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**(WHEN) CAN RELIGIOUS FREEDOM JUSTIFY  
DISCRIMINATION ON THE BASIS OF SEXUAL  
ORIENTATION?—A CANADIAN PERSPECTIVE**

*Noa Mendelsohn Aviv\**

INTRODUCTION

Is it justifiable to ban LGBTQ-positive resources from a public school classroom because of the religious views of some parents?<sup>1</sup> Should bed and breakfast owners be permitted, on the basis of their religious beliefs, to cancel the room reservation of a gay couple?<sup>2</sup> What about a printer whose religious beliefs are in conflict with the material he's being asked to produce for the Gay and Lesbian Archives?<sup>3</sup> And how should we respond to marriage commissioners, acting on behalf of the province, who refuse to perform same-sex marriages as to do so would violate their religious beliefs?<sup>4</sup> These are some of the questions that have faced Canadian courts and human rights tribunals in the past number of years.

The underlying question in these cases asks: in what circumstances, if ever, will a service provider's beliefs justify exempting them from the duty to provide services without

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<sup>1</sup> See *Chamberlain v. Surrey Sch. Dist. No. 36* (2002), 4 S.C.R. 710 (Can.).

<sup>2</sup> See *Eadie v. Riverbend Bed & Breakfast*, 2012 BCHRT 247 (Can.).

<sup>3</sup> See *Ontario Human Rights Comm'n v. Brockie* (2002), 161 O.A.C. 324 (Can. On. Sup. Ct. J.).

<sup>4</sup> See *In re Marriage Comm'rs Appointed under the Marriage Act*, 2011 SCKA 3 (Can.).

discrimination on the basis of sexual orientation or gender identity? The conflict in these “belief-based exemption cases,” as they will be referred to in this Article, arises in the clash between two fundamental and constitutionally protected rights, freedom of religion and equality—a clash that does not readily lend itself to reconciliation.

Conflicts between fundamental rights are never easy, in particular when they elicit highly emotive topics that touch on deeply held fundamental beliefs. And in Canadian law, there is a well-established principle that when it comes to the fundamental rights and freedoms protected in the *Canadian Charter of Rights and Freedoms* (the “*Charter*”),<sup>5</sup> there is no hierarchy: rather than staking out a “trump” right that will always prevail, the courts are required to judge each case in its specific context.<sup>6</sup> This has not been an easy task for the adjudicative bodies charged with deciding the belief-based exemption cases.

This Article provides a critical analysis of four belief-based exemption decisions in Canada and considers what lessons (and cautionary tales) can be learned from them to help resolve future such cases. These lessons include the following: the issues are complex, and as such, cannot be resolved in the abstract. Such cases must be resolved in context on a case-by-case basis in consideration of the evidence before the adjudicating body. A Canadian *Charter* section 1 analysis may be particularly helpful in this analysis. Solutions will likely be difficult, and one fundamental right or the other may be violated. In addition, adjudicators should take heed of their own prejudices and avoid perpetuating in the courtroom the kind of discrimination at play in society. Likewise, courts should be aware of their own biases and recognize the genuine issues and rights at stake on both sides of the conflict. Both equality and freedom of religion are fundamental rights in Canada. For many individuals and groups, their religious convictions underlie a strong belief in the inherent dignity, worth, and equality of all people. For others, their

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<sup>5</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

<sup>6</sup> Reference *re* Same-Sex Marriage, 2004 SCC 79 (Can.) (citing *Dagenais v. Canadian Broad. Corp.* (1994), 120 D.L.R. 4th 12 (Can. S.S.C.)).

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religion includes beliefs about proper conduct and practice and how to interact with those who do not conform to these standards. This may take the form of denying service to LGBTQ individuals, for example, by denying them services. A secular legal system must continue to recognize the *sincerity* of religious beliefs, even if many in our society take issue with the *content* of these beliefs. On the other side, discrimination on the basis of sexual orientation and gender identity is a current as well as a historic reality, and strong equality protections are critically needed. Therefore, another principle that emerges from the case law is the danger of creating sweeping exemptions or ex ante policies that allow, legitimize, and perpetuate such discrimination. Finally, in light of the breadth of potential exemptions and the impact they would have, exemptions that allow service providers to discriminate against LGBTQ people, if allowed at all, should be strictly exceptional.

Given that analyses of belief-based exemptions must be made in context, the scope of this Article will be limited to discrimination on the basis of sexual orientation in the provision of services. In addition, given the case law, the analysis will focus on exemptions grounded in religious beliefs, as opposed to beliefs based on personal convictions and conscience.

Part I provides a brief overview of statutory and constitutional protections for equality and religious freedom in Canadian law. Part II discusses four belief-based exemption cases from Canada, offering a critical analysis of the central issues, while also drawing out useful discussions and conclusions, and pointing out dangers to be avoided in future cases of this nature. Part III summarizes some of the central principles discussed, that may prove helpful in considering belief-based exemptions.

I. LEGAL BACKGROUND: PROTECTION OF FREEDOM OF RELIGION  
AND EQUALITY IN CANADIAN LAW

Both the right to freedom of religion and the right to equality are constitutionally protected in Canada, as both are guaranteed in the *Canadian Charter of Rights and Freedoms*. The *Charter* sets out the fundamental rights and freedoms protected under the

Canadian Constitution (of which the *Charter* is a part).

Section 1 of the *Charter* simultaneously guarantees *Charter* rights whilst also providing for reasonable limits on those rights in limited circumstances, as follows: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>7</sup> This reasonable limits clause allows legislation and government action to limit *Charter* rights, but only if the limit is for a pressing and substantial objective, the means chosen by the law or action are rationally connected to this objective, the limit is minimally impairing, and the limit is proportional in that its deleterious effects do not outweigh its salutary ones.<sup>8</sup> Whether or not a limit is reasonable must be judged in its context.<sup>9</sup>

As to the substantive rights at issue in the belief-based exemption cases: Section 2 of the *Charter* establishes the right to freedom of religion and conscience (among others) as follows:

- (2) Everyone has the following fundamental freedoms:
  - (a) freedom of conscience and religion;
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
  - (c) freedom of peaceful assembly; and
  - (d) freedom of association.<sup>10</sup>

Section 15 of the *Charter* sets out the equality guarantee. Section 15(1) provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin,

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<sup>7</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

<sup>8</sup> *See, e.g.*, *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, para. 186 (Can.).

<sup>9</sup> *See, e.g.*, *Toronto Star Newspapers v. R.*, 2010 SCC 21, para. 3 (Can.).

<sup>10</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2 (U.K.).

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colour, religion, sex, age or mental or physical disability.”<sup>11</sup>

While the *Charter* protects a full array of fundamental rights—such as the rights to life and liberty, freedom of expression, and freedom of association—across Canada, there are also quasi-constitutional provincial, territorial, and federal “human rights” statutes whose focus is the prohibition against discrimination in such areas as housing, employment—and significantly for this Article—the provision of services. In other words, and to avoid semantic confusion, “human rights” in many Canadian jurisdictions is sometimes understood in its legal meaning as the specific right to be free from discrimination. And human rights tribunals are for the most part established pursuant to the aforementioned human rights statutes (not the *Charter*) to adjudicate complaints of discrimination under these statutes.

Thus, belief-based exemption cases may be decided under the *Charter* and resolved through a reasonable limits test under section 1, or they may be decided under the human rights laws.

II. CANADIAN JURISPRUDENCE—FOUR BELIEF-BASED EXEMPTION CASES AND WHAT THEY CAN TEACH US

A. Ontario Human Rights Commission v. Brockie:<sup>12</sup> *Can a Commercial Printer Refuse a Printing Job On the Basis That Its LGBTQ-Positive Content Violates His Belief?*

In April 1996, Mr. Ray Brillinger went into a commercial print shop on behalf of the Canadian Gay and Lesbian Archives (“Archives”) and asked the printer to print blank letterhead and envelopes for the Archives, as well as some business cards for its officers.<sup>13</sup> The text on the materials noted that the Archives “represented [the] interests of ‘gays’ and ‘lesbians’ but said nothing of [its] objects, activities or membership.”<sup>14</sup> Without inquiring into these matters, Mr. Brockie, the president of the

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<sup>11</sup> *Id.* § 15(1).

<sup>12</sup> (2002) 161 O.A.C. 324 (Can. On. Sup. Ct. J.).

<sup>13</sup> *Id.* at para. 6.

<sup>14</sup> *Id.*

print shop (the printer), would not provide this service and later attempted to justify his refusal on the basis of the *Charter* right to freedom of religion.

