spokesperson for Manitoba did not contest the complainants’ application, but committed to registering same-sex couples after the pronouncement of the court order.<sup>106</sup> Though the order does not explicitly mention provincial marriage commissioners, the court’s reformulation of the definition of marriage in Manitoba would directly impact the commissioners’ work. Caroline Kaus, then-director of the Manitoba Vital Statistics Agency notified marriage commissioners concerning their duties in relation to the law:

We anticipate your cooperation in providing your services to same-sex couples in the same manner as you have in the past to opposite-sex couples. As marriage commissioners, you act on behalf of the Province of Manitoba and as such are

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<sup>104</sup> Stephen Verhaeghe, letter to author, November 23, 2007.

<sup>105</sup> *Vogel et. al. v. The Attorney General of Canada et. al.* 2004 Manitoba Court of Queen’s Bench (Family Division) No. 418, at section 8.2.

<sup>106</sup> *Ibid.*, at section 3.0.

expected to comply with the changes to 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.<sup>107</sup>

No further instructions or explanations were given to those commissioners who wished to keep their Certificate of Registration to Solemnize Marriages, yet hold religious beliefs that prohibit involvement in a same-sex marriage ceremony. As explained by the Access and Privacy Officer, neither discussion nor policy development took place as the court's decision to reformulate the common law definition of marriage rendered any such discussion redundant in view of the Manitoba government.

Like Saskatchewan, Manitoba appoints marriage commissioners but does not directly supply remuneration for their services. A commissioner provides their service to members of the public and "is entitled to a fee and expenses as prescribed in the regulations to be paid by the parties to the marriage."<sup>108</sup> Saskatchewan distinguishes this status from that of an employee and cites this difference as the rationale for why the Saskatchewan government is not obligated to follow reasonable accommodation principles for marriage commissioners with religious prohibitions.<sup>109</sup> Since Saskatchewan does not classify marriage commissioners as employees, but rather as statutory officers, reasonable accommodation is not required. Unlike Saskatchewan, Manitoba does not cite this difference as the explanation for the absence of any option for accommodation.

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<sup>107</sup> Letter to Provincial Marriage Commissioners, Vital Statistics Agency of Manitoba, September 16, 2004.

<sup>108</sup> *The Marriage Act*, C.C.S.M. c. M50, section 7(2).

<sup>109</sup> Letter from Frank Quennell, Q.C., Minister of Justice and Attorney General for Saskatchewan, to Janet Epp Buckingham, General Counsel for The Evangelical Fellowship of Canada, December 15, 2004.

The Manitoba Human Rights Commission does emphasize the importance of reasonable accommodation in upholding human rights in the province. A provincial Human Rights Commission fact sheet provides examples of reasonable accommodation in employment situations, placing the burden of accommodation on the employer rather than the employee. The document states, “The onus is on the employer, landlord or service provider to show that reasonable efforts at accommodation have been made.”<sup>110</sup> Religious creed is protected under the Manitoba Human Rights Code, and therefore, is legitimate grounds to consider accommodation. The fact sheet further explains, “Human rights legislation has paramount status in Manitoba. This means that where there is a conflict with other provincial legislation, The Human Rights Code prevails.”<sup>111</sup>

With such a strong emphasis on human rights, including the right to religious belief and expression, the question arises of whether the Vital Statistics Agency adequately addressed provincial guidelines on reasonable accommodation in reaching their decision to require that marriage commissioners participate in same-sex ceremonies. The Manitoba Human Rights Commission document suggests that, where an employee holds a religious belief that affects certain aspects of their job responsibilities, the employer must make reasonable effort to accommodate them. If doing so would amount to undue hardship, the onus is on the employer to demonstrate that. Nothing in the documents provided by the Province of Manitoba indicates that reasonable accommodation concerns were considered, nor do the documents attempt to make the

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<sup>110</sup> Manitoba Human Rights Commission, “Fact Sheet: Reasonable Accommodation [sic],” MHRC, <http://www.gov.mb.ca/hrc/english/publications/factsheets/reason.html> (accessed Nov 27, 2007)

<sup>111</sup> Ibid.

case that accommodation would amount to undue hardship on part of the provincial government.

### 3.2.3 Saskatchewan's Approach

The Saskatchewan government contended that the question of whether marriage commissioners should perform same-sex marriage solemnizations was outside of the province's control. According to the Brief of Law submitted to the Court of Queen's Bench in the case of *N.W. v. Canada (Attorney General)*, the issue of whether provincial marriage license issuers or marriage commissioners should provide their services to same-sex couples "is entirely one of federal common law, within the exclusive jurisdiction of the federal government. It is the responsibility of the federal government to determine the definition of marriage in Canada."<sup>112</sup> The definition of marriage is federal, and this definition determines the *bona fide* job requirements of the commissioners. The Brief was signed by Tom Irvine, Counsel for the Attorney General for Saskatchewan, on November 1, 2004, the same day that the Province issued notice letters to marriage commissioners notifying them of the Attorney General's policy decision should the court decide that opposite-sex requirement for marriage violated the *Charter of Rights and Freedoms*. Conspicuously absent from the Brief of Law or any other internal government correspondence is reference to what might happen to those

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<sup>112</sup>Attorney General for Saskatchewan, "Brief of Law of the Attorney General for Saskatchewan," *Saskatchewan Human Rights Tribunal* (January 20, 2007), at section 2.

marriage commissioners who could not participate in same-sex marriage solemnizations due to religious or conscientious convictions.

The statement in the Brief of Law essentially placed the onus on the federal government to determine whether the province's marriage commissioners ought to perform same-sex marriages. This claim, as well as the silence on the question of reasonable accommodation, is perplexing in light of the language of the federal *Marriage for Civil Purposes Act* and the Supreme Court of Canada's *Reference re: Same-Sex Marriage*. In the preamble, the *Act* states:

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;  
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;  
WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage<sup>113</sup>

Section 3.1 goes on to state:

For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.<sup>114</sup>

Introduced by the members of a Parliamentary Standing Committee, section 3.1 of the federal *Act* states, in no uncertain terms, that redefining marriage in Canada to include

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<sup>113</sup> *Civil Marriage Act*, 2005, c.33.

<sup>114</sup> *Ibid.*, at section 3.1.

same-sex couples should not result in any penalty for individuals whose religious beliefs do not align with such a definition.<sup>115</sup>

The Supreme Court of Canada assessed the constitutionality of the *Act* when it was in draft form. The government of the day referred a series of questions to the Court, one of which asked: “Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?”<sup>116</sup> In its response to the question, the Court addressed both religious marriage and civil marriage and concluded:

the Court is of the opinion that, absent unique circumstances with respect to which we will not speculate, the guarantee of religious freedom in s. 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.<sup>117</sup>

Whether an official is solemnizing a religious marriage or a civil marriage, the Court held that section 2(a) protects them from being compelled by the state to perform same-sex marriage ceremonies. Further, the Court made special note of the responsibility of the provinces to ensure legislation – and by extension, policy – respects and protects the rights of religious officials while still providing a means for same-sex couples to receive marriage solemnizations.<sup>118</sup> The Court also notes that “human rights codes must be

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<sup>115</sup> Mary Hurley, “Bill C-38: The Civil Marriage Act” Legislative Summaries, Library of Parliament – Parliamentary Information and Research Service LS-502E (2005), 14. <http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/summaries/c38-e.pdf> (accessed September 21, 2008)

<sup>116</sup> *Reference re: Same-Sex Marriage*, at paragraph 2.

<sup>117</sup> *Ibid.*, at paragraph 60.

<sup>118</sup> *Ibid.*, at paragraph 55.

interpreted and applied in a manner that respects the broad protection granted to religious freedom under the *Charter*.”<sup>119</sup> In its assessment of the redefinition of civil marriage, the Supreme Court of Canada made it clear both freedom of religion for officials and access to civil marriage for same-sex couples must be accommodated; Section 2(a) of the Charter demands it, and the federal legislation reinforces it.<sup>120</sup> In light of the strong language used in both the *Civil Marriage Act* and the Supreme Court’s response to the constitutional reference, Saskatchewan’s claim, as made in their Brief of Law, that their hands are tied on the issue of whether marriage commissioners are required to perform same-sex marriages is perplexing.

Saskatchewan’s silence on the question of reasonable accommodation is also surprising as the debate surrounding the legality of creating such a requirement for marriage commissioners was already well underway in the mainstream media. British Columbia was the first province to issue letters to provincial marriage commissioners mandating them to solemnize same-sex marriage or resign. This action prompted calls for reasonable accommodation as early as January 2004.<sup>121</sup> The B.C. government reversed its policy later that year, allowing marriage commissioners to refuse participation in same-sex solemnizations provided they refer same-sex couples to other willing commissioners.<sup>122</sup>

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<sup>119</sup> Ibid.

<sup>120</sup> Mary Hurley, “Bill C-38: The Civil Marriage Act,” 13.

<sup>121</sup> “Perform same-sex marriages or resign, B.C. tells commissioners.” *CBC News*, January 21, 2004, online, [http://www.cbc.ca/canada/story/2004/01/21/marriage\\_commissioners040121.html](http://www.cbc.ca/canada/story/2004/01/21/marriage_commissioners040121.html) (accessed April 12, 2007).

<sup>122</sup> “Prairie Officials Compelled to Perform Gay Marriages” *The Globe and Mail*, 18 December 2004, A5.

In Manitoba, a public debate between federal and provincial elected officials was underway even while the Saskatchewan Court of Queen’s Bench case was in process. On November 11, 2004, six days after the Saskatchewan court order was issued, then-federal Justice Critic, Vic Toews, criticized the revised marriage commissioner policy saying, “The policy is discriminatory and violates both the Charter of Rights and the Manitoba Human Rights Act.”<sup>123</sup> The following day, the same news outlet reported: “The Manitoba Human Rights Commission is investigating complaints from marriage commissioners who say they are being discriminated against if they refuse to perform same-sex marriages.”<sup>124</sup> Yet, despite the emergence of a significant public debate on the human rights implications of implementing a policy decision to penalize recalcitrant marriage commissioners, there is no evidence of any discussion within the government of Saskatchewan of reasonable accommodation concerns for marriage commissioners with religious reservations about solemnizing same-sex marriages.

### 3.2.4 The Nature of a Marriage Commissioner

Officials do give the rationale used by the Saskatchewan government to counter critics who accuse the government of violating federal and provincial human rights charters. In essence, the Saskatchewan government considers provincial marriage

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<sup>123</sup> “Commissioners have right to refuse to wed gay couples: Toews.” *CBC News*, November 11, 2004, online, “[http://www.cbc.ca/canada/story/2004/11/11/samesex\\_041111.html](http://www.cbc.ca/canada/story/2004/11/11/samesex_041111.html) (accessed April 12, 2007).

<sup>124</sup> “Marriage commissioners resign over same-sex weddings.” *CBC News*, September 22, 2004, online, [http://www.cbc.ca/canada/manitoba/story/2004/09/22/mb\\_samesex20040922.html](http://www.cbc.ca/canada/manitoba/story/2004/09/22/mb_samesex20040922.html) (accessed April 12, 2007).



commissioners as “statutory officers” and not “government employees,” thus justifying why no accommodation is required. In Saskatchewan, “statutory officers” are public officials appointed according to a particular Act in order to carry out the provision(s) of that Act.<sup>125</sup>

In response to a letter from a religious advocacy group challenging his policy decision, the Attorney General writes:

The Government of Saskatchewan agrees with your position concerning the constitutionally protected freedom of religious officials to decide for themselves whether to perform same-sex marriages. Religious officials are not statutory public officers and are not subject to the *Canadian Charter of Rights and Freedoms* in the same way as civil marriage commissioners.... However, we must respectfully disagree with your suggestion that it is improper for the Government to advise civil marriage commissioners that they must perform civil marriages for same-sex couples. Civil marriage commissioners appointed under *The Marriage Act, 1995* are not employees of the Government of Saskatchewan. They are statutory officers, charged with the administration of the statutory provisions of *The Marriage Act, 1995*. Each civil marriage commissioner offers this service directly to the public, not as an employee of the Government of Saskatchewan. Since they offer a service to the public, *The Saskatchewan Human Rights Code* prohibits them from discriminating in their services on any of the Code’s prohibited grounds, including sexual orientation.<sup>126</sup>

The distinction between employee and statutory officer forms the foundation upon which the government of Saskatchewan bases its rationale for implementing the marriage commissioner policy without an accompanying accommodation policy. The *Charter* and *Saskatchewan Human Rights Code* prohibit both government employees and statutory officers from discriminating against members of the public on protected grounds.

However, the government is obligated to accommodate its employees on those same protected grounds, to the point of undue hardship. As the Attorney General states in the

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<sup>125</sup> Letter from Frank Quennell, Q.C., to Janet Epp Buckingham, December 15, 2004.

<sup>126</sup> *Ibid.*

letter above, the government believes it has no obligation to provide the same accommodation to statutory officers, as they are fundamentally different from employees.

In a written response to a letter he received from the Evangelical Fellowship of Canada regarding their concerns about the province's treatment of marriage commissioners, the Attorney General for Saskatchewan outlines in greater detail the unique traits of a statutory officer versus a government employee. The letter reiterates that marriage commissioners are appointed, not hired, and deal directly with members of the public; however, it goes on to state that the Department of Justice does not have any role in the assignment of their individual duties nor can it relieve them from these duties or re-assign them to other responsibilities.<sup>127</sup> The Attorney General explains, "For this reason, the duty to accommodate as interpreted and applied in the various decisions of the Supreme Court of Canada, to which you refer in your correspondence, is not relevant. All of these authorities were decided in the context of an employer-employee relationship."<sup>128</sup> The distinction between employee and statutory officer seems to make all the difference for the Government of Saskatchewan when deciding whether there is any duty to accommodate. Yet the letter goes on to consider a scenario where provincial marriage commissioners are government employees, and concludes that "the duty to accommodate has not been interpreted to allow a person who provides services to the public to discriminate against members of the public, contrary to *The Saskatchewan*

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<sup>127</sup> Letter from Frank Quennell, Q.C., Minister of Justice and Attorney General for Saskatchewan, to Janet Epp Buckingham, General Counsel for The Evangelical Fellowship of Canada, September 19, 2005.

<sup>128</sup> Ibid.

*Human Rights Code.*”<sup>129</sup> Ultimately, the Attorney General for Saskatchewan opted to implement a policy whereby public officials are not entitled to accommodation for religious issues if those officials provide services to the public and the accommodation requested involves discriminatory forms of public service.

By way of process, there undoubtedly were deliberations that took place among policymakers that are not publicly accessible. What is available indicates that the policy process rested primarily on the legal analyses of the nature of “statutory officers,” their duty to the public whom they serve, and whether the Government has a responsibility to accommodate them, and secondarily on the belief that the Government is not obligated to accommodate a public official if doing so could be perceived as condoning discrimination in the delivery of public services.

### *3.3 Academic Analyses of Saskatchewan’s Policy*

The public controversy over the government’s position on marriage commissioners soon sparked academic debate. In an article published in the 2006 edition of the *Saskatchewan Law Review*, legal scholar Bruce MacDougall levels a clear critique against those who endorse the right for marriage commissioners to lawfully decline participation in same-sex marriage solemnizations. Geoffrey Trotter published a response to MacDougall’s argument in his article in the 2007 edition of the *Saskatchewan Law Review*, “The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor Bruce MacDougall.”

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<sup>129</sup> Ibid.

Finally, Lorraine Lafferty's 2006 *Canadian Bar Review* article, "Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-Sex Marriage?" gives a thorough review of the relevant Canadian jurisprudence on the issue, and challenges those provinces without accommodation regimes for civil marriage officials.

### 3.3.1 Bruce MacDougall: Accommodation is "Constitutionally Inappropriate"

MacDougall argues in favour of policies similar to those of Saskatchewan, suggesting that it is "constitutionally inappropriate" to accommodate a refusal by a civil marriage commissioner to officiate at a same-sex marriage.<sup>130</sup> His argument rests upon three main criticisms of those who would advocate for a right of refusal. First, allowing such an accommodation "constitutes a religious 'veto' over the availability of a public service."<sup>131</sup> Second, the precedent of allowing religious-based refusals in instances such as same-sex civil marriages would act as the thin-edge of a wedge for allowing refusals to provide many other types of government service. Finally, MacDougall argues that "the acceptance of such refusals runs contrary to authority that stands against religious action determining public policy, as well as authority that protects equality based on sexual orientation."<sup>132</sup>

For MacDougall, allowing civil marriage commissioners to refuse participation in a same-sex marriage would be analogous to allowing a public official to refuse to serve

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<sup>130</sup> Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages," *Saskatchewan Law Review* 69 (2006), 351-373.

<sup>131</sup> *Ibid.*, 353.

<sup>132</sup> *Ibid.*

someone of a particular ethnic background if doing so somehow violated their religious convictions. Providing an accommodation on the same-sex marriage issue singles out homosexuals for exclusionary treatment.<sup>133</sup> He speculates that an attempt by a commissioner to refuse participation in the solemnization of a same-sex marriage on strictly “philosophical” grounds would not succeed; therefore, allowing such a refusal on religious grounds puts religious views in a privileged position.<sup>134</sup> Allowing religious views superiority over other views violates, in his estimation, commonly accepted principles of separation of church and state. MacDougall’s line of argument raises fundamental questions about the existence of any distinct rights claims religion.

MacDougall goes on to suggest that accommodating religious-based refusals is inconsistent with very nature of the marriage commissioner’s role. He writes, “A marriage commissioner is a public official carrying out a state function. The state has no ability to marry people except through those individuals hired or empowered specifically to conduct this civil ceremony.”<sup>135</sup> For those reasons, the state cannot permit any religious requirement into the civil marriage regime. According to MacDougall, allowing marriage commissioners to opt out of same-sex ceremonies for religious reasons would do just that

MacDougall’s argument is similar to that advanced by the Attorney General of Saskatchewan. In a radio interview with John Gormley of CJME-Radio, Regina, then-Minister of Justice and Attorney General Frank Quennell defended the decision to require

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<sup>133</sup> Ibid., 355.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid., 356.

all civil marriage commissioners to comply with the same-sex marriage policy, with no exceptions. Former Minister Quennell expresses his concern about commissioners “imposing religious requirements” on a civil marriage should they be allowed to refuse participation on religious grounds. He echoes this concern in the September 19, 2005 letter where he states:

Allowing civil marriage commissioners to refuse to perform civil marriages because of their personal religious beliefs undermines the fundamental purpose of a civil marriage law. A same-sex couple would be required to face a faith-based inquiry which could vary depending upon the particular religious beliefs of the individual commissioner, an inquiry to which no opposite-sex couple would be subjected.<sup>136</sup>

Bruce MacDougall employs the same argument in his article, dismissing the possibility of “reasonable accommodation” for marriage commissioners looking to opt out of performing same-sex marriages for religious reasons. He goes on to reject the suggestion that accommodation jurisprudence might require the government to provide some special arrangement for the affected commissioners, arguing that previous court decisions “do not have to do with religious views *about members of the public* so as to affect different members of the public in different ways.”<sup>137</sup> Public service positions demand formal equality, and allowing *any* exception from that would be tantamount to bringing religious intolerance into a public position. For MacDougall, the importance of the issue lies in its symbolic impact on same-sex couples seeking civil marriages as much as in the practical effect.<sup>138</sup> Marriage commissioners are public officials, charged with the responsibility to provide a specific service to members of the public. In his estimation, a government’s

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<sup>136</sup> Letter from Frank Quennell, Q.C., to Janet Epp Buckingham, September 19, 2005.

<sup>137</sup> Bruce MacDougall, “Refusing to Officiate at Same-Sex Civil Marriages.” 356.

<sup>138</sup> *Ibid.*, 359.

chief concern should be about ensuring that service is available to all those entitled to receive it, without any variation among different groups.

### 3.3.2 Geoffrey Trotter: Right to Decline

Geoffrey Trotter approaches the issue from a different perspective than MacDougall and attempts to challenge some of the weaknesses and inconsistencies in the MacDougall's arguments. Trotter focuses his attention on the employee-discrimination aspect of the debate surrounding provincial marriage commissioners, an aspect MacDougall intentionally left unexamined.<sup>139</sup> Trotter argues that:

A principled application of Human Rights Codes shows that governments can—and must—respect the equality rights of same-sex couples while also accommodating the religious freedom of marriage commissioners by permitting them to decline performance of marriages which are contrary to their sincerely held religious beliefs.<sup>140</sup>

The author argues that the obligation to accommodate marriage commissioners' "right to decline" flows from an employee's right to be free from discrimination by their employer on prohibited grounds, such as religion.<sup>141</sup>

Trotter counters MacDougall's argument that allowing a "right to decline" for marriage commissioners is a veiled endorsement of homophobia by challenging the assumption that any move to decline participation in a same-sex ceremony is always in

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<sup>139</sup> Ibid., at note 9.

<sup>140</sup> Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants – A Response To Professor Bruce MacDougall." *Saskatchewan Law Review* 70:2 (2007), 365.

<sup>141</sup> Ibid. The author uses this term to refer to the concept that marriage commissioners should have the right to decline participation in a same-sex marriage ceremony based on a conflict with their religious belief.

bad faith. He engages in a lengthy discussion of instances in which a religious person may hold beliefs that disagree with another's without constituting hate towards that person or the group to which they belong. Not only may an individual's religious belief prohibit a specific behaviour, it may require the individual to "refrain from assisting with or contributing to [that behaviour]." <sup>142</sup>

Citing the example of doctors and nurses who have been granted the right to refuse participation in abortions on the basis of religious and conscientious belief, <sup>143</sup> Trotter challenges MacDougall's assertion that allowing a marriage commissioner the right to decline participation in a same-sex marriage ceremony would constitute giving a "religious veto" over the couple's ability to get married. In the case of a doctor or nurse, "The nurse is not motivated by *animus* against the woman seeking the procedure, but is merely not able to provide the service themselves. The nurse is not given a veto over the ability of the patient to be served by another nurse, but is merely granted protection from being personally compelled to assist." <sup>144</sup> He applies the same principle to marriage commissioners, suggesting that "there is no animus directed towards a same-sex couple seeking such services, nor an attempt to veto their choice to marry; rather, the religious individual is simply unable to be the one to provide the service without violating his or her own conscience." <sup>145</sup>

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<sup>142</sup> Ibid., 370.

<sup>143</sup> Canadian Medical Association, "Position Statement on Induced Abortion." (15 December 1998) online: [www.cma.ca/index.cfm/ci\\_id\\_3218/la\\_id/1.htm](http://www.cma.ca/index.cfm/ci_id_3218/la_id/1.htm). (Accessed May 28, 2008)

<sup>144</sup> Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages," 371.

<sup>145</sup> Ibid. 374-375.



Having addressed MacDougall's concern that right to decline was a veiled endorsement of homophobia, Trotter attempts to counter what he calls MacDougall's "equality to access" argument, namely that "the constitutional right of gays and lesbians to equal access of public services imposes a duty on the state to ensure that every marriage commissioner is willing to perform same-sex marriages."<sup>146</sup> The author first takes issue with conflating the state with its employees. Whereas MacDougall writes: "By allowing or tolerating officials who refuse to accord a benefit to same-sex couples, the government would effectively be accepting for itself such views"<sup>147</sup> Trotter argues that this inappropriately equates the state (which does not have the right to deny lawful services to an individual or group of individuals without sufficient cause) and employees of the state (which do have the right to hold and practice religious beliefs that might prohibit providing certain lawful services to another individual). In allowing religious employees the opportunity to observe their holy days rather than working, the state does not automatically accept the religious belief as its own. Trotter suggests that granting the Right to Decline to marriage commissioners is more tolerant and more consistent with its obligations under the Charter and Human Rights Codes than the alternative espoused by MacDougall.<sup>148</sup>

According to Trotter, not only does allowing marriage commissioners the "right to decline" fail to constitute a religious veto over same-sex couples who seek civil marriage, it is a more logical approach from a practical perspective. He writes:

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<sup>146</sup> Ibid.

<sup>147</sup> Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages," 365.

<sup>148</sup> Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages," 375.

a rule which compels marriage commissioners who cannot in good conscience perform same-sex marriage to resign their commission will clearly not increase the availability of marriage services to same-sex couples. Such a marriage commissioner is unavailable to same-sex couples whether or not he retains his commission—forcing a resignation will only mean there are even fewer marriage commissioners for all other citizens who desire their services.<sup>149</sup>

Instead, the state ought to pursue other options that enhance its ability to provide services to same-sex couples as well as opposite-sex couples rather than diminish its ability to serve either.

In a counter-move to MacDougall’s “religious veto” argument, Trotter suggests it would be an unfortunate irony should an effort to free same-sex couples from discrimination result in discrimination against religious marriage commissioners. He goes on to argue that “the result of the policy advocated by Professor MacDougall would be to grant same-sex couples an ‘equality veto’ over religious marriage commissioners who would be forced by conscience to resign their commissions.”<sup>150</sup>

Trotter bases his rebuttal of MacDougall’s article on the relationship between the state and the marriage commissioners as employer and employee respectively. Put plainly, “The same-sex couple is not the only party whose human rights must be respected by the state—the marriage commissioner also has human rights the state must respect.”<sup>151</sup> Applying the legal test set-up in the *Meiorin* decision,<sup>152</sup> Trotter concludes that a rule compelling all marriage commissioners to perform same-sex marriage constitutes a *prima facie* case of discrimination. The government is obligated, therefore,

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<sup>149</sup> Ibid., 376.

<sup>150</sup> Ibid., 377.

<sup>151</sup> Ibid., 378.

<sup>152</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*. See Section 2.2.2 above.

to accommodate the affected marriage commissioners, unless it can prove doing so would amount to undue hardship. In determining what amounts to “undue hardship,” Trotter suggests that previous court decisions involving accommodation cases where the employer is the government impose a particularly high standard because of the immense resources available to the state as employer.<sup>153</sup>

In Trotter’s opinion, the existing rule in some provinces requiring all marriage commissioners to perform same-sex marriage ceremonies, regardless of religious belief that might prohibit such participation, does not satisfy the *Meiorin* test and fails to accommodate Charter-protected rights to the point of undue hardship. Trotter asserts that MacDougall’s argument “loses sight of the fact that those who serve the public are members of that public themselves. Rights-bearing citizens do not lose their human rights when they enter public employment.”<sup>154</sup> All three parties must be considered in the analysis: the state, the marriage commissioner, and the same-sex couple. The author states that MacDougall has left out the second party and would accommodate only those persons who affirm homosexual behaviour. Trotter concludes: “To deny employment in the public service to religious persons who hold minority beliefs would be to introduce an apparent de facto policy of religious apartheid which is unworthy of the tolerant and diverse society that Canada aspires to be.”<sup>155</sup> Trotter’s conclusion echoes that of legal scholar Richard Moon, who states: “Even when the state is pursuing otherwise legitimate

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<sup>153</sup> Geoffrey Trotter, “The Right to Decline Performance of Same-Sex Civil Marriages,” 384.