The evidence before the Ontario Human Rights Board (the “Board”) included Mr. Brockie’s testimony as to his religious beliefs, including a belief that “homosexuality is detestable” and that “providing printing services to [LGBTQ] organizations would be in direct opposition to his belief.”<sup>15</sup> The printer had previously done work for LGBTQ customers and for a company which “produces underwear marketed to the gay male population,” but argued that this was different since, in his view, the Archives were promoting the “homosexual lifestyle.”<sup>16</sup> The Board decided against Mr. Brockie on the basis of the significant social and historical discrimination faced by LGBTQ individuals, the economic and psychological impact of this discrimination, and the fact that Canadian society had decided to protect LGBTQ people from discrimination. The Board found that Mr. Brockie would still be free to hold and practice his beliefs within his home and Christian community, just not by denying service to one group in the public marketplace. In the result, the Board made two orders against the printer. It ordered him and his company to pay damages to Mr. Brillinger and the Archives. And it ordered the printer in the future to provide printing services to LGBTQ people and to organizations that exist for their benefit.<sup>17</sup>

On appeal, the printer claimed that this decision by the Board violated his right to freedom of religion under section 2(a) of the *Charter* and under section 15 as a violation of his right to be free from discrimination on the basis of religion.<sup>18</sup> He argued that his dignity would be demeaned by being “conscripted to support a cause with which he disagree[d]” on the basis of a sincere religious belief.<sup>19</sup> This, in his view, should confer a “defence to discrimination” and a “right of dissent.”<sup>20</sup>

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<sup>15</sup> *Id.* at para. 15.

<sup>16</sup> *Id.* (internal quotation marks omitted).

<sup>17</sup> *Id.* at para. 17.

<sup>18</sup> *Id.* at para. 37.

<sup>19</sup> *Id.* at para. 19.

<sup>20</sup> *Id.*

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The court hearing the appeal presented this case as a “conflict of dignities,”<sup>21</sup> citing from the preamble to the Ontario Human Rights Code<sup>22</sup> (the “Code”), a statute dedicated to promoting equality and prohibiting discrimination, as follows:

- (a) recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations; and
- (b) it is public policy in Ontario to recognize the dignity and work [worth] of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the Province.<sup>23</sup>

The interesting question raised in this case asked: should there be an exemption for a service provider who did not refuse to serve LGBTQ individuals, but rather refused to produce content that ran directly counter to the service provider’s own beliefs? The court on appeal answered in the affirmative, while still finding against Mr. Brockie with respect to the particular facts at issue. The court upheld the Board’s specific order against the printer requiring him to pay damages for refusing to print the requested letterhead, envelopes and business cards. However, the court modified the Board’s general order that would have required him and his company to serve LGBTQ people and LGBTQ-positive organizations in the future. Instead, the court held that in the future, the printer would not be required “to print

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<sup>21</sup> *Id.* at para. 20.

<sup>22</sup> Ontario Human Rights Code, R.S.O. 1990, c. H.19, pmb1 (Can.).

<sup>23</sup> *Id.*



material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.”<sup>24</sup> Unfortunately, the court’s formulation is unworkable, and it opens the door to many forms of unacceptable discrimination.

*The Issues: Who is a Person, Producing Content that Conflicts with One’s Beliefs, and the Slippery Slope of Exemptions*

As a preliminary matter, the court briefly considered the question of who is a “person” under the Code—for the purpose of bringing a discrimination claim, being the subject of a claim, or raising the right to religious freedom—and whether these would include organizations and corporations.<sup>25</sup> The court found that the term “person” could include a corporation responsible for discriminating.<sup>26</sup> Likewise, organizations and corporations were able to claim that they are the *object* of discrimination, as this is consistent with the Code’s purpose, and would allow those suffering from discrimination to act in association with others.<sup>27</sup> However, when it comes to the *discriminator*, the Court found that a corporate entity could not assert a *Charter* right, such as the right to freedom of religion.<sup>28</sup> This finding may be helpful in other exemption-based belief cases. It was, however, of no practical import in *Brockie*, as Mr. Brockie was able to raise his own individual *Charter* rights.

As to the main issue concerning the content of the requested service, Mr. Brockie argued that there should be a distinction between a refusal to provide service because of the customer’s *human characteristic*, here his sexual orientation, and a refusal aimed at a person engaged in the political act of *promoting the cause* of those with such characteristics. The court rejected this argument as specious and irrational.<sup>29</sup> The court stated that no

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<sup>24</sup> *Brockie*, 161 O.A.C. 324 at paras. 58–59.

<sup>25</sup> *Id.* at para. 24.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at para. 26.

<sup>28</sup> *Id.* at para. 39.

<sup>29</sup> *Id.* at para. 29.

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authorities had been cited to support such a distinction, and concluded that “efforts to promote an understanding and respect for those possessing any specified characteristic should not be regarded as separate from the characteristic itself.”<sup>30</sup> This conclusion is similar to the Canadian courts’ consistent rejection of attempts to distinguish between the identity and behaviour of LGBTQ people<sup>31</sup> (as discussed below) but goes even further. The Court held that not only are individuals protected from discrimination in relation to who they are and what they do, but they are also protected in their endeavour to seek understanding and respect for themselves.

The court then considered whether the Board, in making its order against the printer, had exercised its discretion in a manner consistent with the *Charter*.<sup>32</sup> This order had not only required Mr. Brockie to pay damages to Mr. Brillinger and the Archives, but had also required that in the future, the printer would have to provide printing services to LGBTQ people and to organizations promoting their interests. All of the parties (and two of the intervenors) conceded that the Board’s decision infringed Mr. Brockie’s freedom of religion as it would force him to act in a manner contrary to his beliefs.<sup>33</sup> The question at issue was, therefore, whether this infringement was justified under section 1 of the *Charter*.<sup>34</sup>

In its section 1 analysis, the court considered whether the Board’s order was rationally connected to its objective.<sup>35</sup> The court distinguished between the activity in issue—the printing of materials such as letterhead and business cards—and a hypothetical situation involving the printing of materials with more editorial content.<sup>36</sup> The latter materials, in the court’s view,

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<sup>30</sup> *Id.* at para. 31.

<sup>31</sup> *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, para. 123 (Can.) (citing *Trinity W. Univ. v. Coll. of Teachers* (1998), 169 D.L.R. 4th 234, para. 69 (Can. B.C. C.A.)).

<sup>32</sup> *Brockie*, 161 O.A.C. 324 at para. 36.

<sup>33</sup> *Id.* at para. 40.

<sup>34</sup> *See supra* notes 7–9 and accompanying text.

<sup>35</sup> *Brockie*, 161 O.A.C. 324 at paras. 45–56.

<sup>36</sup> *Id.*

could espouse “causes or activities clearly repugnant to the religious tenets of the printer.” Since the objective of the Code is to prohibit discrimination on the basis of certain characteristics, and to encourage equality, the court held that an order prohibiting more than discrimination may not be rationally connected to its objective, and even if so, would be unconstitutional.<sup>37</sup>

With respect to the minimal impairment branch of the section 1 analysis, the court found that: “[s]ervice of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion,” and that limits to this freedom may be justified where the exercise of this freedom causes harm to others. Nonetheless, the court held that the general order was not minimally impairing, as the Board could have achieved its goals without intruding to the extent it did on Mr. Brockie’s freedom.<sup>38</sup>

Finally, the court upheld the damages order against Mr. Brockie for his refusal to print the letterhead, business cards and envelopes at issue. However, the court modified the Board’s general order concerning future print jobs, creating a new standard and order according to which, the printer and shop would not be required “to print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.”<sup>39</sup> The court offered two contrasting examples to illustrate how, in its view, this would work: (1) if the printing project contained material that proselytized and promoted the “gay and lesbian lifestyle” or that mocked Mr. Brockie’s religious beliefs, this material may be found “in direct conflict with the core elements of his religious beliefs;”<sup>40</sup> and (2) if the material to be printed contained a directory of goods and services of interest to the LGBTQ community, this material may be held as not “in direct conflict with the core elements of Mr. Brockie’s religious beliefs.”<sup>41</sup>

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<sup>37</sup> *Id.* at para. 49.

<sup>38</sup> *Id.* at paras. 51–52.

<sup>39</sup> *Id.* at para. 58.

<sup>40</sup> *Id.* at para. 56.

<sup>41</sup> *Id.*

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Presumably, then, the Court viewed the letterhead, envelopes and business cards as falling into the second category.

The court in *Brockie* faced a difficult issue—how to uphold the duty to provide services without discrimination, while also recognizing the position of a service provider whose beliefs run counter to the material they are being asked to produce. This conundrum could also, in some respects, be stated in reverse (although the Court did not do so): what if it had been Mr. Brockie who had walked into the print shop of Mr. Brillinger, asking on behalf of Mr. Brockie’s Church to print a brochure containing anti-LGBTQ Biblical passages and a call-out to LGBTQ people to attend this Church?<sup>42</sup> Does the right to equality in the public domain always require a service provider to produce material regardless of its content? The court’s response attempted to create an objective standard according to which the duty to provide services to the public without discrimination would generally be upheld, while exempting the printer if the material to be printed was in direct conflict with the core elements of his religious beliefs or creed. This standard is problematic on a number of levels.