<sup>154</sup> *Ibid.*, 385.

<sup>155</sup> *Ibid.*, 392.

legislative goals, it may be required to compromise those goals in order to accommodate minority religious practices.”<sup>156</sup>

### 3.3.3 Lorraine Lafferty: Duty to Accommodate

Lorraine Lafferty argues along similar lines as Trotter, without engaging in a direct debate with MacDougall. In her 2006 article, Lafferty reviews the historical and legal context of the same-sex marriage solemnization debate and proceeds to engage the question of whether public officials can refuse to perform same-sex marriages. She argues that Canada is undergoing a time of profound transition as the country adjusts to a new definition of marriage that includes same-sex couples. Lafferty concludes that accommodating the religious beliefs of public officials is the appropriate response during this period of change.<sup>157</sup> Citing the example of *Moore v. British Columbia (Ministry of Social Services)*, Lafferty argues that, “In the case of public officials and same-sex marriage, accommodation can be accomplished by reassigning solemnization duties from one public official to another.”<sup>158</sup>

In the *Moore* case, a public servant was terminated from her job as a Financial Aid Worker for British Columbia after refusing an application for financial support for an abortion. The employee refused the application on technical grounds, but would not have

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<sup>156</sup> Richard Moon, “Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms.” *Brandeis Law Journal* 41 (2002-2003), 567.

<sup>157</sup> Lorraine P. Lafferty, “Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-Sex Marriage?” *The Canadian Bar Review* 85 (2006), 287-316.

<sup>158</sup> *Ibid.*, 312.

processed it otherwise because of her religious beliefs which do not support abortion.<sup>159</sup>

Moore was dismissed for this reason, but the Council of Human Rights deemed the dismissal discriminatory and “found that it would not have created undue hardship on either the employer or Moore’s fellow employees to re-assign any files that would require Moore to make decisions contrary to her religious beliefs.”<sup>160</sup> Had Moore been the only person able to process the application the outcome may have been different, but since other employees could handle applications related to abortion, accommodation did not constitute undue hardship.

Lafferty applies the same line of reasoning to public officials responsible for civil marriages and concludes that a similar accommodation regime could be introduced for those existing marriage commissioners who cannot perform same-sex marriages because of religious beliefs. Lafferty also directly refutes the former Attorney General of Saskatchewan’s claim that the province has no obligation to accommodate marriage commissioner since they are statutory officers, not employees. She writes,

[Marriage commissioners], although representing the state in performing a civil function, are not as closely allied with the state as those public servants who are employed by government at a government site. These authorized officials who perform a civil function, but are otherwise independent from the state, are a hybrid between religious officials who, also by statute, perform a civil function and public servants who are employed by government. Since religious officials can refuse to perform same-sex marriages and government employees who cannot perform same-sex marriages on religious grounds ought to be accommodated, it would seem consistent to, and anomalous not to, provide accommodation to the point of undue hardship to this group of public officials who are not government employees.<sup>161</sup>

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<sup>159</sup> Moore v. British Columbia (Ministry of Social Services), June 29, 1992 (British Columbia Council of Human Rights) at paragraph 24.

<sup>160</sup> Lorraine P. Lafferty, “Religion, Sexual Orientation and the State” 306.

<sup>161</sup> Ibid., 312.

In Lafferty's view, refusing to accommodate the religious beliefs of civil marriage commissioners, who bridge the gap between religious marriage officials and government employees, is inconsistent with the *Charter* and provincial human rights codes. She explicitly argues in favour of accommodating the religious beliefs of marriage commissioners, though it is not clear whether she favours accommodation in perpetuity, or only during the "period of change as Canada transitions from the historical and familiar definition of marriage as the union of one man and one woman to the new and inclusive definition of marriage as the union of two persons."<sup>162</sup> If, in fact, she favours the latter, it may be that she and other legal scholars, such as Bruce Ryder,<sup>163</sup> make up a middle way between the positions put forward by MacDougall and Trotter. Regardless, in the immediate present, Lafferty aligns closely with Trotter's position that governments should accommodate the religious beliefs of marriage commissioners.

### *3.4 Saskatchewan's Policy on Marriage Commissioners*

In developing a policy for their provincial marriage commissioners, the Government of Saskatchewan adopted a perspective similar to that proposed by Bruce MacDougall. The process did not involve public consultations, but instead relied upon

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<sup>162</sup> Ibid., 316.

<sup>163</sup> See Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship." Ryder suggests that marriage commissioners hired or appointed when same-sex civil marriage was not lawful should be accommodated if their religious beliefs prohibit their participation in same-sex solemnizations; however, governments are under no obligation to similarly accommodate marriage commissioners hired or appointed after the change in definition of lawful marriage took effect.

legal analyses of the policies of other jurisdictions and a particular perspective on the “nature” of the marriage commissioner office and its public duties.

Defending his policy decision, the Attorney General for Saskatchewan argued that marriage commissioners are not “employees” but “statutory officers.” This distinction would seem to undermine Trotter’s argument in favour of an accommodation regime as he bases it on the employer-employee relationship. In his September 19, 2005 letter, the Attorney General claims that, as statutory officers, marriage commissioners deal directly with the public and are not assigned duties by the Department of Justice, nor can the Department “relieve them from these duties or re-assign them to other responsibilities.”<sup>164</sup> This, he says, sets them outside of the employer-employee relationship and outside traditional accommodation jurisprudence. What is not clear, however, is whether the Attorney General based his conclusion on anything other than the manner in which a marriage commissioner is appointed to his or her position and whether the Department can remove them.

While it is accurate to say that the Department of Justice cannot relieve a marriage commissioner of their position, it is misleading to suggest that marriage commissioners cannot be removed at all. Section 48 of the *Marriage Act, 1995* addresses the consequences should a marriage commissioner perform a marriage ceremony after his or her removal from office. Clearly, they can be relieved of their position; just not by the Department of Justice. In the case of appointed provincial officials, they are installed and removed either by means of an Order-in-Council, which is submitted to the Lieutenant

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<sup>164</sup> Letter from Frank Quennell, Q.C., to Janet Epp Buckingham, September 19, 2005.

Governor by the Minister responsible, or by a letter of appointment signed by the Minister. In Saskatchewan, the Minister of Justice and Attorney General is responsible for submitting orders to appoint and remove marriage commissioners. The Department of Justice itself has no authority to appoint or remove a commissioner, but the head of the Department, the Minister, does. Since an employee is simply a worker who is hired to perform a job, it is unclear whether there is a substantial difference between a statutory officer, appointed to perform a job, and an employee. In any case, arguing this distinction is a moot point since, as the Attorney General argued, both roles exercise some form of public service and, accordingly, both must avoid discriminating on any prohibited ground of discrimination.

In his September 19, 2005 letter to the Evangelical Fellowship of Canada, the Attorney General for Saskatchewan reiterated that, whether statutory officer or employee, marriage commissioners with religious beliefs proscribing their participation in same-sex marriages could not be accommodated as they are public officials.<sup>165</sup> The Saskatchewan Human Rights Tribunal agrees with the Attorney General on this point. In their decision on *M.J. v. Nichols*, the Tribunal writes:

The Commission takes the position that a marriage commissioner performing a civil marriage ceremony is not acting as a private citizen, rather as a public official. . . . As the marriage commissioner is a public official acting on behalf of the state, he is required to provide services to ensure that all persons who meet the legal requirements for marriage can marry without regard to his or her personal characteristics.<sup>166</sup>

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<sup>165</sup> Ibid.

<sup>166</sup> *M. J. v. Nichols*, May 23, 2008 (Saskatchewan Human Rights Tribunal), at paragraph 91.



The Tribunal upholds a clear distinction between private citizens and public officials. The former are entitled to receive government services in a manner that respects the rights enshrined in the *Charter*. The latter have no such entitlement and are responsible for ensuring government services are delivered to all members of the public in an equitable way. Lafferty dismisses this view, arguing instead that civil marriage commissioners ought to receive the same reasonable accommodations afforded to religious officials on one side of the spectrum, and public servants on the other.

### *3.5 Conclusion*

The debate between MacDougall, Trotter and Lafferty illustrates how one's vantage point will determine one's opinion on the marriage commissioner issue. Trotter approaches the question from the perspective of the commissioner as an employee/statutory officer and, consequently, holds that the Government-as-employer has an obligation to accommodate religious requirements to the point of undue hardship. The state is responsible for ensuring public services are delivered to all members of the public entitled to receive them, but must also ensure that public officials receive the same benefit from the *Charter* as the people they serve. Lafferty agrees that accommodation of religious belief is necessary as Canada wrestles with a transition between definitions of marriage. Accommodation is also the only option consistent with Canadian values on diversity of beliefs. MacDougall views the issue from the perspective of the public looking to receive the government service and argues that the state's sole concern is

ensuring public services are provided equitably and in a manner that maintains formal equality for all members of the public. If accommodating the religious beliefs of a public official somehow threatens that equality, then it simply is not reasonable and therefore not required.

The process employed by the Government of Saskatchewan for establishing a policy to govern marriage commissioners failed to adequately address the Charter-protected right to religious freedom for marriage commissioners. Reasonable accommodation was deemed unnecessary due to the nature of a statutory officer's public responsibilities, prompting the government to send the letters to the commissioners notifying them that they are obligated to perform same-sex ceremonies if asked, otherwise they must resign.

Orville Nichols chose to retain his commission but declined participation in a same-sex marriage ceremony because of his religious beliefs. His decision resulted in a complaint against him and a hearing before the Human Rights Tribunal in Saskatchewan. Nichols opted to challenge the policy in the judicial arena, beginning with the quasi-judicial tribunals. The issue has not been brought to the courts as yet. The next chapter examines the approach taken by Canada's courts towards religious freedom rights, highlighting their tendency to restrict religious freedom to the private sphere and the possible implications of this emphasis for debates over religious freedom and public service.

## Chapter 4: The Privatization of Religious Freedom

### *4.1 Introduction*

A pluralistic liberal democracy like Canada faces the complex challenge of competing rights and the need to create space for the diverse beliefs of all citizens. The *Charter* seeks to “guarantee the rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>167</sup> While it is the role of the legislators and courts in Canada to accomplish both of these responsibilities, in recent years, the courts have played an increasingly critical role in determining the place and scope of religious freedom. A review of recent court decisions reveals that the courts have tended to privatize religion freedom. These decisions have been made with the express purpose of *enhancing* the scope of religious freedom, but the trend has been to enhance religious freedom in the private sphere, while simultaneously deflating it in the public sphere.

### *4.2 Restriction of Religious Freedom in the Public Sphere*

#### 4.2.1 *R. v. Big M Drug Mart Ltd.*

A look at the seminal *Charter* case dealing with religious freedom shows the beginnings of the deflation of the public place of religious belief. *R. v. Big M Drug Mart Ltd.* is recognized as the foundational, post-*Charter* religious freedom case. In an effort

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<sup>167</sup> *Canadian Charter of Rights and Freedoms*, at section 1.

to interpret the scope of Section 2(a), Justice Dickson addressed both the private and public expressions of religious freedom. In his judgment he wrote:

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.<sup>168</sup>

The “right to declare religious beliefs openly” and the “right to manifest religious belief by worship and practice or by teaching and dissemination” seem to support the conclusion that religious belief cannot, and must not, be restricted to the private sphere of life but may be manifest privately and publicly. Legal scholar Richard Moon suggests the Court’s decision in *Big M* demonstrated that section 2(a) of the *Charter* does not preclude state support for religion, unlike the Establishment Clause enshrined in the American Constitution.<sup>169</sup> However, Moon goes on to say that in *Big M* the Court held the view that “State support for the practices or institutions of a particular religion will breach s.2(a) only if it coerces some members of the community, and interferes with their ability to practice their faith.”<sup>170</sup> However, Moon adds that in recent years the Canadian courts “have taken such a broad view of religious coercion that any form of state support

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<sup>168</sup> *R. v. Big M Drug Mart Ltd.*, at paragraph 94.

<sup>169</sup> Richard Moon, “Liberty, Neutrality, and Inclusion.” 563.

<sup>170</sup> *Ibid.*

for the practices or beliefs of a particular religion, or for religious over non-religious belief systems, might be viewed as coercive and therefore contract to s.2(a).”<sup>171</sup>

Other legal scholars, such as Janet Epp Buckingham, take a different view on the Court’s decision in *Big M*. In her view, “The case provided an opportunity for the Court to articulate a new approach to freedom of religion, one befitting a constitutional guarantee.”<sup>172</sup> However, Buckingham also criticizes the individualistic bent of Justice Dickson’s approach to religious freedom, suggesting his individualistic articulation results in a deflation of religious freedom in the public sphere.<sup>173</sup> Striking down public observance of the Sabbath “established greater equality for other religions in that all were now equally publicly ignored.”<sup>174</sup> Whereas Moon suggests that the Court’s decision in *Big M* demonstrated that section 2(a) of the *Charter* does not explicitly preclude state support for religion, Janet Epp Buckingham argues that *Big M* limited the possibility of state support for religion to that which is essentially individual and private.

#### 4.2.2 Religious Freedom and Education

Recent Canadian court decisions on cases pertaining to public education also confirm this trend to deflate religious freedom in the public sphere. Given the public nature of educational institutions and the critical place of education for many religious traditions, education has frequently been a central site for conflicts over the place of

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<sup>171</sup> Ibid.