First, the idea of an objective standard to assess belief systems is unfeasible. In *Brockie*, the court’s conclusion—and the “objective standard” it relied upon—was that the printing of the letterhead, business cards and envelopes was *not* in conflict with Mr. Brockie’s core beliefs.<sup>43</sup> This was based on a legal fiction. Not only was no evidence produced to support this conclusion, but it appeared to contradict the facts that were established in the case. The court cited evidence showing that Mr. Brockie had been willing to do business with LGBTQ people, as well as with

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<sup>42</sup> If the discrimination had been against a church, the analysis would be different. As discussed *supra* Part I, an analysis concerning discrimination on the basis of sexual orientation must be viewed in light of its current and historical contexts. Discrimination on the basis of religion and creed will raise its own issues, for example: whether creed includes nonreligious beliefs based on a person’s conscience; and whether disapproval of certain religious views or practices ought to be considered discrimination. These issues are beyond the scope of this Article.

<sup>43</sup> See *supra* notes 36–41 and accompanying text.

a company whose underwear was marketed towards gay men. Mr. Brockie's refusal to do business with Mr. Brillinger, then, appeared to have been based precisely on the content of the materials. Given that Mr. Brockie chose to turn down business, and potentially alienate Mr. Brillinger, the Gay and Lesbian Archives, and possibly other customers as a result of his refusal, it seems at least plausible, if not likely, that Mr. Brockie refused to print the material because it was in direct conflict with his core beliefs. The court's "objective" standard is not helpful in clarifying this situation.

Second, belief and practice are highly personal, a principle well established by the Canadian courts.<sup>44</sup> While Canadian courts do utilize certain objective standards with respect to religious beliefs—such as whether the infringement of these beliefs is trivial or insubstantial<sup>45</sup>—it should be difficult for a court in some circumstances to insert an "objective" standard without supporting evidence to establish that a belief is not a core element. This is especially true if a savvy service provider has testified that avoiding the promotion of certain behaviours or ideas is central to their religious and spiritual integrity. Supporting evidence on whether or not a particular element or belief is important to a person may come in many forms, such as the individual's testimony as to what impact would result from a rights violation, and evidence concerning the consistency of their behaviour, though these examples raise their own challenges.

Third, the court's "objective" standard—that would exempt a service provider from the duty to provide service without discrimination if the product is in direct conflict with the core elements of their religious beliefs—could also create a slippery slope leading to countless additional denials of service. This point was effectively made by the concurrence in *Marriage Commissioners*.<sup>46</sup> In the context of discrimination on the basis of sexual orientation, belief-based exemptions could be claimed by a

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<sup>44</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (Can.).

<sup>45</sup> *E.g.*, *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, para. 32 (Can.) (citing *Amselem*, [2004] 2 S.C.R.).

<sup>46</sup> *See infra* Part II.D for further discussion.

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wedding planner asked to organize a same-sex wedding, or anyone associated with the wedding industry from the caterer to the receptionist working for the dress-maker. An architect asked to design a family home or bedroom could refuse, as could anyone else in the building industry. An individual involved in service or hospitality, such as a room service waiter or a concierge asked for the location of a romantic restaurant might feel the same urge to refuse. And the same may be said for any person providing services to support the couple or family's life as a couple or family.

Indeed, the logic behind the court's examples, suggesting that Mr. Brockie may not refuse to print neutral, LGBTQ material, but may refuse to print material that promotes the "gay and lesbian lifestyle,"<sup>47</sup> could justify many refusals as described in the above paragraph, all of which involve the service provider arguably promoting or contributing to said "lifestyle." In addition, the court's attempted distinction between LGBTQ value-neutral content and LGBTQ promotional material bears a striking resemblance to the distinction that the court had earlier rejected between discrimination on the basis of sexual identity and discrimination on the basis of sexual behaviour.<sup>48</sup>

A more useful standard may nonetheless be derived from one of the examples provided by the court. The court had suggested that it may be permissible to exempt Mr. Brockie if the brochure mocked his religious beliefs.<sup>49</sup> Given the danger of creating a slippery slope and overly broad exemptions, this Article would narrow the court's example still further and consider permitting an exemption for a service provider who refuses to produce material that directly fosters hate towards the service provider (and/or towards a group protected under the antidiscrimination laws). Thus, if Mr. Brillinger had been the service provider and had refused to print the above-mentioned hypothetical brochure containing anti-LGBTQ Biblical passages, he might have been justified in this refusal. Likewise, Mr. Brockie might be justified

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<sup>47</sup> See *supra* note 35–41 and accompanying text.

<sup>48</sup> See *supra* note 31 and accompanying text.

<sup>49</sup> *Brockie*, 161 O.A.C. 324, at para. 31.

if he refused to print a brochure stating, for example, that any church not recognizing LGBTQ rights is Satanic.

It should be noted that the issue of refusals on the basis of content is limited in scope. Human rights laws prohibit only discrimination on the basis of particular grounds (such as race, gender, creed, and sexual orientation). In all other contexts, a service provider is free to refuse to produce material that has a message with which they disagree, as long as the message is not a proxy for the protected group.

To conclude, the facts in *Brockie* present a useful basis for considering discriminatory refusals involving content that violates a service provider's beliefs. While the Court's attempt to define an objective standard based on the core beliefs of the service provider is not helpful, not feasible, and in fact demonstrates how such standards could lead to a multitude of exemptions that would undermine the purpose of the human rights laws, a narrowed solution may exist for those situations in which a service provider is asked to produce material that directly fosters hate towards the service provider (and/or towards a group protected under the antidiscrimination laws).

*B. Chamberlain v. Surrey School District No. 36:*<sup>50</sup> *Can a School Board Refuse to Allow into its Classrooms Books Depicting Same-Sex Parents?*

*Chamberlain v. Surrey School District No. 36* is one of the most recent and relevant decisions from the Supreme Court of Canada dealing with discrimination on the basis of sexual orientation in the provision of services, addressing both freedom of religion and LGBTQ rights. *Chamberlain* involved a kindergarten teacher who asked the local school board to approve three books as supplementary learning resources for use in teaching the family life education curriculum.<sup>51</sup> The books—*Asha's Mums*, *Belinda's Bouquet*, and *One Dad, Two Dads, Brown Dad, Blue Dads*—depicted families with same-sex

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<sup>50</sup> 4 S.C.R. 710 (2002) (Can.).

<sup>51</sup> *Id.* at para. 44.

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parents.<sup>52</sup> The school board responded by passing a resolution refusing to allow these books into the schools.<sup>53</sup> As a result of the board's resolution, in some schools in the district, certain resources were removed, including library books, posters, and pamphlets.<sup>54</sup>

While *Chamberlain* did not involve a private actor in the role of service provider, it concerns discrimination in the provision of "services." Those being discriminated against or otherwise negatively impacted may have included: children, parents, teachers, and the general community. As to the service-provider, while the discriminating body in this case was an elected school board, its decision was based in large part on the views of "parents" in the community who objected to the books, and a concern that having the books at school would create controversy in the children's homes because of their parents' views.

The majority rejected the school board's resolution as unreasonable for having violated the board's obligations under its governing statute and the relevant regulation, which should have included secularism, nonsectarianism, tolerance, and respect for diversity. By resolving the case on the basis of administrative law principles in this manner, the majority declared it unnecessary to address *Charter* issues.<sup>55</sup> It was the dissent who raised the difficult questions about the right to dissent and disapprove, and who demonstrated the clash between freedom of religion and equality and their underlying values in this case.<sup>56</sup> A complete analysis and response to the dissent should address these issues through an expanded understanding of secularism and a contextual balancing of the interests at stake, and then conclude, as the majority did, that the school board's decision to ban the books was impermissible.

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<sup>52</sup> *Id.* at para. 50.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at para. 46.

<sup>55</sup> *Id.* at para. 76.

<sup>56</sup> *See id.* at paras. 146–52.



*1. The Majority: Diversity, the Meaning of Secularism, and Tolerance vs. Freedom of Religion*

The majority opinion, delivered by Chief Justice McLachlin, decided against the school board on the basis of administrative law, thus attempting to avoid the difficult issues by avoiding a *Charter* analysis.<sup>57</sup> However, the dissent tackled these issues head-on, often in very problematic ways, as will be discussed.<sup>58</sup> Perhaps in response to this, the majority relied on the relevant administrative law to take strong stands on diversity, secularism, and tolerance.<sup>59</sup> It made a compelling case for respecting diversity.<sup>60</sup> It considered the meaning of secularism,<sup>61</sup> whether religious views may be included in public debate, and how these views may and may not be used in decision-making.<sup>62</sup> And the majority responded to the dissent's position on cognitive dissonance—the experience of parents whose children may be forced to learn values contradictory to those at home.<sup>63</sup>

On the issues of secularism and tolerance, the majority held that these were part of the school board's statutory obligations which the board had failed to meet:

The Board's first error was to violate the principles of secularism and tolerance in [section] 76 of the *School Act*. Instead of proceeding on the basis of respect for all types of families, the Superintendent and the Board proceeded on an exclusionary philosophy. They acted on the concern of certain parents about the morality of same-sex

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<sup>57</sup> The majority concluded that the school board's decision must fail because the board acted outside its statutory mandate by failing to apply both statutory criteria and the board's own procedures. *Id.* at para 59.

<sup>58</sup> *Id.* at paras. 75–187 (Gonthier, J., dissenting); *see also infra* Part II.E.

<sup>59</sup> *Chamberlain*, 4 S.C.R. 710 at para. 33 (majority opinion).

<sup>60</sup> *Id.* at para. 49.

<sup>61</sup> *Id.* at para. 33.

<sup>62</sup> *Id.* at para. 59.

<sup>63</sup> *Id.* at paras. 62–66. The majority also found that the school board had failed to follow its regulation, and that the criteria it relied on were the wrong ones. *Id.* at para. 71.

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relationships, without considering the interest of same-sex parented families and children who belong to them in receiving equal recognition and respect in the school system.<sup>64</sup>

Similarly, the majority noted the requirement that the board recognize diverse communities within the school district and approach the needs of each with “respect and tolerance.”<sup>65</sup> The majority found that the board had not considered families with same-sex parents and had relied instead on the views of a particular group who opposed any depiction of same-sex relationships.<sup>66</sup>

The recognition that there may be different kinds of families in the school—some who oppose the book, some with same-sex parents, some with an LGBTQ-positive approach—is so obvious it should not need to be stated.<sup>67</sup> But as will be discussed below, this was a point the dissent missed almost entirely.<sup>68</sup>

The majority’s administrative law analysis also involved a discussion about secularism and freedom of religion, and whether the school board was permitted to take into account the views of parents who objected to the books on the basis of religious concerns. The majority concluded that the principle of secularism required by the law did not preclude parents from objecting to the books on the basis of religious considerations.<sup>69</sup> What secularism did require, they found, was that the religious views of one part of the community could not be used to exclude minority voices, that educational decisions and policies must respect the “multiplicity of religious and moral views”<sup>70</sup> held by parents and families in the community, and that the board’s decision must be reasonable in the context of the statutory scheme. In his concurring opinion, Justice LeBel agreed with the majority’s

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<sup>64</sup> *Id.* at para. 58.

<sup>65</sup> *Id.* at para. 25.

<sup>66</sup> *Id.* at para 71.

<sup>67</sup> There will also be families with LGBTQ children and members of the community with a deeply held, fundamental belief in equality.

<sup>68</sup> See discussion *infra* Part II.E.

<sup>69</sup> *Chamberlain*, 4 S.C.R. 710 at para. 59.

<sup>70</sup> *Id.*

conclusion that parents' decisions can be based on religious or other views.<sup>71</sup> However, for Justice LeBel, the idea of secularism would rule out "policy based on beliefs that are intolerant of others . . . whether those beliefs are religious, moral or philosophical."<sup>72</sup> Translating such beliefs into policy is prohibited, he continued, to the extent that these beliefs deny the validity of other points of view:

There is no difficulty in reconciling the *School Act's* commitment to secularism with freedom of religion. Freedom of religion is not diminished, but is safeguarded, by the state's abstention from favouring or promoting any specific religious creed . . . . Disagreement with the practices and beliefs of others, while certainly permissible and perhaps inevitable in a pluralist society, does not justify denying others the opportunity for their views to be represented, or refusing to acknowledge their existence.<sup>73</sup>

Accordingly, the majority seemed to imply what the concurrence stated explicitly—that the constitutional right to freedom of religion, coupled with the board's statutory duty to uphold the principle of secularism, required that there be room for all manner of belief and opinion. Given the inevitable conflicts that may arise between two or more belief systems, intolerance would not be tolerated. It would be interesting to consider expanding the meaning of secularism still further, such that in a situation involving a fundamental rights violation, community standards (and prejudices) could not prevail over evidence-based decision making.

Another interesting aspect of the majority opinion was its response to the school board's reliance on the concept of "cognitive dissonance"<sup>74</sup> in order to exclude the books. The board had used this term to mean that children should not be exposed to

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<sup>71</sup> *Id.* at para. 188 (LeBel, J., concurring).

<sup>72</sup> *Id.* at para. 210.

<sup>73</sup> *Id.* at paras. 211–12.

<sup>74</sup> *Id.* at para. 64 (majority opinion).

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ideas with which their parents disagreed.<sup>75</sup> The majority found this argument antithetical to the curriculum's objective of promoting tolerance and an understanding of all types of families. The majority provided a number of examples of differences (based on religion or morals) that may be found in a diverse community—including differences in what classmates were permitted to eat or wear or how they behaved—and stated:

[S]uch dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body . . . . The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others. Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves . . . . When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.<sup>76</sup>

The emphasis on tolerance is critical in a multicultural society, and it is true that members of this society—children and adults—will be exposed to diverse customs, families, and values.

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<sup>75</sup> *Id.* at para. 58.

<sup>76</sup> *Id.* at paras. 65–66.

However, the majority's analysis would have been far better if it had reached this conclusion without minimizing the genuine harm that may have been suffered by some parents who objected to the books and whose children may have been in the classrooms at issue. Once images have been viewed, words read, or ideas shared among the children, they cannot be unviewed and unlearned. Many parents would recoil at the thought of their children being coercively taught values that directly contravene their own—whether such values espouse militarism, sexism, or a particular telling of history. Indeed, as will be discussed, such coercion may amount to a violation of the parents' dignity. And while the possibility of private school or home-schooling<sup>77</sup> may allow certain parents to opt out of the public system, such an option is beyond the means of many families due to the cost of private school and the financial needs of families with two working parents. Leaving the public school system could also result in a loss of other benefits, such as academic standards, social and community engagement, and sports and art programs. These benefits should, of course, also be available to LGBTQ students, parents, teachers, and equality seekers. Therefore, on balance, openness, inclusion, and diversity would need to prevail.

To conclude, while the majority reached the correct conclusion, it would have been preferable if it had done so with greater sensitivity to the religious freedom of the objecting parents. Such sensitivity would have required the majority to directly engage the real rights infringement faced by these parents and the difficult issues presented by the dissent. The resulting discussion would have more accurately depicted the interests at stake, and would have been richer as a result.

*2. The Dissent: Heterosexist Assumptions, Sincere  
Discriminatory Beliefs, and Dignity*

The dissenting opinion, delivered by Justice Gonthier, was indeed sensitive to the harms suffered by objecting parents. As such, the dissent raised the difficult issues in this case concerning

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<sup>77</sup> *Id.* at para. 30.

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freedom of religion, freedom of conscience, equality, and freedom of expression; the tension when a dissenting opinion is discriminatory; and the collision of dignities between those of differing views.<sup>78</sup> In other respects, however, the dissenting opinion should serve as a cautionary tale of how *not* to adjudicate cases involving discrimination on the basis of sexual orientation. With respect, significant parts of this opinion were based on anachronistic ideas and a heteronormative perspective that quite simply failed to recognize the claims and, in some cases, the existence of LGBTQ children, parents, and educators, as well as other equality seekers in the community.

First, the dissent relied on the distinction (already then discredited in the case law) between the right to equality of *all persons*, which it said was “consonant with their inherent human dignity,” and the “conduct of persons,” which it implied may not be deserving of equal respect, concern, and consideration.<sup>79</sup> The sexual orientation/sexual behaviour distinction (alternatively referred to as the status/conduct or identity/practice distinction) is one that recurs throughout the belief-based exemption cases. Canadian tribunals and courts have consistently rejected this distinction when it comes to LGBTQ rights, affirming instead that: “Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person.”<sup>80</sup>

Second, the dissenting opinion attempted to distinguish between the rights of “homosexual persons” to be free from discrimination and “parental rights to make the decisions they deem necessary to ensure the well-being and moral education of their children.”<sup>81</sup> In other words, the dissent’s analysis proceeded as if there were two distinct categories: (1) parents who have a right to educate their children, raise them in their faith, and

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<sup>78</sup> *Id.* at paras. 75–187 (Gonthier, J., dissenting).

<sup>79</sup> *Id.* at para. 77.

<sup>80</sup> *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, para. 123 (Can.) (citing *Trinity W. Univ. v. Coll. of Teachers* (1998), 169 D.L.R. 4th 234, para. 69 (Can. B.C. C.A.)).

<sup>81</sup> *Chamberlain*, 4 S.C.R. 710, at para. 79 (Gonthier J., dissenting).

decide their “best interests;”<sup>82</sup> and (2) “homosexual persons” seeking the inclusion of LGBTQ-positive materials in schools.<sup>83</sup> The values and rights of LGBTQ or LGBTQ-positive parents or students were largely excluded from the analysis and did not seem to play a significant role in the dissenting opinion’s hetero-normative worldview.<sup>84</sup>

Third, unfortunately and with respect, things went from bad to worse when the dissent tried to determine whether the books under discussion were about nondiscrimination, or whether they contained LGBTQ-positive messaging.<sup>85</sup> The low point in a less-than-flawless opinion occurred when the dissenting judges, two members of the Supreme Court of Canada, expressed this distinction with no apparent shame or apology as follows:

The experts basically present two competing views of these Three Books. One view is that they are simply books aimed at the dominant theme of nondiscrimination, with the presence of parents in a same-sex relationship simply being tangential context. The books are therefore about acceptance. The other view is that regardless of the valid and present acceptance theme, a different message is also present: *parents in same-sex relationships are being portrayed as “normal” by being portrayed in a positive sense.*<sup>86</sup>

There is good reason to take issue with the above aspects of the dissenting opinion. Nonetheless, the dissent should be credited with bringing to the surface one of the fundamental

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<sup>82</sup> *Id.* at para. 103.