<sup>172</sup> Janet Epp Buckingham, “The Fundamentals of Religious Freedom: The Case for Recognizing Collective Aspects of Religion.” *Supreme Court Law Review* 36 (2d) (2007): 260. Please see this article for an analysis of the collective aspects freedom of religion, which is not specifically addressed by this thesis.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid., 262.

religious belief in the public sphere. Historically, *The Constitution Act, 1867*<sup>175</sup> made specific provisions for confessional schools. Section 29 of the Canadian *Charter* reaffirmed the rights of confessional schools: “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”<sup>176</sup> More recently, the courts have decided on a number of cases concerning the place of religious belief in schools.<sup>177</sup> The trend in these decisions has been to view religion as relegated to the private sphere and to argue for the subtraction of religious beliefs and practices from the sphere of public education..

#### 4.2.3 Zylberberg v. Sudbury Board of Education

In 1988, the Ontario Court of Appeal ruled in *Zylberberg v. Sudbury Board of Education* that the practice of saying the Lord’s Prayer and reading from Christian scriptures in the school was a violation of fundamental religious freedoms. Exemptions from participation were available to any student or parent who wished to decline from participating in the exercise; however, the Court ruled that this did not properly accommodate other beliefs. Instead, the Court referenced the 1969 *Mackay Report*, the product of a major study of religious education commissioned by the Ontario Ministry of

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<sup>175</sup> *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3

<sup>176</sup> *Canadian Charter of Rights and Freedoms*, at section 29.

<sup>177</sup> See Paul Clarke, “Religion, public education and the Charter. Where do we go now?” and William J. Smith, “Balancing security and human rights: Quebec schools between past and future.”

Education in 1967, which recommended that religion no longer guide moral education.<sup>178</sup> Citing the *MacKay Report*, the Court states: “Every course or program in the public school should be designed to be acceptable to all reasonable persons and, consequently, leave no justification for requiring discriminatory exemptions.”<sup>179</sup> Brown points out that this statement calls for an educational approach that effectively excludes religious practices and teaching from public schools.<sup>180</sup> Freedom of religion in public schools becomes *freedom from* religion, which, as a corollary of the logic employed in *Zylberberg*, means that religion’s place is in the private lives of the students and their families. In his analysis of this judgment, Brown concludes that, “In matters of public education, the Ontario courts are saying, the *Charter* requires a secularism which is closed to any accommodation of religious beliefs.”<sup>181</sup>

The courts are aiming at neutrality. However, removing religion from the public domain is not neutral. Janet Epp Buckingham notes that “removal of religion from schools sends a strong message to religious adherents, and to young people in general, that religion is not an important part of daily life.”<sup>182</sup> She goes on further to say, “Religions suffer a loss of function when removed from public life. The privatization of religion sends a message that religion is something that should be hidden.”<sup>183</sup>

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<sup>178</sup> Terri A. Sussel, *Canada’s Legal Revolution*, (Toronto: Emond Montgomery, 1995) 137.

<sup>179</sup> *Zylberberg v. Sudbury Board of Education*, page 25.

<sup>180</sup> David M. Brown, “Freedom From or Freedom For?” 589.

<sup>181</sup> *Ibid.*, 593.

<sup>182</sup> Janet Epp Buckingham, “The Fundamentals of Religious Freedom.” 265.

<sup>183</sup> *Ibid.*

#### 4.2.4 Canadian Civil Liberties Association v. Ontario (Minister of Education)

The Ontario Court of Appeal applied the reasoning they used in *Zylberberg* to a 1990 decision on religious education in the public schools. In *Canadian Civil Liberties Association v. Ontario (Minister of Education)*,<sup>184</sup> the Court deemed a provincial regulation requiring two periods per week of religious education, and the accompanying curriculum employed by the Elgin County Board of Education, in violation of section 2(a) of the *Charter*. The Court ruled that the purpose of the regulation was to indoctrinate students in the Christian faith, and therefore could not withstand *Charter* scrutiny. Further, using the reasoning employed in *Zylberberg*, the Court ruled that opt-out provisions for children and teachers who preferred not to participate in religious education, as well as then-recent efforts to broaden the scope of the religious education curriculum, failed to mitigate the infringement of the appellants' rights.<sup>185</sup>

In their decision, the Court relied upon *Big M* to support the overturning of the provincial regulation on religious education. The Court ruled against the religious education regulation based on its original purpose, independent of any evolution in social circumstances over time. The Court held that the original purpose for the regulation was religious indoctrination. They were not concerned with whether or not the regulation's purpose, or its application, had evolved over time. The Court argued, "Although the social circumstances surrounding the legislation may have changed over time, the

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<sup>184</sup> *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, (1990), 71 O.R. (2d) 341. (Hereinafter referred to as "*Elgin County*")

<sup>185</sup> *Ibid.*, 342.



original purpose has not. Changing circumstances, as Dickson J. pointed out in *Big M...* are relevant only to effects.”<sup>186</sup>

Benjamin Berger argues that the court’s core concern in education and religious freedom cases such as *Zylberberg* and *Elgin County* centres on the principle of personal autonomy. He writes, “Any factor – legal or contextual – that might interfere with the autonomy-based core of religious freedom is suspect in the eyes of contemporary constitutionalism.... The issue is not the separation of church and state *per se*, but a concern for the autonomy of the child.”<sup>187</sup> The court did not argue that autonomy could be ensured only by eliminating religious instruction from the school setting. Janet Epp Buckingham points out, “In the *Elgin County* case, the court gave lengthy advice on how schools should give instruction about religions, not indoctrination in a particular faith.”<sup>188</sup> However, the Ontario government did decide to resolve the issue by eliminating religion from public schools. In order to protect the autonomy of the individual in matters of religious belief, religion was pushed out of the public sphere occupied by the schools.

#### 4.2.5 Chamberlain v. Surrey School District No. 36

The Supreme Court decision in *Chamberlain v. Surrey School District No. 36* reflects the same tendency to relocate religious belief out of the public sphere and in to the private sphere alone. In this case, James Chamberlain, a kindergarten grade-one teacher in Surrey, B.C., sought to introduce three texts depicting same-sex families to his

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<sup>186</sup> Ibid., 358.

<sup>187</sup> Benjamin Berger, “Law’s Religion: Rendering Culture.” 296.

<sup>188</sup> Janet Epp Buckingham, “The Fundamentals of Religious Freedom.” 264.

class reading material. The parents on the school board denied Mr. Chamberlain's request on grounds that the controversial content would result in cognitive dissonance for children of such a young age, that it was age inappropriate, and that such material did not reflect the values of the children's parents. The lower court in British Columbia overturned the decision of the school board on the basis of the B.C. *School Act*, holding that the parents on the board based their decision on their religious beliefs. The schools are *secular* institutions, therefore the board's decision was deemed inappropriate and invalid. The B.C. Court of Appeal upheld the board's right to disallow the texts, disagreeing with the lower court's understanding of the term "secular"<sup>189</sup> and preferring a more inclusive definition of "secular" akin to that proposed by Iain Benson.<sup>190</sup> Mr. Justice Mackenzie, writing for the Court of Appeal, held that "strictly secular" should be understood as pluralist or inclusive in the widest sense.<sup>191</sup> Mackenzie J. argued, "To interpret secular as mandating 'established unbelief' rather than simply opposing 'established belief' would effectively banish religion from the public square."<sup>192</sup>

The decision of the Supreme Court of Canada was interesting as it ruled in favour of Mr. Chamberlain, forcing the school board to re-examine its decision to ban the materials, but at the same time affirmed the religiously inclusive definition of "secular"

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<sup>189</sup> Richard Moon, "Sexual Orientation Equality and Religious Freedom in the Public Schools." 272.

<sup>190</sup> See Iain Benson, "Notes Towards a (Re)Definition of the 'Secular'."

<sup>191</sup> *Chamberlain v. Surrey School District No. 36*, (2000), 191 D.L.R. (4th) 128; [2000] 10 W.W.R. 393; (2000), 26 Admin. L.R. (3d) 297; (2000), 80 B.C.L.R. (3d) 18, at paragraph 33.

<sup>192</sup> *Ibid.*, at paragraph 30.

used by the Court of Appeal.<sup>193</sup> In reference to the B.C. *School Act*, Chief Justice

McLachlin wrote:

The Act recognizes that parents are entitled to play a central role in their children's education. Indeed, the province encourages parents to operate in partnership with public schools and, where they find this difficult, permits them to homeschool their children or send them to private or religious schools where their own values and beliefs may be taught.<sup>194</sup>

This statement highlights the Court's tendency to restrict religious belief in the public sphere in two ways: first, it implies that home-schools and private religious schools are the sole place to teach religious beliefs and values; second, it implies that partnership with public schools must exclude the religious beliefs of the parents if they find the partnership "difficult." Interestingly, the Chief Justice goes on to suggest that the Court is trying to *avoid* the privatization of any beliefs. She writes:

Perhaps, if as submitted before this Court, it is preferable that the development of beliefs relating to religious faith or morality be undertaken exclusively in the private sphere, then perhaps so too should the development of beliefs as to what is or is not appropriate sexual conduct be undertaken in the private sphere, since it is clear that the nature of both kinds of belief, although constitutionally protected, are publicly contested. In my view, however, it is preferable that no constitutionally protected right be forced exclusively into the private sphere. In cases where there is a conflict between public expressions of rights, an accommodation or balance will need to be struck, either by defining the scope of the rights so as to avoid the conflict, or within s. 1 balancing.<sup>195</sup>

In *Chamberlain*, the Chief Justice states both that the Court does not want to force any rights into the private sphere, and that the Court affirms a religiously inclusive definitions of "secular." However, where a right, such as religious freedom, conflicts with other

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<sup>193</sup> Iain Benson, "The Context for Diversity and Accommodation in the Democratic State."

<sup>194</sup> *Chamberlain v. Surrey School District No. 36*, at paragraph 30.

<sup>195</sup> *Ibid.*, paragraph 135.

protected rights in the public sphere, that right must be willing to accommodate other views.

#### 4.2.6 A Dilemma for the Courts

Richard Moon describes the dilemma faced by the courts when dealing with issues of religious freedom in the schools. He writes:

Because the public school system is meant to stand outside religious controversy and encompass all members of the community, whatever their religious beliefs, it is difficult for the Court to accept that the adherents of widely-held religious views cannot serve as teachers. Instead the Court strikes a balance: the individuals are included (can serve as teachers) but their beliefs are not (cannot be manifested in the classroom). The individual must leave her or his religious beliefs about sexual orientation at the entry to the school and must act in accordance with the tolerance/respect values of the civic curriculum. This response is consistent with the familiar contemporary understanding of public secularism, as the exclusion of religion from public life, or the ‘privatization’ of religious commitment.<sup>196</sup>

In his analysis of *Trinity Western University v. British Columbia College of Teachers*<sup>197</sup> – a case in which the Supreme Court ruled on whether graduates of a religious university were eligible to teach in the public school system – Moon attempts to address the question of the appropriate place for religious belief in civic life. In the case of public schools, he suggests the appropriate place is in the private sphere, not in the public institutions; this is seen clearly in the representative education cases explored above.

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<sup>196</sup> Richard Moon, “Sexual Orientation Equality and Religious Freedom in the Public Schools.” 258.

<sup>197</sup> *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772; (2001), 82 C.R.R. (2d) 189; (2001), 31 Admin. L.R. (3d) 163; (2001), 39 C.H.R.R. 357.

### *4.3 Expansion of Religious Freedom in the Private Sphere*

#### 4.3.1 *Syndicat Northcrest v. Amselem*

The courts' tendency to privatize religious belief is clearly illustrated in the 2004 case, *Syndicat Northcrest v. Amselem*. In *Amselem*, the Supreme Court ruled in favour of a group of Orthodox Jews who claimed that their religious rights were infringed upon by the terms and conditions of the condo building they occupied. The Supreme Court made the bold step of defining the "essence" of religion as consisting in "deeply held personal convictions." The decision of the majority, delivered by Justice Iacobucci, states:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>198</sup>

Despite a reference to the "comprehensive" nature of religious "faith and worship," this definition also emphasizes the essentially *individual* and *personal* nature of religion. In this particular case, the testimony of experts in the Jewish religion was not considered relevant because of "private nature" of belief. As Janet Epp Buckingham points out, "The judgment affirms the individual nature of freedom of religion and seems to leave no place for religious institutions or communities in determining religious practices for their

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<sup>198</sup> *Syndicat Northcrest v. Amselem*, at paragraph 39.

adherents.”<sup>199</sup> Justice Iacobucci makes this explicit when he elaborates on the process employed by the Court to determine whether an issue falls under the protection of Section 2(a) of the *Charter*. He writes:

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.<sup>200</sup>

The requirements spelled out by Justice Iacobucci are significant in that they are all distinctly personal and subjective in nature. The judgment results in a relegation of religious belief to the private sphere. The first requirement given above, for example, serves to disconnect religious belief from any authority or community beyond that subjectively affirmed by the individual. Bruce Ryder rightly points out that “subjective” does not necessary mean “private.” Justice Iacobucci affirms that religious practice may occur in public. Ryder writes, “In [Iacobucci’s] analysis, religion is not a purely private matter; it may be manifested in public view, and it may require accommodation from others.”<sup>201</sup> However, the public expression of religion is defensible only insofar as they are displays of essential private and subjective convictions that make little or no impact on the public sphere. Yet the court also maintains that religion is a “cultural” phenomenon and central to cultural identity. Richard Moon critiques the Court’s

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<sup>199</sup> Janet Epp Buckingham, “The Fundamentals of Religious Freedom.” 261.