<sup>83</sup> *Id.* at para. 125.

<sup>84</sup> There are a few small references in the dissent to the possibility that LGBTQ people might have children; however, these are only raised, it seems, as theoretical constructs, which seem to have no connection with the “parents” who appear far more frequently throughout the opinion, and who feature in the dissent’s reasoning as those who have a right to decide what is best for their children. *Id.* at paras. 120, 147.

<sup>85</sup> This, in itself, is a questionable distinction.

<sup>86</sup> *Chamberlain*, 4 S.C.R. 710 at para. 174 (Gonthier, J., dissenting) (emphasis added).

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challenges in this case: in a liberal, pluralistic society, how should the right to equality interact with dissenting beliefs. The dissent expressed this challenge as follows:

It is a feeble notion of pluralism that transforms “tolerance” into “mandated approval or acceptance.” In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity: there is a potential for a collision of dignities. Surely a person’s [section] 2(a) or [section] 2(b) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person’s [section] 15 rights, just like a person’s [section] 15 rights cannot be trumped by [section] 2(a) or 2(b) rights. In such cases, there is a need for reasonable accommodation or balancing.<sup>87</sup>

There are a number of interesting threads in this reasoning. First, there is the assertion that people can and must be able to hold a diversity of views to agree with, but also to disapprove of each other’s conduct. For this reason, the dissent asserted, equality cannot simply trump freedom of religion and conscience—there will be a need for balancing.<sup>88</sup> Second, it is not clear if the dissenting judges required that only beliefs *based on religion* must be protected. For the dissenting judges, it may have been that one person disapproving of another’s conduct constituted a protected belief. They did not explicitly require that such beliefs be religiously grounded. The third thread is the idea that *dignity* may in some cases be offended when one’s freedom of religion is violated.

While the reasoning in these threads is correct, they fail to paint a full picture, and deserve further attention. With respect to the first thread, protections for dissenting and pluralistic views are critical. It is true that such views may protect offensive

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<sup>87</sup> *Id.* at para. 132.

<sup>88</sup> *Id.* at paras. 132–35.



beliefs such as those of the objecting parents, but they have also protected minority and marginalized views—including LGBTQ-positive positions. However, what was missing from the dissent's analysis was the deeply inequitable context in which these two dissenting views were competing. At the time of the *Chamberlain* challenge, majoritarian privilege rested with the community that banned the books and accepted anti-LGBTQ discrimination. In addition, in the conflict between the two dissenting views, one (the anti-LGBTQ perspective) was aimed at singling out, excluding, and removing from the classroom any resources that mentioned the other (LGBTQ parents).

With regard to the second thread concerning the basis of the beliefs, it is important that deeply held fundamental beliefs of conscience be respected and protected. In the Canadian Constitution, freedom of conscience is protected under the *Charter* alongside freedom of religion.<sup>89</sup> Such freedom of conscience may protect a person's right to hold anti-LGBTQ beliefs even if not based on a religious worldview, though the content of such beliefs may lose validity or credibility in the public perception, absent a religious connection. Indeed, discriminatory acts and beliefs that lack the sanction of a religious worldview may better demonstrate the intolerable nature of such discrimination. However, freedom of conscience should *also* protect a person's right to the belief that all people are born equal in dignity and rights. This belief can and frequently is grounded in religious roots. It could also be based on secular humanism or other deeply held convictions. The practical result, with respect to the belief-based exemption cases, is that if a person experiences discrimination on the basis of their sexual orientation, it is not just their equality rights that have been violated. There may well also have been a violation of their and others' deeply held fundamental belief in equality and dignity. In *Chamberlain*, for example, parents with deeply held beliefs in the equality of all people may have felt that the school board's ban

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<sup>89</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 2(a) (U.K.). *See also supra* note 10 and accompanying text.

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violated their freedom of conscience or religion and caused cognitive dissonance in their homes. The same may be said of Mr. Brillinger when he was denied printing services, or any person for whom equality is a fundamental value, when forced to participate in a discriminatory situation, whether the discrimination is against themselves or others. For this reason, invoking freedom of religion and conscience may not be determinative in resolving such cases.

Finally, on the issue of dignity, the dissent provided an important reminder that a violation of religious freedom could offend one's dignity.<sup>90</sup> "Dignity" is most commonly associated with equality rights, and discrimination will in many cases result in injury to a person's dignity. What the dissent establishes is that dignity is not just the purview of equality. If, for example, one is coerced to act against one's deeply held fundamental beliefs, such as being forced to convert to another religion, or perhaps to violate one's laws of purity, or as here, to have one's children taught to believe in a value that contradicts one's own beliefs, such coercion could amount to a violation of dignity. In the result, resort to the notion of "dignity" could apply to equality or freedom of religion, and as such, this concept may also not be determinative in resolving tensions between these rights in the belief-based exemption cases. A "collision of dignities," as mentioned in the dissent, may require another form of resolution.<sup>91</sup>

In conclusion, the court may have done well to rely on an expanded understanding of secularism. Given a situation in which fundamental rights were at stake, the decision about allowing resources into the classroom should perhaps have been based on evidence as to the material's educational value, ability to engage, age appropriateness, or harmfulness. A proportionality analysis should require that parents' objections on the basis of their religious freedom would need to be weighed in context against the impact on LGBTQ parents, children, teachers, and others that would be singled out for exclusion, and the fact that all children

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<sup>90</sup> *Chamberlain*, 4 S.C.R. 710 at para. 134 (Gonthier, J., dissenting).

<sup>91</sup> *Id.* at para. 132.

in the relevant grades would be deprived of exposure to the diversity at issue. While the dissent raised compelling questions about a collision of dignities and the right to disapprove and dissent, on balance in this case, the objecting parents seeking to single out a group for discrimination and exclusion in a public school should not be able to rely on rights such as freedom of religion and equality, whose very purpose is to avoid discrimination and exclusion.

*C. Eadie v. Riverbend Bed & Breakfast:*<sup>92</sup> *Can Bed and Breakfast Owners Rely on Their Religious Convictions to Deny a Room to a Gay Couple?*

The case of *Eadie v. Riverbend Bed & Breakfast* involved a couple (the “complainants”) who booked a room at the Riverbend Bed and Breakfast (the “Riverbend”).<sup>93</sup> When the Riverbend owners (the “owners”) learned that the complainants were gay, they cancelled the reservation.<sup>94</sup> The complainants filed a human rights complaint with the British Columbia Human Rights Tribunal (“Tribunal”), on the basis of section 8 of the British Columbia Human Rights Code (the “B.C. Code”).<sup>95</sup> The owners denied that their conduct was discriminatory, arguing that the cancellation was justified on the basis of their constitutionally

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<sup>92</sup> 2012 BCHRT 247 (Can.).

<sup>93</sup> *Id.* at para 1.

<sup>94</sup> *Id.* at para. 2.

<sup>95</sup> The B.C. Code is legislation aimed at prohibiting discrimination in such areas as employment, housing, and the provision of services, absent a *bona fide* and reasonable justification for the discrimination. *Id.* at para. 95 (quoting British Columbia Human Rights Code, R.S.B.C. 1996, c. 210, § 8(1)).

Section 8(1) of the British Columbia Human Rights Code provides as follows:

A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public . . . .

British Columbia Human Rights Code, R.S.B.C. 1996, c. 210, § 8(1).

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protected right to freedom of religion.<sup>96</sup>

The Tribunal found for the complainants, holding that the owners had refused to provide service because of the complainants' sexual orientation, that the owners had not proven a *bona fide* and reasonable justification for the discrimination, and could not rely on any of the other exemptions in the B.C. Code. Some of the remedies included: a declaration that the owners' conduct was discriminatory, an order for the owners to cease and desist from this and similar conduct, and an order that the owners pay each complainant a modest sum for the indignity and humiliation each had suffered.<sup>97</sup> Although the *Eadie* Tribunal reached the correct result, its analysis was strained and flawed. Based as it was on contemporary human rights (antidiscrimination) law, it did not use the appropriate tools to adequately address a conflict of rights.

The Tribunal's analysis began well, carefully evaluating evidence to establish the context, including the beliefs of the owners and the harms caused to the complainants resulting from the discrimination.<sup>98</sup> The Tribunal also properly considered and rejected the sexual identity/behaviour distinction and reached the correct conclusion that the complainants had made out a *prima facie* case of discrimination.<sup>99</sup> The challenges in this case arose in the next phase of the analysis, when the Tribunal followed the prescribed steps to evaluate whether the owners had a *bona fide* and reasonable justification ("BFRJ") for their discriminatory conduct.<sup>100</sup> The BFRJ test proved unhelpful in resolving the issues, and did not allow for nuance or a balancing of the conflicting rights. In its BFRJ analysis, the Tribunal defined the

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<sup>96</sup> *Eadie*, 2012 BCHRT 247 at para. 2. The Tribunal did not have jurisdiction over constitutional questions *per se*. However the question of equality versus freedom of religion was properly before the Tribunal, as it had jurisdiction to interpret and apply the antidiscrimination provisions of the B.C. Code using normal principles of statutory interpretation, including an interpretation informed by Charter values.