<sup>200</sup> *Syndicat Northcrest v. Amselem*, at paragraph 56.

<sup>201</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship,” 92.

approach in *Amselem*, arguing the Court’s attempt to balance a notion of religion that is fundamentally subjective with a notion of religion as a phenomenon rooted in cultural identity is unsustainable.<sup>202</sup> Moon argues “any attempt by the courts to find a middle ground, to treat religion as both choice and identity...may appear unprincipled, even incoherent.”<sup>203</sup>

By classifying religious belief as a subjective matter of private citizens, the courts contend that they are liberating religious freedom from restrictive confessional definitions and allow for a more “generous” and “expansive” interpretation of Section 2(a). Iacobucci J. found that the “trial judge and the majority of the Court of Appeal took, with respect, an unduly restrictive view of freedom of religion,”<sup>204</sup> which was remedied by employing the “religious freedom analysis” described above. The majority in *Amselem* saw their ruling as one that would expand religious freedom. By relegating religious belief to the interior sphere of the personal, the Court sought to create a more inclusive and pliable basis for the application of Section 2(a). Iacobucci J. goes on to say: “This court has long articulated an expansive definition of religion, which revolves around the notion of personal choice and individual autonomy and freedom.”<sup>205</sup> For the majority, expanding religious freedom is accomplished by defining religion as any sincerely held, deep, personal belief.

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<sup>202</sup> Richard Moon, “Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*.” *Supreme Court Law Review* 29 (2005), 219.

<sup>203</sup> *Ibid.*, 220.

<sup>204</sup> *Ibid.*, at paragraph 37.

<sup>205</sup> *Ibid.*, at paragraph 39.

#### 4.3.2 Multani v. Commission scolaire Marguerite-Bourgeoys

The Supreme Court ruling in *Multani*, examined in Chapter 2, also serves as an example of the expansion of freedom of religion in the private sphere. The Court held that a blanket prohibition against carrying a *kirpan* in school violated the religious freedom rights of Gurbaj Multani. Instead, conditions such as those described by the Quebec Superior Court could be set to accommodate the requirements of Mr. Multani's religious belief while respecting safety obligations. Bruce Ryder suggests the Supreme Court's decision in *Multani* followed the same principles the Court applied in *Amselem*. In both cases, the right of the religious individual to maintain and express his religious belief was upheld.<sup>206</sup> What is interesting about *Multani*, is *where* that right was upheld.

Like the education cases explored above, the setting for *Multani* was a public school. However, unlike the other cases, the Court's decision in *Multani* attempted to expand, rather than restrict, freedom of religion. The education cases explored above dealt with religious freedom and expression in the public sphere. *Multani*, despite sharing a similar setting, followed along the same lines as *Amselem* insofar as it dealt with religious freedom as an expression of subjective religious belief and practice. The ruling of the Superior Court, which was upheld by the Supreme Court, set out the conditions under which Mr. Multani could carry his *kirpan* on school grounds.

Summarizing these conditions, Shaheen Shariff writes,

the Quebec Superior Court (2002) placed added restrictions but allowed Gurbaj to wear the kirpan to school provided that he wore it underneath his clothes, that it be contained in a scabbard made of wood, not metal, that it be wrapped in a secure manner, that he allow school staff members to inspect it at any time, that

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<sup>206</sup> Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship," 104.



he would not be allowed to withdraw it from its scabbard at any time, and that he would immediately report its loss to school authorities. His failure to meet any of these conditions would cost him the right to wear the kirpan to school.<sup>207</sup>

In essence, the Superior Court upheld Mr. Multani's right to the accommodation of his religious beliefs and practices provided he kept particular expressions of those beliefs and practices private while at school. Despite the fact the setting of the case was the public sphere, the decision has the effect of expanding freedom of religion while reinforcing the principle of the private or subjective nature of religion.

#### 4.3.3 Attempting Inclusion

The trend to privatize religious belief is an effort to expand the legal definition of religion in the hopes of fostering a far more inclusive right to religious freedom. It is not difficult to see the benefits of this effort for the individual believer, provided one accepts the definition of religion articulated by the majority in *Amselem*. If an individual considers himself to be religious, but does not have ties to a formal religious institution, he may still receive the respect and protection of the Canadian courts afforded to more 'classic' religious believers who adhere to more mainstream confessional expressions of Christianity, Judaism, Islam, etc. In commenting on the Court's decision in *Amselem*, Moon identifies two significant determinations of the Court:

First, Iacobucci J. held that freedom of religion under section 3/section 2(a) protects practices that are not part of an established religious belief system. A spiritual practice or belief will fall under the protection of section 3/section 2(a), even though it is entirely personal, and not part of a more widely-held religious belief system. Second, a practice will be protected under section 2(a)/section 3

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<sup>207</sup> Shaheen Shariff, "Balancing Competing Rights." 482-483.

even though it is not regarded as obligatory by the individual claimant. Freedom of religion protects cultural practices that have spiritual significance for the individual, ‘subjectively connecting’ him or her to the divine.<sup>208</sup>

The “subjective” condition is perhaps the most influential aspect of the judgment. Any practice deemed by an individual to be part of their personal religious belief, as long as that belief is sincerely held, is eligible for protection under the *Charter*. The judgment of the Court, Moon argues, “Suggests that religious beliefs/practices are a personal matter and should be protected under the single right to freedom of conscience and religion, because they have been chosen by the individual or because they are the outcome of his or her autonomous judgment.”<sup>209</sup>

In a pluralistic liberal democracy like Canada, such a move by the courts would appear to be a good thing. With myriad religious beliefs, some institutionally centred and others not, an expansive interpretation of Section 2(a) would provide protection for virtually all citizens of the state. If the expansion of religious freedom in the private sphere requires the privatization of religion, one may say, “so be it.” However, restricting religious belief to the private sphere does not necessarily provide an environment in which religions can flourish. Janet Epp Buckingham writes,

One can sum up the state of the law regarding religious freedom as strong protection for individual religious practices where they do not conflict with other rights, and they are not practiced in public or do not require public acknowledgement. Is this privatization of religion, these individual-based protections, sufficient for religious communities? The short answer is no.<sup>210</sup>

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<sup>208</sup> Richard Moon, “Religious Commitment and Identity.” 202.

<sup>209</sup> Ibid.

<sup>210</sup> Janet Epp Buckingham, “The Fundamentals of Religious Freedom.” 270.

In the same vein, Canadian scholar David Novak argues that, “When there is genuine social respect for the religions that members of society have chosen to be part of, we then have true ‘multiculturalism.’”<sup>211</sup> Buckingham’s argument suggests that the privatization of religion is indicative of a lack of what Novak calls “genuine social respect.” In the absence of such social respect, we lack “true multiculturalism.” In considering the merits of expanding religious belief in the private sphere, one must not ignore the effects of that expansion on religious freedom in other spheres of social life.

#### *4.4 Reference re: Same-Sex Marriage*

The conclusions reached in the Supreme Court *Reference re: Same-Sex Marriage* provide an example of the judicial trends examined above. In this constitutional reference, the Court answered four questions, the third of which asks, “Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?”<sup>212</sup> The Court understood the question as asking whether religious officials would be protected from compulsion by the *state* regarding the performance of same-sex marriage ceremonies, and concluded that section 2(a) would provide adequate protection “absent unique circumstances with respect to which [the Court] will not speculate.”<sup>213</sup> This qualifying clause is a curious feature of the reference, especially when viewed alongside the Court’s

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<sup>211</sup> David Novak, *In Defense of Religious Liberty* (Wilmington, DE: ISI Books, 2009), 10.

<sup>212</sup> *Reference re: Same-Sex Marriage*.

<sup>213</sup> *Ibid.*, at paragraph 60.

disclaimer that the protection they refer to applies only to state action, and their belief that “the protection of freedom of religion against private actions is not within the ambit of this question.”<sup>214</sup>

Rather than explicitly defining the protection available to religious officials regarding same-sex marriage, the Court defers the issue to the provinces saying: “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.”<sup>215</sup> While this serves as a complete answer in the context of a constitutional reference, the Court missed the opportunity to give a more robust response to the issue the draft clause sought to address. It seems that, on this point, the Supreme Court did not want to rule on the right of officials to decline participation in a same-sex marriage ceremony for religious reasons. The Court made no move to strengthen the rights of officials acting under a public commission to protection of their religious beliefs, but entrusted this responsibility to the Provinces.<sup>216</sup> This decision was formally issued with the *Reference* in October 2004, one month after the Manitoba Government issued its ultimatum to provincial marriage commissioners, and only weeks before Saskatchewan followed suit. In both cases, officials were given no options for reasonable accommodation of their religious beliefs. Marriage commissioners, as public officials, face a conflict between the freedom of religion rights afforded to them as individuals and their status as public officials. In making its decision

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<sup>214</sup> Ibid., at paragraph 55.

<sup>215</sup> Ibid.

<sup>216</sup> See also: Mary Hurley, “Bill C-38: The Civil Marriage Act”

in the *Reference*, the Supreme Court would have been well aware of the recent actions of some provincial governments; yet the Court made no move to address or protect the religious freedom claims of religious believers working as officials in the public sphere.

#### *4.5 Carving Out Space*

The privatization of religious belief results in a corresponding deflation of the protection of religious freedom rights in the public sphere. While the Court's motive was to create a more expansive definition of religion and to increase the scope of religious protection in the private lives of citizens, its actions have more restrictive implications for the expression of religious belief in the public sphere. How is this shift justified?

In "Freedom of Religion and the Rule of Law: A Canadian Perspective", McLachlin, C.J. describes the law as a comprehensive belief system, not unlike religion. She argues that "the rule of law" makes comprehensive claims upon the self.<sup>217</sup> She goes on to say, "While the rule of law makes total claims upon the self, it is also, in the words of Professor Kahn, 'a way of being in the world that must compete with other forms of social and political perception.' That is, there are other sources of authority, other cultural modes of belief, that make strong claims upon the citizen."<sup>218</sup> Religion is considered one such competing source of authority and belief. The consequence is that the rule of law must cope with religious belief, and vice versa. Issues of law and religious freedom

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<sup>217</sup> Rt. Hon. Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective." in *Recognizing Religion in a Secular Society*, ed. Douglas Farrow, 12-35 (Montreal, QC: McGill-Queen's University Press, 2004).

<sup>218</sup> *Ibid.*, 15.

provide the most obvious examples of the tension between two systems that place total claims on an individual. Coming from the perspective of the rule of law, Chief Justice McLachlin states, “When we inquire into religious freedoms in Canada, therefore, we are exploring one aspect of a theme that suffuses Canadian legal history – the challenge that the law faces when it takes religious freedom seriously.”<sup>219</sup>

The question quickly arises as to how the courts maintain the delicate balance and navigate the challenging territory between the claims of law and religious freedom claims. In a striking comment, the Chief Justice articulates the role the courts play: “The courts are, in effect, called upon to *carve out a space* within the rule of law in which religious commitments and claims to authority – sometimes wholly at odds with legal values and authority – can manifest and flourish.”<sup>220</sup> This picture of *carving out a space* gives insight into the logic behind the trend explored in this chapter. In pushing religious belief to the private sphere, the courts “carve out” a space in which those beliefs can be freely expressed and receive expansive protection under the law. The deflation of religious freedoms in the public sphere, the sphere of law, only serves to reinforce the proper space for religious belief. The tension between the rule of law and religious freedoms is lessened, in the eyes of the courts, as clear boundaries are drawn as to where, “[Religious] claims to authority – sometimes wholly at odds with legal values and authority – can manifest and flourish.” However, Richard Moon suggests that the boundaries are not particularly clear; rather, he calls them “difficult and perhaps incoherent lines” that may only be able to blunt the conflict between belief systems, but

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<sup>219</sup> Ibid., 21.

<sup>220</sup> Ibid., 29. [emphasis mine]

not prevent it altogether.<sup>221</sup> Iain Benson, in response to the Chief Justice's comments, expresses his concern that "the Chief Justice's conception of law asks too much when it views itself as larger than the religious and other conceptions alongside which it must operate."<sup>222</sup>

Addressing the *Charter*, Chief Justice McLachlin goes to say:

The Charter has articulated freedom of religion as one of our society's goods, along with parallel goods guaranteed in other sections. But in addition, case law interpreting the Charter has contributed to and refined this articulation, helping us to understand what we mean by "religious freedom" and what values it protects. In this sense, the Charter awakened a discussion about the purposes and objectives of protecting religious freedom and, in doing so, called upon us all to better articulate our normative commitments.<sup>223</sup>

While Chief Justice McLachlin looks to case law to refine how "freedom of religion" is articulated, the cases examined in this chapter reveal the trajectory of the courts' decisions on matters of religious freedom: the spaces in which religious belief and practice can "manifest and flourish" is in the private sphere or as innocuous and inoffensive manifestations of subjective religious convictions within the public sphere.

#### *4.6 Conclusion*

In an effort to maintain the balance between rule of law and religious freedoms, the Canadian courts have tended to privatize religious belief, deflating the freedom of both religious individuals and the religious institutions to express religious belief in ways that might make a difference in the public sphere. Though the courts' declared intention

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<sup>221</sup> Richard Moon, "Liberty, Neutrality and Inclusion." 573.

<sup>222</sup> Iain Benson, "The Context for Diversity and Accommodation in the Democratic State."

<sup>223</sup> *Ibid.*, 31.

has been to expand the scope of religious freedom protection, this expansion is restricted to the private sphere or to highly curtailed expressions of subjective convictions within the public sphere. Chief Justice Beverley McLachlin believes the courts are called on to “carve out a space” within the rule of law where religious beliefs can flourish and receive protection, but “the rule of law” governs the public sphere.

While the cases discussed in this chapter point towards the tendency of the courts when dealing with religious freedom cases, they also highlight a number of unresolved issues. The courts and lawmakers must grapple with complex tensions: public versus private conceptions of religious freedom; collective religious rights versus individual rights; freedom of religion for individuals with public authority versus private individuals. These issues warrant fulsome discussions of their own, but such a project goes beyond the limited ability of this thesis.

However, these broad trends are important considerations in evaluating the Government of Saskatchewan’s decision to require all civil marriage commissioners to participate in same-sex marriage ceremonies when asked. The rationale behind the policy decision rests on the argument that marriage commissioners are statutory officers who have a responsibility to provide their services to any eligible couples who request them. This argument holds that the obligations of the commissioners *as public officials* are the prime consideration, not the religious beliefs of a commissioner *as an individual*. Case law appears to support this conclusion. In recent years, Canada’s highest court has concluded that freedom of religion deserves expansive protection in the private sphere, but limited protection in public sphere. If religion has any direct impact on the public



sphere apart from relatively innocuous displays of subjective convictions, then the courts step in. Any government considering a policy for certain public officials that may have religious freedom implications would take this into account. In Saskatchewan, the resulting policy appears to align with the courts' logic.

But the courts fail to adequately address the ambiguity that arises from their reasoning: why should the religious rights of citizens suffer serious deflation when they assume a public office for their employment? By taking on such a role, does an individual surrender certain basic human rights that would otherwise be expansively protected? Recent court decisions have tried to balance the rights protected under the *Charter* with the secularity of the state, all while upholding the public-private dichotomy. They do not, however, critically examine the implications of defining religious freedom rights in a way that allows for very different outcomes in the public and private spheres of life.

## Chapter 5: Contemporary Academic Debates

### 5.1 Introduction

The concrete dilemma of the provincial marriage commissioners who have been forced to resign by the Government of Saskatchewan is but one aspect of a larger, on-going debate: how should religious belief and the public sphere interact in a liberal democracy? The Bouchard-Taylor Commission attempts to engage the multilayered complexities this question in its report on accommodation practices in Quebec. As stated earlier, one of the central ambiguities in the Commission's report revolves around the place of religion in the public sphere. The absence of a coherent rationale for specific restrictions on the expressive religious freedom of some public officials, but not others, only serves to underscore the deeper conceptual confusions at play in current debates.

Academics have attempted to address these confusions by constructing models that engage the foundational problems encountered by a liberal democracy. John Rawls is recognized as one of the most influential political philosophers among contemporary academics. Following his first major work, *A Theory of Justice*,<sup>224</sup> Rawls revised his view of liberal theory, presenting it in his more recent work, *Political Liberalism*.<sup>225</sup> His model of public reason will serve as the starting point in this chapter for examining the contemporary academic debates over the place of religion in the public sphere. Critical

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<sup>224</sup> John Rawls, *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971)

<sup>225</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005)

responses to Rawls' theory will be examined in an effort to address the challenge of religious diversity in a liberal democracy.

## 5.2 Religion in Political Discourse

### 5.2.1 John Rawls

In his watershed study, *Political Liberalism*, John Rawls attempts to address one pivotal question: “How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”<sup>226</sup> This marks a departure from his earlier work, *A Theory of Justice*, in which he attempts to set out a theory of the social contract that, as Samuel Freeman describes, assumes “everyone in a well-ordered society of justice as fairness would find it rational to develop and exercise their capacities for justice in order to achieve the good of social union and realize their nature as free and equal autonomous moral beings.”<sup>227</sup> Faced with concerns about the “unrealistic idea of a well-ordered society as it appears in *Theory*,”<sup>228</sup> Rawls acknowledges that a pluralistic, democratic society will contain a plurality of reasonable systems of belief that are inherently incompatible. With this in mind, Rawls asks, “How do you see religion and

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<sup>226</sup> John Rawls, *Political Liberalism*, 4.

<sup>227</sup> Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (New York: Oxford University Press, 2007), 217.

<sup>228</sup> John Rawls, *Political Liberalism*, xix.

comprehensive secular doctrines as compatible with and supportive of the basic institutions of a constitutional regime?”<sup>229</sup>

According to Rawls, every citizen maintains a “comprehensive doctrine.” In an interview with *Commonweal* magazine, Rawls defines this concept:

A comprehensive doctrine, either religious or secular, aspires to cover all of life. I mean, if it's a religious doctrine, it talks about our relation to God and the universe; it has an ordering of all the virtues, not only political virtues but moral virtues as well, including the virtues of private life, and the rest. Now we may feel philosophically that it doesn't really cover everything, but it aims to cover everything, and a secular doctrine does also.<sup>230</sup>

Liberal democracies should provide space for all “reasonable” comprehensive doctrines.

Rawls outlines three main features of a reasonable doctrine: it is an exercise of theoretical reason, it is an exercise of practical reason, and it evolves slowly given sufficient reason to do so.<sup>231</sup> A reasonable doctrine is an exercise of theoretical reason as it “covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner.”<sup>232</sup> It is an exercise of practical reason when it judges and balances values according to their significance.<sup>233</sup> For Rawls, “all reasonable doctrines affirm [a constitutional democratic society] with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion.”<sup>234</sup> Any comprehensive doctrine that is unable to support

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<sup>229</sup> Bernard G. Prusak, “Politics, religion & the public good.” *Commonweal* 125/16 (1998): 13.

<sup>230</sup> Ibid.

<sup>231</sup> John Rawls, *Political Liberalism*, 59.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> John Rawls, “The Idea of Public Reason Revisited” *University of Chicago Law Review* 64 (1997), 801.

such society fails to meet the test of what is “reasonable.”<sup>235</sup> Rawls argues that the major world religions provide examples of reasonable comprehensive doctrines.

How, then, does a pluralistic democracy function when its citizens maintain often-opposing reasonable comprehensive doctrines? The answer for Rawls is in the theory of public reason. According to this theory:

three conditions seem to be sufficient for society to be a fair and stable system of cooperation between free and equal citizens who are deeply divided by the reasonable comprehensive doctrines they affirm. First, the basic structure of society is regulated by a political conception of justice; second, this political conception is the focus of an overlapping consensus of reasonable comprehensive doctrines; and third, public discussion, when constitutional essentials and questions of basic justice are at stake, is conducted in terms of the political conception of justice.<sup>236</sup>

Public reason demands that citizens adopt a common political language when engaging in discussions in the public political forum. Rawls divides this forum into three parts consisting of: the discourse of the judiciary, the discourse of government officials, and the discourse of candidates for public office.<sup>237</sup> Public reason applies to these specific political and judicial forums, but not to the lives of private citizens, religious communities, the academy, the media, or other associational dimensions of civil society. In fact, the requirement of public reason does not apply to large sectors of the public sphere. Public reason intends to provide a common language with which citizens who hold diverse comprehensive doctrines can engage in discussions about law, public policy and fundamental constitutional questions.

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<sup>235</sup> See also Chapter 7 of Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy*, for further discussion about Rawls’ definition of “reasonable”.

<sup>236</sup> John Rawls, *Political Liberalism*, 44.

<sup>237</sup> John Rawls, *The Law of Peoples*, Harvard University Press: Cambridge, MA (1999), 134.

According to Rawls, no comprehensive doctrine, secular or religious, can claim superiority in the public forum if the principles of political liberalism and public reason are adhered to. He emphasizes that public reason cannot be biased towards any particular doctrine. In his article, “The Idea of Public Reason Revisited,” Rawls writes, “Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.”<sup>238</sup> He defines the “essentials” of public reason in terms of five key aspects which comprise its structure:

(1) the fundamental political questions to which it applies; (2) the persons to whom it applies (government officials and candidates for public office); (3) its content as given by a family of reasonable political conceptions of justice; (4) the application of these conceptions in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; and (5) citizens’ checking that the principles derived from their conceptions of justice satisfy the criterion of reciprocity.<sup>239</sup>

Rawls is careful to make the distinction between the *idea* of public reason, as defined by the five features above, and the *ideal* of public reason. For Rawls, the ideal of public reason is reached when public officials “explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable,” and citizens hold public officials to the standard of public reason.<sup>240</sup> Public reason requires citizens and public officials to engage in public

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<sup>238</sup> John Rawls, “The Idea of Public Reason Revisited,” 766.

<sup>239</sup> *Ibid.*, 767.

<sup>240</sup> *Ibid.*, 769.

dialogue using language that expresses political values other citizens might reasonably support.<sup>241</sup>

Critics of public reason argue that Rawls is asking citizens to leave their beliefs at the door when engaging in public political discussions, something they suggest is impossible. Rawls rejects this criticism, claiming that public reason “does not mean that doctrines of faith or nonreligious (secular) doctrines cannot be introduced into political discussion, but rather that citizens introducing them should also provide sufficient grounds in public reason for the political policies that religious or nonreligious doctrines support.”<sup>242</sup> Rather than leaving one’s beliefs at the door, public reason permits their introduction provided arguments grounded in these beliefs are presented on the basis, and in the language of public reason. Rawls explains this “proviso” in more detail. He states:

[A]ny comprehensive doctrine, religious or secular, can be introduced into any political argument at any time, but I argue that people who do this should also present what they believe are public reasons for their argument. So their opinion is no longer just that of one particular party, but an opinion that all members of a society might reasonably agree to, not necessarily that they would agree to. What's important is that people give the kinds of reasons that can be understood and appraised apart from their particular comprehensive doctrines...<sup>243</sup>

The theory strives for neutrality towards all reasonable comprehensive doctrines, which allows the pluralistic liberal democracy to function despite the variety of beliefs contained within it. Rawls’ public reason does not exclude religion from the public sphere, but delineates the role religious belief should play in public discourse. Religious

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<sup>241</sup> Ibid., 773.

<sup>242</sup> John Rawls, *The Law of Peoples*, 125.

<sup>243</sup> Bernard G. Prusak, “Politics, religion & the public good,” 14.

comprehensive doctrines can be introduced into political arguments provided they are accompanied by public reasons that other citizens could reasonably endorse.

### 5.2.2 Robert Audi

Robert Audi advances a concept of *secular reason* as an alternative to Rawls' public reason. According to Audi, any meaningful attempt to address the issue of religion in a pluralistic liberal democracy must pose this critical question to the religious believer: "What should conscientious and morally upright religious citizens in a pluralistic society want in the way of protection of their own freedom and promotion of standards that express respect for citizens regardless of their religious position?"<sup>244</sup> Audi argues that the "conscientious and morally upright" religious citizen should respond to this question by recognizing the principles of secular rationale and the principle of secular motivation.

The principle of secular rationale states that "one has a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support (say for one's vote)."<sup>245</sup> For clarity, he goes on to define what qualifies as a secular reason:

If such a reason is secular, no special religious qualifications are needed to understand it; and if it is adequate, any appropriately educated person can understand it; and if it is an adequate reason for law or public policy, then either it or something it clearly implies will at least normally be intelligible to a normal adult with a good high school education.<sup>246</sup>

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<sup>244</sup> Robert Audi, *Religious Commitment and Secular Reason*, 84.

<sup>245</sup> *Ibid.*, 87.

<sup>246</sup> *Ibid.*, 90.



Thus far, Audi's model does not sound materially different from Rawls' public reason.

The second principle of secular motivation, however, makes the difference clear. Going beyond simply requiring citizens to engage in political discourse using a common political language to express a public policy, Audi writes:

I propose, then, a *principle of secular motivation*, which adds a motivational condition to the rationale principle. It says that one has a (prima facie) obligation to abstain from advocacy or support of a law or public policy that restricts human conduct, unless in advocating or supporting it one is sufficiently *motivated* by (normatively) adequate secular reason.<sup>247</sup>

Audi's secular reason requires citizens to not only present their political arguments in terms of "secular rationale" but also to be motivated to do so by secular reasons. Critics suggest that this principle essentially requires the individual to abandon his or her comprehensive religious beliefs to participate in the public forum. Whereas Rawls' overlapping consensus is satisfied with a plurality of doctrines agreeing on the basis of their common commitments to liberal political principles, Audi's secular reason requires uniformity in "secular" motivation. However, motivation is inextricably bound up with the aspirational dimensions of an individual's comprehensive doctrine. If that comprehensive doctrine happens to be religious in nature, then the individual will be virtually unable to satisfy the principle of secular motivation.

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<sup>247</sup> Ibid., 96.

### 5.2.3 Jonathan Chaplin

Jonathan Chaplin presents a third model for addressing public political discourse. Chaplin suggests the constraints proposed by Rawls and Audi fundamentally misunderstand what “secular” and “public” mean and are ultimately discriminatory.<sup>248</sup> In contrast, Chaplin argues for a place for religiously based arguments in the public sphere. These he defines as “political arguments whose grounding in religious beliefs is made clear by those advancing them.”<sup>249</sup> Chaplin’s approach dismisses both the principle of secular rationale and the principle of secular motivation. He argues that while Audi’s model assumes that “secular reasons” should be accepted by all “conscientious and morally upright” citizens, nevertheless these reasons can be as exclusive and ideological as religious convictions. Further, Chaplin argues that “religious citizens may not actually be *able* to isolate a reason from their stock of potential reasons for a policy *as secular*”<sup>250</sup> let alone find their motivation in a “secular reason.”