<sup>97</sup> *Id.* at para. 173.

<sup>98</sup> *Id.* at paras. 1-95.

<sup>99</sup> *Id.* at paras. 96-115.

<sup>100</sup> *Id.* at para. 116.

function of the service provider in an absolutist manner that effectively determined the outcome of the complaint;<sup>101</sup> applied a spectrum analysis to evaluate the religiosity of the service provider,<sup>102</sup> and in this as well, came to a conclusion lacking in nuance; and conducted a superficial analysis of two other statutory exemptions that it found to be inapplicable to the complaint.<sup>103</sup> A proportionality analysis of the kind employed in constitutional cases under section 1 of the *Charter* would have been more direct in raising and assessing the relevant issues, and it would have allowed for the kinds of nuance and balancing necessary in a conflict of rights situation.

*1. Establishing Prima Facie Discrimination; Evidence of Religious Beliefs and the Impact of Discrimination; and Sexual Orientation vs. Sexual Behaviour*

The decision in *Eadie* began with the Tribunal taking the time to consider evidence concerning not only the events that occurred, but also the beliefs of the owners and the impact of the events on the complainants.<sup>104</sup> All of these were important for an in-depth contextual analysis. The owners Susan Molnar and Les Molnar were a religious couple, active members of a Church, who hosted religious activities in their home which was also the Riverbend bed and breakfast.<sup>105</sup> The Riverbend itself had no direct connection to the Church.<sup>106</sup> The owners' beliefs about sex and sin, the role of their home religiously, and their belief in God were all recounted by the Tribunal.<sup>107</sup> These included a belief that all sex outside of a committed, heterosexual marriage is a sin, and that the owners are responsible for what takes place in their home.<sup>108</sup>

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<sup>101</sup> *Eadie*, 2012 BCHRT 247 at para. 144.

<sup>102</sup> *Id.* at para. 125.

<sup>103</sup> *Id.* at paras. 125–26.

<sup>104</sup> *Id.* at paras. 1–80.

<sup>105</sup> *Id.* at paras. 11–17.

<sup>106</sup> *Id.* at para. 21.

<sup>107</sup> *Id.* at paras. 11–17.

<sup>108</sup> *Id.* at paras. 15–17.

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The complainants Shaun Eadie and Brian Thomas were a gay couple.<sup>109</sup> The Tribunal took the time to describe the emotional and psychological impact of the cancellation on the complainants. This included a description of the bullying, demeaning conduct, and bigotry the complainants had faced since childhood, and how the incident with the Riverbend caused one complainant to “return” to a childhood in which he was shunned and excluded. The Tribunal described how the one complainant had since established his self-confidence, but the refusal shocked and devastated him. The Tribunal also detailed how angry, emotional, and disturbed both complainants felt as a result of the cancellation, and how they had experienced this as an affront to their dignity.<sup>110</sup>

In this case—as in many belief-based exemption cases—there was an attempt by the owners to distinguish between sexual behaviour and sexual orientation. Mr. Molnar argued that his concern was with sexual conduct in his home and therefore he might have considered an “amicable” arrangement, such as providing two rooms and receiving assurances from the complainants that they would do nothing offensive to the owners’ beliefs (i.e. no sexual conduct).<sup>111</sup> The Tribunal in *Eadie* rejected this orientation/conduct distinction both as a matter of fact<sup>112</sup> and of law. In support of the latter conclusion, the Tribunal cited, among others, the 2005 B.C. Human Rights Tribunal decision of *Hayes v. Barker*.<sup>113</sup>

[T]he ground of sexual orientation is not exclusively status or identity based, but also protects against discrimination on the basis of behaviours engaged in as a result of a person’s orientation. If it were otherwise, the prohibition on discrimination on the basis of sexual orientation would offer scant protection indeed. Such an

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<sup>109</sup> *Id.* at para. 1.

<sup>110</sup> *Id.* at paras. 77–80.

<sup>111</sup> *Id.* at para. 58.

<sup>112</sup> The Tribunal found that Mr. Molnar had cancelled the complainants’ reservation because they were a gay couple. *Id.* at para. 115.

<sup>113</sup> 2005 BCHRT 590 (Can.).

interpretation would prohibit a person from being fired for “being” gay, while doing nothing to prohibit a gay man being fired for having sex with his male partner . . . .<sup>114</sup>

The Tribunal also rejected the owners’ hypothetical “amicable” arrangement on the grounds that the complainants should not be required to make assurances in order to access a service.<sup>115</sup> One of the complainants expressed his concerns with such an arrangement as follows: “[I]t would have been the same as asking a person of colour to enter from a separate door.”<sup>116</sup>

In conclusion, the Tribunal was satisfied that the complainants had made out the first part of the complaint, having established a prima facie case of discrimination.<sup>117</sup> It was now open to the owners, under the B.C. Code, to attempt to prove a bona fide and reasonable justification for the discrimination.<sup>118</sup> The owners tried to do so on the basis of their religious beliefs.<sup>119</sup>

*2. The Bona Fide and Reasonable Justification Defence;  
Defining the Service; the Spectrum Analysis; Intimacy of the  
Service; and a Balancing Test*

Both the complainants and the owners in *Eadie* relied on a 2005 B.C. Human Rights Tribunal belief-based exemption case called *Smith v. Knights of Columbus*,<sup>120</sup> which also focused on the BFRJ analysis. The Knights of Columbus was a Catholic

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<sup>114</sup> *Eadie*, 2012 BCHRT 247 at para. 114 (citing *Hayes*, 2005 BCHRT 590, at para. 22).

<sup>115</sup> *Id.* at para. 144.

<sup>116</sup> *Id.* at para. 66.

<sup>117</sup> *Id.* at para. 115.

<sup>118</sup> The elements of a bona fide and reasonable justification are: (1) the respondents adopted a standard, rule, or goal that is rationally connected to the function; (2) they adopted the rule in good faith, in the belief that it was necessary to the fulfillment of the purpose or goal; and (3) the standard was reasonably necessary to accomplish the purpose or goal, in that the respondents could not accommodate the individual without incurring undue hardship. *Id.* at paras. 116–17.

<sup>119</sup> *Id.* at paras. 128–30.

<sup>120</sup> 2005 BCHRT 544 (Can.).

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men's organization that rented out a Church-owned and Church-affiliated banquet hall to Parish church groups, as well as to the general public. While there were no restrictions publicized, the Parish priest had the final word on which activities were permissible in the hall.<sup>121</sup> In *Knights*, a couple had rented the hall for their wedding reception, but when the organization learned that the rental was for a reception following a same-sex wedding contrary to the Church's teachings, they cancelled the reservation.<sup>122</sup>

The *Knights* decision is notable for certain problematic aspects of its analysis. The Tribunal in *Knights* did declare, correctly, that "while everyone is entitled to hold and manifest their own sincerely held religious beliefs and to declare those beliefs, . . . [this] right is not absolute."<sup>123</sup> In effect, however, the reasoning of the *Knights* Tribunal provided near-absolute protection for the organization's freedom of religion in the public domain.

Following the prescribed steps for a BFRJ analysis,<sup>124</sup> the *Knights* Tribunal had to determine certain concepts to be applied in the test, namely: the rule or standard that led to the prima facie discrimination; and the function of the service at issue. The *Knights* Tribunal made these determinations in a manner that incorporated religious belief, effectively deciding the outcome of the analysis through these determinations.<sup>125</sup> The *Knights* Tribunal determined that the rule adopted by the Knights organization was: the organization does not rent out the hall for purposes "contrary to its core [Catholic] beliefs."<sup>126</sup> The function of the service was determined to be: renting the hall in ways *that would not undermine the organization's relationship with the Catholic Church or conflict with the beliefs of the members of the organization.*<sup>127</sup> Given that both the rule that led to the denial of

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<sup>121</sup> *Id.* paras. 1, 6.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at para. 93.

<sup>124</sup> *See supra* note 116

<sup>125</sup> *Knights of Columbus*, 2005 BCHRT 544 at paras. 108–09.

<sup>126</sup> *Id.* at para. 108 (emphasis added).

<sup>127</sup> *Id.* at para. 88.



service and the function of the service were defined in connection with the beliefs of the Church and/or of the organization, it is no wonder that the *Knights* Tribunal concluded that this rule was rationally connected to this function.<sup>128</sup>

As to the question of whether the Knights could have accommodated the complainants without undue hardship,<sup>129</sup> the Tribunal conducted a “spectrum analysis” to evaluate where the case fell on the spectrum between upholding the service providers’ freedom of religion, and the equality rights of the complainants. The Tribunal held that the further the act of prima facie discrimination from the service provider’s core religious beliefs, the less it would be likely to be justified. The Tribunal found, further, that in the case at bar, the hall fell somewhere on the continuum between a parish church, that would not have been required to act against its religious beliefs, and a purely commercial space with no religious affiliation, in which case the complainants would have been entitled to rent the space. Interestingly, the *Knights* Tribunal referred to *Brockie* as an example of just such a commercial enterprise.<sup>130</sup> The Tribunal concluded that:

a person, with a sincerely held religious belief cannot be compelled to act in a manner that conflict[s] with that belief, even if that act is in the public domain . . . . [T]he Knights are entitled to this constitutional protection and therefore *cannot be compelled to act in a manner that is contrary to their core religious beliefs*.<sup>131</sup>

Even though the respondents were not being asked to participate in the solemnization of a same-sex marriage, the Tribunal decided, renting the hall for its celebration would have required the organization to indirectly condone the celebration of a same-sex marriage, contrary to the members’ core religious

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<sup>128</sup> *Id.* at para. 89.