Rawls’ public reason fares better according to Chaplin’s assessment, but “still has the effect of preventing religious believers from articulating with full integrity what the source of their political views are.”<sup>251</sup> Requiring citizens to mute their religious discourse in order to adopt a common political language when engaging the public forum masks the foundational dimensions of their political views. As an alternative, Chaplin proposes distinguishing between what he calls “confessional discourse” and “political discourse.”

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<sup>248</sup> Jonathan Chaplin, “Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy,” *University of British Columbia Law Review* 33 (2000), 617-646.

<sup>249</sup> *Ibid.*, 620.

<sup>250</sup> *Ibid.*, 632.

<sup>251</sup> *Ibid.*, 638.

The former argues for comprehensive doctrines while the latter addresses itself to law and public policy. Confessional discourse is invoked when a citizen speaks publicly from their beliefs, be they “religious” or “secular” beliefs. To illustrate, Chaplin suggests a statement such as “human life is sacred” is confessional by nature and may be legitimately used in political discussions.<sup>252</sup> That said, Chaplin argues that the citizen making such a statement has spoken “confessionally,” but must still speak “politically” to address what policy implications flow from it. He makes clear that he is not simply renaming the religious/secular dichotomy, but is instead creating categories that permit both religious and secular engagement. In his model, Chaplin suggests that “political discourse need not be construed as necessarily ‘secular’ in the sense of devoid of religion; rather such discourse can quite legitimately be premised on confessional commitments without in any way being rendered unsuitable for use in supporting a law or public policy.”<sup>253</sup>

Richard Moon argues in support of some of the principles behind Chaplin’s model. Moon notes that admitting religious values into public debate only if they are accompanied by secular analogues carries a bias towards the Christian religious values that have historically shaped Western society.<sup>254</sup> Instead, Moon believes that political dialogue must be possible provided we “assume that others hold opinions for reasons that we can understand, even if we do not find their reasons convincing.”<sup>255</sup>

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<sup>252</sup> Ibid., 642.

<sup>253</sup> Ibid., 643.

<sup>254</sup> Richard Moon, “Liberty, Neutrality, and Inclusion.” 572.

<sup>255</sup> Ibid.

Chaplin does place conditions on the use of confessional discourse and political discourse. When drafting policy or issuing a legal decision, judges and legislators must be careful to use political, and not confessional, discourse.<sup>256</sup> Confessional discourse has a legitimate place in political debate, but not in the products of governments or courts. Citizens may speak using the language of their comprehensive doctrines, but the voice of the government or judiciary must speak in terms of the public interest and refrain from using the language of any one comprehensive doctrine.

#### 5.2.4 Significance for Saskatchewan's Marriage Commissioner Policy

Audi, Rawls, and Chaplin take up different positions along the spectrum of opinion regarding the role of religion in political discourse and the public sphere. While none of these speakers addresses specifically the issue of whether a provincial marriage commissioner should be permitted to decline participation in a same-sex marriage ceremony on religious grounds, they propose models for how religion should be allowed to engage the public forum broadly. As a result, we can only speculate as to how each would evaluate the policy adopted by the Government of Saskatchewan. Nevertheless, certain assumptions seem evident.

Since Audi argues that citizens must engage public policy discussions with secular rationale for crafting their arguments and secular motivation for advancing those arguments, he likely would reject the suggestion that civil marriage commissioners should be accommodated to decline participation in same-sex ceremonies because of

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<sup>256</sup> Jonathan Chaplin, "Beyond Liberal Restraint" 643.

their religious beliefs. In the complaints made before the Human Rights Commission, the marriage commissioners in question were clearly motivated by their religious beliefs. Even if they employ “secular rationale” to argue that freedom of religion rights warrant an accommodation policy, Audi’s model does not accept those reasons because they are religiously motivated.

Rawls’ public reason would accept the arguments provided they employ a common political language founded in the principle of overlapping consensus. That is not to say he would agree with the arguments, but if they are communicated according to the rules set out by public reason, they are acceptable entries in the political discussion. For Chaplin, there is no difficulty whatsoever with advancing arguments in favour of a right to decline, even if those arguments themselves are rooted in a religious comprehensive doctrine. The confessional commitments of the marriage commissioner can be explicitly set out in such a case.

Although these speakers do not address the civil marriage commissioner issue specifically, they present models of how religion should interact with the public sphere generally. To fully evaluate questions of freedom of religion in the lives of public officials, the broader question of the role of religion in a liberal democracy must be engaged.

### *5.3 Liberalism, Secularism, and Religion*

The underlying rationale for the marriage commissioner policy in Saskatchewan, the debate over reasonable accommodation and the approach of the Canadian courts in addressing questions of religious freedom is the assumption that Canada is a “secular nation.” The models put forward by Rawls, Audi, and Chaplin as they seek to define the rules of engagement for religious citizens attempting to enter the political forum of a non-religious country deal with this theme. The decisions of the courts look to “carve out space” for religious belief in Canada’s secular context, and the ruling of the Human Rights Commission in the case involving Orville Nichols held that allowing Mr. Nichols to decline participation in same-sex marriage ceremonies would introduce a religious requirement for a secular civil marriage regime.

Except in a handful of cases, the assumption that Canada must be defined as a secular nation in order to sustain the integrity of our pluralistic society goes unchallenged. Since it stands at the heart of the logic behind the policy adopted by the Government of Saskatchewan, it warrants a critical look. How the “secular” is understood is central to understanding that relationship and the reasoning behind the decision to exclude marriage commissioners with religious convictions preventing participation in same-sex marriages. Two Canadian legal theorists, Benjamin Berger and Iain Benson, have taken up the question of the concept of the secular and its place in law and public policy. In the same vein, Bruce Ryder describes what he calls “the Canadian conception of equal religious citizenship” which rests upon the inclusive approach to religious neutrality put forward by Berger and Benson.

### 5.3.1 Benjamin Berger

Benjamin Berger argues that Canada's constitutional law takes a specific view of religion that ultimately defines how religion is treated. According to its view, religion is considered (a) essentially individual, (b) centrally addressed to autonomy and choice, and (c) private.<sup>257</sup> Berger suggests that Canadian constitutional law "understands" religion through the lens of these principles of liberalism. According to Berger, "Law says 'for *my purposes* religion is the following'; however, in this modest claim is the seed of the larger: 'and if you appear before me, this is the only definition that will attract the recognition of the state.'"<sup>258</sup> This approach towards religion is problematic, as any demand for a stark severance between moral claims and public positions inevitably generates conflicts for the religious conscience. Religious belief is not simply a separate compartment within an individual citizen's psyche, but is a comprehensive doctrine of the whole person, as Rawls puts it. Berger writes:

When religious conscience is properly understood as a pervasive claim upon the lives of believers, a liberalism that demands the severance of moral claims and political positions and a vision of secularism that requires an a-religious public space are irreconcilable with the freedom of religion accorded by the *Charter*. For this reason, secularism and liberalism must be remoulded to accommodate each other, as well as the demands of religious conscience.<sup>259</sup>

Since religious belief lays such a comprehensive claim upon the life of an individual, it is impossible to ask that individual to leave his or her beliefs at the door when engaging in

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<sup>257</sup> Benjamin Berger, "Law's Religion: Rendering Culture." 283.

<sup>258</sup> *Ibid.*, 312.

<sup>259</sup> Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State." 67.

public roles. To do so misunderstands the nature of religious conscience, restricts the free exercise of religion, or excludes citizens who hold religious beliefs from participation in public life. The latter violates the spirit and intention of the *Charter*.

Berger's solution to this problem is to adopt an understanding of the term secular that does not mean "a-religious," but is instead more inclusive of, and conducive to, pluralism. Secularism as a-religiousness is "understood as an admonition made by the state to its citizens to refrain from entering the public sphere with any religious convictions, principles, or practices in tow."<sup>260</sup> In this view, secularism provides rules of civic engagement for citizens of the state, but is problematic for a country like Canada, which values pluralism and multiculturalism. According to Berger, "If the Canadian state encouraged the maintenance of religious and cultural values, but excluded them from participation in the public debate," as the theory of a-religious secularism would have it, this would result in "a very shallow brand of multiculturalism."<sup>261</sup>

Berger's preferred understanding of secularism – pluralistic secularism – creates "a common language of civic values that all moral visions – religious and otherwise – must master in order to assume a place in the public sphere."<sup>262</sup> This common language is essential for balancing religious conscience and liberal democracy. The values identified by Berger are then linked to the *Charter* values referenced by Canadian courts, such as human dignity, autonomy, and security.<sup>263</sup> In his analysis of religious freedom jurisprudence, Berger suggests that the courts assess religious positions and practices

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<sup>260</sup> Ibid., 49.

<sup>261</sup> Ibid., 50.

<sup>262</sup> Ibid., 52.

<sup>263</sup> Ibid., 53.



against Canadian civic values to determine their permissibility in Canadian law and, in doing so, reconcile disparate beliefs and encourage a pluralistic society.<sup>264</sup> Berger uses the Supreme Court's decision in *Big M. Drug Mart* as an example. He states, "The value-based positions at odds in this case were discussed using the language of freedom, public safety, order, health, and most significantly, human dignity. It is this set of values that inform the civic canopy in Canada, and to the extent that the *Lord's Day Act* was dissonant with these visions of the good, the legislation was struck down."<sup>265</sup> *Big M*, Berger argues, became the pattern followed by Canadian courts when dealing with religion. Civic values serve as the ideal against which other value positions, religious or non-religious, are measured and judged.<sup>266</sup>

Berger's vision of secularism attempts to include fully all comprehensive doctrines in the public sphere, provided they engage public policy and debate using the language of civic values. This model closely mirrors that of Rawls' public reason, but seeks to address the problematic privatization of religion in a way public reason does not. Berger suggests that Rawls' public reason and overlapping consensus are based on the idea that the common core of human action is reason, whereas Berger identifies "competing conceptions of human agency – one based on reason, one upon faith."<sup>267</sup> Berger's vision of secularism employs the language of *values*, versus the language of *reason*, which, he suggests, provides better platform for public discourse for both religious and non-religious belief systems.

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<sup>264</sup> Ibid., 54.

<sup>265</sup> Ibid., 57.

<sup>266</sup> Ibid., 67.

<sup>267</sup> Ibid., 48.

### 5.3.2 Iain Benson

Iain Benson takes a different tack in evaluating secularism in liberal democracies. Benson attempts to break down the dichotomy between religious and secular, believers and unbelievers. In popular discourse, the term “believers” applies to those who adhere to a particular religion, and “unbelievers” to those who do not. Benson suggests that any division between “believers” and “unbelievers” is erroneous since “everyone is a believer, the question is: ‘in what?’”<sup>268</sup> He goes on to say, “Thus, every citizen is a believer and a member of various, perhaps overlapping ‘faith communities’ ... These various belief and faith communities may be based upon religious or non-religious commitments.”<sup>269</sup> In that sense, there is little difference between the religious and secular, as the secular itself is informed by beliefs and values just like religion. Benson writes, “The term ‘secular’ has come to mean a realm that is neutral or, more precisely, ‘religion-free.’ Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error.”<sup>270</sup>

In the same vein as Berger, Benson argues that the term “secular” should be read as religiously *inclusive* rather than *exclusive*. Tracing the history of the term “secularism,” he highlights its ideological nature, showing that it is not dissimilar to

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<sup>268</sup> Iain Benson, “The Context for Diversity and Accommodation in the Democratic State.”

<sup>269</sup> Ibid.

<sup>270</sup> Iain Benson, “Notes Towards a (Re)Definition of the ‘Secular’.” 520.

religion. Since the courts have often called Canada a secular state, the central question remains: what kind of “secular state” is it?

If Canada is secular in the exclusive sense, religion has no place in public discourse, decision-making, or influencing the decisions of public officials. According to Benson, however, that leaves one ideology accepted by the state: secularism. If one agrees that secularism is a belief system unto itself, then Canada would have a *de facto* state religion. However, if Canada is secular in the inclusive sense, various religious beliefs have a place in the public sphere, but no belief system is privileged over others. Using this understanding, “A secular state is one that is not run or directed by a Church or any particular religion.”<sup>271</sup>

Regarding the definition of “secularism,” Benson writes, “Secularism is, in fact, a particular ideology with a particular history, content, and strategy—an anti-religious strategy. Virtually everywhere it is used by jurists or commentators, it is undefined and unrecognized as an anti-religious ideology.”<sup>272</sup> He bristles against the religious-secular dichotomy, preferring to set up the term “religious” against its obvious opposite, “non-religious.” The use of these terms “is simpler and less ideologically loaded than continuing to employ terms such as ‘secular’ and ‘secularism,’ which often contain conceptions foreign to our intentions in using them or that bury anti-religious categorizations often implicit in their use.”<sup>273</sup>

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<sup>271</sup> Ibid., 7.

<sup>272</sup> Ibid., 154.

<sup>273</sup> Ibid., 155.

The arguments presented by Berger and Benson pose a significant challenge to the ongoing debate about the place of religion in lives of public officials, and specifically for the discussion about the marriage commissioner policy adopted by the Government of Saskatchewan. Since that policy is premised upon the assumption that Canada is a secular nation, it follows that religious conviction of its public officials must be excluded from any public activities. Therefore, understanding “secular” to be another comprehensive belief system alongside and identical to religious belief systems undercuts the rationale behind the policy. Benson would argue that the policy is simply one of many enforcing a state religion. Berger would criticize the suggestion that religious citizens who take up public posts can leave their values, beliefs and principles at the door. Both writers advocate an inclusive understanding of “secular” that creates space for pluralism over any exclusive understanding meant to sanitize the public sphere of belief systems other than secularism. Under such an understanding, religious individuals are entitled to the equal rights and privileges of citizenship, as are non-religious individuals.