<sup>129</sup> *Id.* at paras 91–92.

<sup>130</sup> *Id.* at paras. 106–10.

<sup>131</sup> *Id.* at para. 113 (emphasis added).

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beliefs.<sup>132</sup> This absolutist position, whereby the organization's core beliefs should not be violated, may be more extreme than the problematic "objective" standard adopted by the Court in *Brockie*.<sup>133</sup>

Despite this, the *Knights* Tribunal found for the complainants on the narrow ground that the Knights had not accommodated the complainants *in a manner that did not violate the respondents' beliefs*. Such accommodation could have included, according to the Tribunal: meeting with the complainants, explaining the situation to them, formally apologizing, reimbursing them immediately, and possibly offering them assistance to find another venue.<sup>134</sup>

The BFRJ analysis in *Knights* raises a number of difficulties, demonstrating certain analytical positions that should be avoided in belief-based exemption cases. First, in *Knights*, the religious nature of the organization appears to have trumped other factors, such as the extremely tenuous connection between the service provider and the service. In contrast, for example, to Mr. Brockie the printer, who presumably would have had to be personally involved to some extent in producing the requested material, the organization in *Knights* did not appear to have had a connection to the event other than through the rather impersonal act of renting out the hall; and even that was for the wedding reception, not the ceremony itself. Indeed, the identity of the organization as service provider appears to have been determinative for the Tribunal, as it stated in its spectrum analysis that it would not require the Catholic Church to rent its Parish Church space for the reception against its core religious beliefs, but that it would have no difficulty compelling a commercial enterprise, such as that in *Brockie*, to rent its hall.<sup>135</sup> It is not clear how the Tribunal reconciled this reasoning with its conclusion that it would not force any person with a sincerely held religious belief to act against that belief. After all, Mr.

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<sup>132</sup> *Id.*

<sup>133</sup> See *supra* notes 32–48 and accompanying text.

<sup>134</sup> *Knights of Columbus*, 2005 BCHRT 544 at paras. 127–28.

<sup>135</sup> *Id.* at para. 109.

Brockie was the owner of just such a business, and a commercial marriage hall might be owned by someone with views similar to those of the Knights. An additional difficulty arises in this regard. The premise of the spectrum analysis as applied in this case seems to create an exemption based on the religious identity of the service provider. However, the B.C. Code already has an exemption for religious organizations, an exemption that did not apply in this case. At the least, the Tribunal should have attempted to reconcile its spectrum-analysis exemption with the existing statutory exemption.

Second, the Tribunal adopted an absolutist position—that it would not have forced the organization to do *anything* that violated its members' core beliefs, even in the public domain—which is wrong both in principle and in law. The logic in *Knights* could lead to even more severe and absurd results, as it would seem to justify any discrimination as long as there was a sincerely held core religious belief. What if, for example, the Knights organization, on the basis of a sincerely held religious belief, refused to work with LGBTQ couples, would not refer them to another venue, and perhaps even felt it immoral to be near with them (and therefore put up signs in the window indicating that LGBTQ people would not be served)? On the logic of the *Knights* Tribunal, this discriminatory conduct could be justified and may be protected. The Tribunal's absolutist reasoning undermines the very basis of the human rights antidiscrimination laws, which were designed specifically to compel people to act against their convictions if those convictions would lead to discriminatory results. To be fair, it is hard to know whether the *Knights* Tribunal intended to take such an extreme position, given its conclusion that the organization had in fact discriminated.

The *Eadie* Tribunal, in the first part of its BFRJ analysis, used similar reasoning, but reached a different conclusion as to the function of the service being provided by the Riverbend. This Tribunal accepted that the Riverbend owners sincerely believed allowing a same-sex couple to share a bed in their home would harm the owners' relationship to their Lord.<sup>136</sup> Nonetheless, the

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<sup>136</sup> *Eadie v. Riverbend Bed & Breakfast*, 2012 BCHRT 247, para. 139.

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Tribunal found that the owners had not established a bona fide and reasonable justification for their discriminatory conduct.<sup>137</sup> Here, as in *Knights*, the conclusion hinged on the definition of the function of the service. In *Eadie*, the Tribunal defined the function of the bed and breakfast without reference to the owners' religious views, finding that the Riverbend's function was to provide temporary accommodation to the general public.<sup>138</sup> Therefore, the Tribunal concluded, the rule excluding couples who were not a married man and woman was not rationally connected to this purpose of providing temporary accommodation.<sup>139</sup> The two cases together provide a clear illustration of how the definition of the service's function effectively determines the rest of the analysis, but is not helpful in resolving the belief-based exemption cases. If the function is defined, as in *Knights*, in relation to the service providers' religious beliefs, they will be granted near-absolute protection for these beliefs, subject to the duty to accommodate. If the function is defined without reference to the service providers' religious beliefs, as in *Eadie*, they will be left without any protection, despite the fact that they appear to have believed just as fervently as the Knights did that their business should be run without harming their relationship with their Church or with their Lord. Such absolutist conclusions in both cases do not leave room for nuance or balancing.

For the sake of caution, the *Eadie* Tribunal did not stop at the first part of the BFRJ analysis. In its decision on the third part of the analysis assessing the duty to accommodate, the Tribunal addressed a number of issues. It considered the argument that the Riverbend was in the owners' home.<sup>140</sup> The Tribunal held that there was no statutory exception available for "services" in a situation of shared sleeping, bathroom, or cooking facilities, to parallel the statutory exception for tenancy in such

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(Can.).

<sup>137</sup> *Id.* at para. 145.

<sup>138</sup> *Id.* at para. 141.

<sup>139</sup> *Id.* at para. 144.

<sup>140</sup> *Id.* at paras. 151–53.

circumstances.<sup>141</sup> The Tribunal concluded that those parts of the Riverbend occupied by guests were properly characterized as business premises.<sup>142</sup> What underlies this formalistic discussion may be the idea that intimacy between service provider and the recipients of the service could in very exceptional cases justify a belief-based exemption, or minimize the duty to accommodate. No such level of intimacy was reached by renting a room in a bed and breakfast.

Next, the *Eadie* Tribunal considered the religiosity of the Riverbend. It conducted a spectrum analysis, concluding that the Riverbend was “*more toward* the commercial end of the spectrum . . . . While the business was operated by individuals with sincere religious beliefs respecting same-sex couples, and out of a portion of their personal residence, it was still a commercial activity.”<sup>143</sup>

The Tribunal also considered the Riverbend’s clientele, concluding that they were not restricted to the Christian community.<sup>144</sup> The Tribunal refrained from deciding whether this would have made a difference to the decision.

The focus on religiosity seems to imply that religious institutions who wish to discriminate in providing services to the public could enjoy a lower duty to accommodate. As discussed above, an exemption or diminished duty to accommodate based on the religious identity of the service provider is rife with issues, as it lacks nuance and does not leave room for consideration of factors such as the impact of the harm. A test hinging on the religiosity of the service provider may also lend itself to absolutist conclusions, as appears to have been the case in *Eadie*.

The Tribunal also held that as it was the owners’ decision to run a business in their home, in this they were not compelled by the state to act contrary to their religious beliefs.<sup>145</sup> The Tribunal acknowledged that being religious practitioners in the public

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<sup>141</sup> *Id.* at para. 160.

<sup>142</sup> *Id.* at para. 161.

<sup>143</sup> *Id.* at para. 165 (emphasis added).

<sup>144</sup> *Id.* at para. 166.

<sup>145</sup> *Id.* at para. 165.

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domain may carry a cost (in money, tradition, or inconvenience), but stated that such costs are less serious than a limit that effectively deprives the adherent of any meaningful choice with respect to their practice.<sup>146</sup> Having decided that the owners were not deprived of a meaningful choice with respect to the exercise of their religion, the Tribunal concluded:

[T]heir choice or mode of business operation may be limited by their religious practice. Having entered into the commercial sphere, the Molnars (owners), like other business people, were required to comply with the laws of the Province, including the *Code*, which is quasi-constitutional legislation that prohibits discrimination on the basis of sexual orientation.<sup>147</sup>

Thus the *Eadie* Tribunal appeared to be saying that business people who choose to enter the commercial sphere may not discriminate. This too is near-absolutist reasoning, as the Tribunal appeared to be ruling out religious freedom exemptions for any person providing services in the public domain who is not acting in furtherance of a religious goal. This included the owners, despite their strong personal religious views. It could also include a female massage therapist who, for religious reasons, does not accept adult male customers.