### 5.3.3 Bruce Ryder

Bruce Ryder explores the “Canadian conception of equal religious citizenship” and finds that Canada takes “a more robust approach to equal religious citizenship than can be found in the human rights jurisprudence of many other countries.”<sup>274</sup> Under current Canadian laws, religious citizens find a greater degree of inclusion than they would in countries like France or Turkey who define equal religious citizenship in

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<sup>274</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” 87.

exclusive, secular terms. Ryder suggests that, in recent decades, Canada has expanded religious freedoms to include freedom of belief, worship, dissemination, *and practice*.<sup>275</sup> Such protection goes farther than many other developed countries allow. However, Ryder warns against arrogance on the part of Canadians, suggesting that some recent legal controversies have seen religious rights “too readily restricted on the ground that they clash, or are perceived to clash, with the equality rights of others or public security concerns.”<sup>276</sup>

As an example of such a controversy, Ryder cites the case of provincial marriage commissioners who were denied accommodation if their religious beliefs proscribed participation in same-sex marriage. Summarizing the arguments posited by Lafferty, Ryder states,

Public employees are not required to leave their faith at home simply because they are working for the “secular” state. While litigation in relation to the marriage commissioner issue is ongoing, the fact that several human rights commissions found that marriage commissioners’ complaints of religious discrimination were not even worthy of a tribunal hearing is clear evidence of the fragility of the Canadian conception of religious citizenship in the current context.<sup>277</sup>

He does make an important qualification: only marriage commissioners appointed *before* same-sex marriage was legalized need be accommodated; governments may lawfully restrict the hiring of new marriage commissioners to persons who are willing to solemnize same-sex marriages.<sup>278</sup> Ryder attempts to argue that the decision to override religious freedoms must not be made lightly; however, he seems to undermine the

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<sup>275</sup> Ibid., 91.

<sup>276</sup> Ibid., 100.

<sup>277</sup> Ibid., 102.

<sup>278</sup> Ibid.

strength of his argument by implying, as he does in the case of marriage commissioners, that religious freedom must be protected in one instance, but is justifiably overridden in another, similar instance. Still, he sees the existing Canadian conception of equal religious citizenship as a jewel to be guarded and any “downward pressure on religious rights is... a threat to our model of multicultural citizenship.”<sup>279</sup>

Ryder would agree with Benson and Berger that an inclusive approach to religious neutrality is the only option for sustainable pluralism. In an earlier work, he distinguishes Canada’s approach to religious neutrality from that of the United States. While both the Canadian and American constitutions require state neutrality *between religions*, the American constitution demands state neutrality *about religion* whereas Canada’s constitution does not.<sup>280</sup> According to Ryder, “The Canadian position appears to be that the state can aid religion so long as it does so in a manner that respects the principle of neutrality or even-handedness between religions,”<sup>281</sup> making Canada better suited to equal religious citizenship than the United States. He argues that this must be proactively protected and “the pressures to adopt policies that force people of faith to choose between adherence to their faith and full membership in Canadian society need to be vigorously resisted in the current context.”<sup>282</sup>

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<sup>279</sup> Ibid., 107.

<sup>280</sup> Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion.” *Supreme Court Law Review* 29 (2d) (2005): 161-199.

<sup>281</sup> Ibid., 175.

<sup>282</sup> Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship,” 107.

## *5.4 Conclusion*

Benjamin Berger captures well the central question of the debate over the role of religion in the lives of public officials: “This is the root of the problem of religious freedom in a liberal state – how far can the individual be allowed to exercise the freedom that liberalism wants to accord him?”<sup>283</sup> The answer to that question depends on the view one takes towards religion’s interaction with political discourse and how one defines the relationship between the religious and the secular. Is Canada a “secular” nation, and if so, what does that mean? How does a citizen who holds a religious comprehensive belief system engage the non-religious state? Can she assume the post of public official and allow her beliefs to continue to inform her thoughts and actions, or must they be shed before donning the mantle of public official?

Thinkers such as Rawls, Chaplin, and Berger would suggest it is impossible to ask religious citizens to leave their beliefs at the door of the public office. At the same time, they would all agree that there must be rules of engagement for every individual entering the public forum to guard both the impartiality of the state towards a myriad of belief systems as well as the pluralistic environment that allows those belief systems to exist and grow alongside one another. Benson argues that the state must view secularism as the belief system it is and ensure it is treated in the same manner as any other, even those that are religious. Bruce Ryder praises the Canadian conception of equal religious

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<sup>283</sup> Benjamin Berger, “The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State.” 46.

citizenship, but warns of its fragility and the threat posed by recent legal developments, including those pertaining to civil marriage commissioners.

In the specific case of civil marriage commissioners in Saskatchewan, a number of critical questions surface. The Government of Saskatchewan adopted the position that allowing marriage commissioners with certain religious convictions to decline participation in same-sex marriage ceremonies would violate government neutrality in religious matters.<sup>284</sup> What specific model did the policymakers adopt to direct what interaction they believe religious belief ought to have with political discourse? Is their approach rightly described as an *exclusionary* form of secularism? If one accepts Benson's argument about the nature of "secularism," one could claim that the Government of Saskatchewan was elevating a specific comprehensive belief system over a religious one. How does the Government of Saskatchewan understand the "secular" nature of the state? Does the province's policy run contrary to the Canadian conception of equal citizenship described by Ryder?

These and other questions warrant studies of their own, perhaps, but they serve to highlight the complex and contested assumptions behind the marriage commissioner policy adopted by the province. The arguments of the larger academic debate over the interplay between religion and the state are frequently evident in the policy decisions pertaining to specific situations. When analysing any specific situation, the larger debate serves to illuminate the background perspectives that are typically taken for granted. There is no evidence that, when issuing their final policy decision, the Government of

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<sup>284</sup> Attorney General for Saskatchewan, "Brief of Law," at section 2.



Saskatchewan had meaningfully acknowledged and critically engaged the larger discussion in order to give reasoned account of the perspective implicit in their policy.

Based on the rationale provided by the province, one thing is clear: the Government of Saskatchewan does not believe religious belief should have a vocal role in policy discussions. In the lives of its public officials, the province adopted a policy that restricts religious belief to the realm of the private alone and prohibits some religious citizens from continuing in certain public roles. In the case of civil marriage commissioners, religious convictions must not be publicly manifest in word or deed.

## Chapter 6: Conclusion

Determining the role of religion in society and the public forum continues to be one of the critical challenges for liberal democracies. Canada, as a pluralistic and multicultural nation, is not exempt from this challenge and will continue to wrestle with questions about how religious belief should interact with the public sphere. While Canada has not constitutionally entrenched the separation of church and state, judicial interpretation and public policy have accepted an *implicit* separation.

The Canadian courts emphasize the secularity of the public sphere in an effort to create common ground for a society with diverse systems of belief. The question then remains: What happens when a religious individual assumes a public role? What place does religious belief or its expression have in the life of a public official? In an attempt to comment on the larger question, this work has focused specifically on one group of public officials caught between the quest to maintain a particular vision of secularity and the commitment to protect and promote religious freedom rights enshrined in the *Charter*.

A handful of civil marriage commissioners in the Province of Saskatchewan found themselves in the middle of this crossfire. These individuals were appointed by the Government of Saskatchewan to solemnize civil marriages in the province according to the *Marriage Act, 1995*. Following a decision of the Court of Queen's Bench deeming the opposite-sex requirement for civil marriage to be discriminatory, the government

issued letters informing the marriage commissioners that full participation in any requests to perform same-sex marriages was mandatory. Officials were expected to comply with the requirement or else immediately resign their commission. This policy raises a number of critical questions: How do these measures impact the religious freedom rights of individual marriage commissioners if their religious beliefs forbid their participation in same-sex marriages? Should the provincial government accommodate marriage commissioners who refuse to solemnize same-sex marriages because of sincerely held religious convictions? The answers to these questions speak to the larger issue at hand: What place does religious belief, or its expression, have in the life of a public official?

I have examined four key issues in an attempt to evaluate the marriage commissioner policy and the questions that stem from it: reasonable accommodation, the policy development process undertaken by the province of Saskatchewan, the judicial trend to privatize religious freedom, and the contemporary academic debate over the place of religion in the public sphere.

The first key issue is reasonable accommodation, its history and its contemporary application in Canada. In recent years, Canadian courts have applied accommodation principles when deciding cases outside of a labour context. This deviation from its roots in American labour statutes began an evolution in how reasonable accommodation was viewed by Canadian society. As the term reasonable accommodation moved into the sphere of popular discourse, it lost its distinct connection to the labour sphere from which it originated. Furthermore, while the courts traditionally employed established tests and criteria to determine what constituted a “reasonable” accommodation in the labour

context, those tools are not transferable to the social context in which the principles are now being applied.

This evolution in the understanding and application of reasonable accommodation proved to be problematic for marriage commissioners in Saskatchewan for, while some commissioners sought redress based on workplace accommodation, the province applied arguments against it that were rooted in a political stance based on a more imprecise concept of *social* accommodation. Had the matter been addressed using workplace accommodation, the resultant policy decisions would have looked quite different.

The second key issue examined was the process employed by the Government of Saskatchewan in determining the policy for civil marriage commissioners. In developing their policy, the Government relied upon legal analyses of the policies of other provinces and based their policy rationale upon a particular definition of what exactly a marriage commissioner is. Saskatchewan policymakers argue that commissioners are not employees, but statutory officers, thus relieving the province of any obligation to accommodate on the grounds of religious freedom. The Saskatchewan Human Rights tribunal agrees with this distinction, though it is unclear whether there is any substantial difference between a statutory officer appointed to perform a job, and the common understanding of what constitutes an employee. The Government of Saskatchewan established a policy founded upon a clear distinction between private citizens and public officials. The former are entitled to receive government services in a manner that respects the rights enshrined in the *Charter*. The latter, including civil marriage commissioners, have no such entitlement and are responsible for ensuring government

services are delivered to all members of the public in an equitable way irrespective of any religious beliefs that official holds.

The policy reflects the third key issue examined: the Canadian judicial trend to expand religious freedom protection in the private sphere at the expense of its protection in the public sphere. In an effort to maintain the balance between rule of law and religious freedoms, the courts have deflated religious freedom protection in the public sphere, as seen in cases involving public schools, government bodies, and public officials. Chief Justice Beverley McLachlin suggests the courts are working to “carve out a space” within the rule of law where religious beliefs can flourish and receive protection, but the case law suggests this space is specifically located away from the public forum or within carefully closeted spaces for subjective convictions within the public sphere. The marriage commissioner policy adopted by the Government of Saskatchewan seems to align with this trend, holding that the obligations of the commissioners *as public officials* are the sole consideration, not the religious beliefs of a commissioner *as an individual*. Key aspects of religious freedom seem to dissipate when one moves from the private to the public sphere.

Underpinning the policy decision of the Saskatchewan government and the trend of the Canadian courts are assumptions about the proper interaction between religious belief and the public sphere of a liberal democracy. The debate over what the proper relationship should be is the fourth key issue examined. The view one takes towards the interaction of religion with political discourse, and how one defines the relationship between the religious and the secular, ultimately dictates one’s perspective on the

appropriate place of religion in the life of a public official. The Government of Saskatchewan is proof of this. Based on the policy adopted by the province, it seems that policymakers see no role for religious belief in political discussion. The province employs a policy that effectively restricts religious belief to the private sphere, and as illustrated in the case of civil marriage commissioners, suggests religious convictions must not be publicly manifest in word or deed in the work lives of public officials.

The policy of the Saskatchewan government regarding the role of provincial marriage commissioners raises the question: How do these measures impact the religious freedom rights of individual marriage commissioners if their religious beliefs forbid their participation in same-sex marriages? The Government of Saskatchewan adopted a policy that requires public officials to refrain from expressing their religious beliefs in the public sphere and dismisses calls for an accommodation regime. The implication is that, when accepting employment as this type of public official, an individual is not entitled to the same scope of freedom of religion as any other citizen.

I have examined the circumstances surrounding this one group of public officials in an attempt to address the larger question of what place religious belief or its expression has in the life of a public official in Canada. When considered together, the four key factors indicate that the contemporary shift in how reasonable accommodation is understood and applied, in conjunction with the current judicial trend to assign religious belief to the private sphere, confirm the conclusion that the religious rights of private citizens are seriously curtailed when they assume a public role. In a country that places

the utmost importance on multiculturalism, pluralism, and the values of the *Charter*, this curtailment is not insignificant.

Canadian legal scholar David Novak writes, “When there is genuine social respect for the religions that members of society have chosen to be a part of, we then have true ‘multiculturalism.’”<sup>285</sup> The reverse, then, is also true: without genuine social respect for the religions that members of society have chosen to be a part of, true multiculturalism cannot survive. As a province, Saskatchewan must examine whether their policy requiring public officials to refrain from expressing their religious beliefs in the public sphere violates the *Charter*. As a nation, Canada must carefully and critically examine any curtailment of a fundamental right. Religious belief occupies a central place in the lives of Canadians, shaping their perspectives and informing their actions. Any restriction or diminution of the right to freedom of religion warrants careful consideration. Failing to do so puts at risk the multiculturalism our country so highly values.

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<sup>285</sup> David Novak, *In Defense of Religious Liberty*, 10.

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