The Tribunal's reasoning on this point is not persuasive. Harms to religious freedom are constitutional infringements, which must be acknowledged as such and balanced against the relevant countervailing interests, as discussed below. It is also unpersuasive to assert that "simply" asking people to change their mode of business does not constitute an interference with their freedom of religion. Asking people to change or move their business because they are not in compliance with the law is coercive, whether the owner chooses to shut down their business (as the owners did subsequently in *Eadie*) or to comply with the law against their own convictions. Such coercion may be justified, as it was in *Eadie*, but the impact on the owners can

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<sup>146</sup> *Id.* at para. 168

<sup>147</sup> *Id.* at para. 169.

nonetheless still be acknowledged.

What the analyses in *Knights* and *Eadie* demonstrate are the challenges created when trying to balance equality with freedom of religion within a bona fide and reasonable justification test as applied in these cases. The Tribunals engaged in awkward discussions and reached unlikely conclusions, inserting religious beliefs into the function of a wedding hall and determining that a bed and breakfast was “more” on the commercial end of the spectrum. A straightforward balancing exercise, like that under section 1 of the *Charter*, would be preferable,<sup>148</sup> similar to that conducted by the courts in *Marriage Commissioners* and in *Brockie*.<sup>149</sup> Though the court reached the wrong conclusion in the latter case, these courts were able to ask themselves the correct questions and consider nuanced solutions.

On the facts in *Eadie*, a balancing exercise could consider the equality rights of the complainants, assess the actual harms they suffered, as well as the social context and greater harms that may occur if the owners could single out LGBTQ people for discrimination. It could weigh this against the religious freedom of the owners, the actual harms they would suffer if prohibited from discriminating, and the greater social context. In a belief-based exemption case such as this, one party or the other may end up feeling forced out of the public domain. Indeed, some might consider this to have been the fate of the Riverbend owners, who did in fact leave the public domain and shut down their bed and breakfast following the Tribunal’s decision prohibiting them from discriminating. If anyone has to leave the public domain, in most instances, it likely should be those who want to be kept apart, to exclude or discriminate.

Moreover, in the *Eadie* and *Knights* cases, as well as the

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<sup>148</sup> This appears to be the method proposed by the Ontario Human Rights Commission for those situations where reconciliation is not possible. See ONTARIO HUMAN RIGHTS COMM’N, POLICY ON COMPETING HUMAN RIGHTS (2012), available at [http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights\\_accessible\\_2.pdf](http://www.ohrc.on.ca/sites/default/files/policy%20on%20competing%20human%20rights_accessible_2.pdf).

<sup>149</sup> *In re Marriage Comm’rs Appointed under the Marriage Act*, 2011 SCKA 3 (Can.); *Ontario Human Rights Comm’n v. Brockie* (2002), 161 O.A.C. 324 (Can. On. Sup. Ct. J.).

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others discussed in this Article, it is likely no coincidence that those who created the exclusionary rule were those with greater social capital, while those who would have been excluded belonged to a group that has experienced, and continues to experience, discrimination and marginalization. This too may be relevant context in determining the outcome of these cases. Had the *Eadie* Tribunal engaged in such a balancing exercise, it could have concluded, as this Article would, that the individual and social benefits of preventing discrimination against a couple on the basis of their sexual orientation in the specific, social, and historical context of this case outweigh the deleterious impact on the owners.

This conclusion, that the owners in *Eadie* should not be permitted to discriminate, is simple albeit coercive. However, there is nothing earth-shattering in the proposition that law coerces. The human rights laws work *ex ante* by prohibiting discrimination, and *ex post facto* by enforcing coercive measures where discrimination has taken place. The coercive nature of these laws has not changed since they were first established with the purpose of forcing individuals and businesses to serve, employ, and house people of different religions and races, against the sometimes deeply held convictions of those who would have otherwise discriminated. The importance of the antidiscrimination measures justifies the creation of these coercive human rights laws and continues to justify their implementation. This is particularly true for anti-LGBTQ discrimination in the current Canadian context. That said, it is still necessary for a court or Tribunal to examine each belief-based exemption case on its facts.

*D. Reference re Constitutional Act, 1978 (Saskatchewan):<sup>150</sup>  
Should Civil Marriage Commissioners Be Exempt From  
Solemnizing Marriages Contrary to Their Religious  
Beliefs?*

In 2004 and 2005, same-sex marriage was legally recognized

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<sup>150</sup> *In re Marriage Comm'rs*, 2011 SCKA 3.



across Canada following a series of constitutional challenges<sup>151</sup> and ultimately, new federal legislation.<sup>152</sup> This tremendous change raised a new legal and constitutional question with respect to belief-based exemptions. In the province of Saskatchewan, eight marriage commissioners resigned after being informed that they were required to perform same-sex marriage ceremonies, while others filed human rights complaints claiming that their freedom of religion and their right to carry on an occupation without religious discrimination had been violated. Other human rights complaints and litigation followed.

Eventually, the Lieutenant Governor in Council asked the Saskatchewan Court of Appeal to provide an advisory opinion, known as a reference, on the constitutionality of two alternative possible amendments to the province's *Marriage Act*.<sup>153</sup> The court's opinion, although not legally binding, was provided in the form of a judicial decision: this is the *Marriage Commissioners* decision.<sup>154</sup> The two possible amendments under consideration in this case, if passed into law, would have created a belief-based exemption for marriage commissioners by allowing them to decline to solemnize a marriage if it would be contrary to their religious beliefs. The first option would have made the exemption available only to those marriage commissioners appointed on or before November 5, 2004—the date on which the courts in Saskatchewan recognized same-sex marriage.<sup>155</sup> The second

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<sup>151</sup> See, e.g., *W. (N.) v. Canada* (Att'y Gen.), 2004 SKQB 434 (Can.); *Halpern v. Canada* (Att'y Gen.), [2003] O.J. No. 2268 (QL), *sub nom.*, *Halpern v. Toronto* (2003), 172 O.A.C. 276 (Can. Ont. C.A.); *Ligue Catholique pour les droits de l'homme c. Hendricks*, [2004] Q.J.No. 2593 (Can. Que.), *sub nom.*, *Hendricks c. Québec* (Procureure générale), [2004] R.J.Q. 851 (Can. Que. C.A.); *EGALE Canada Inc. v. Canada* (Att'y Gen.), 2003 BCCA 251 (Can. B.C. C.A.).

<sup>152</sup> Civil Marriage Act, S.C. 2005, c. 33 (Can.).

<sup>153</sup> The Marriage Act, 1995, S.S. 1995, c. M-4.1 (Can.). The Lieutenant Governor in Council is the Saskatchewan Cabinet, with the approval of the Lieutenant Governor.

<sup>154</sup> 2011 SKCA 3 (Can.).

<sup>155</sup> The operative part of the first option reads as follows:

28.1(1) Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner who was appointed on or

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option would have made the exemption available to all marriage commissioners in the province, regardless of the date of their appointment.<sup>156</sup> The court's analysis addressed both possible exemptions together.

The court held that these exemptions would, if enacted, be unconstitutional and invalid: they would violate the equality rights of LGBTQ individuals guaranteed in section 15 of the *Charter*; this infringement of section 15 would be unreasonable and unjustifiable under the *Charter's* section 1 reasonable limits test, as the proposed exemptions would not be minimally impairing, and their harms would far outweigh their benefits.

This case, similar to *Chamberlain*, did not involve a private actor in the role of service-provider. Indeed, the majority's decision was based in large part on the fact that marriage commissioners act as government officials. Nonetheless, there is a great deal in the *Marriage Commissioners* decision that is helpful for exploring the issue of belief-based exemptions—for the most part because of its contribution to this debate, in particular its section 1 analysis, but also, with respect, because of its flaws. The issues raised include the following: whether the purpose of the proposed exemptions was to protect religious freedom or to facilitate discrimination on the basis of sexual orientation;<sup>157</sup> who may define religious beliefs, and the oft-cited yet problematic distinction between religious beliefs and acts; the deleterious effects of the exemptions, and their impact on individuals and society, particularly if institutionalized and

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before November 5, 2004 is not required to solemnize a marriage if:

- (a) to do so would be contrary to the marriage commissioner's religious beliefs; and
- (b) the marriage commissioner has filed the notice mentioned in subsection (2) within the period mentioned in that subsection.

*Id.* at para. 17.

<sup>156</sup> The second option reads: "28.1 Notwithstanding *The Saskatchewan Human Rights Code*, a marriage commissioner is not required to solemnize a marriage if to do so would be contrary to the marriage commissioner's religious beliefs." *Id.*

<sup>157</sup> *Id.* at paras. 74, 78–79, 115.

legitimized through official policy; and again, the slippery slope of exemptions that could be justified if the proposed exemptions were permitted.<sup>158</sup> This Article shares many of the court's conclusions, but differs on the question of religious freedom and the right of individuals to define their religious views and priorities for themselves.

*1. Factual Background, Charter Analysis, Equality, the LGBTQ-Specific Context, and the Purpose of the Exemptions*

The court's factual findings established the background to this case, as follows: marriage commissioners in Saskatchewan are appointed by the Minister and provide the only route to marriage for individuals who want a nonreligious ceremony.<sup>159</sup> Indeed, the *Marriage Act* specifies the requirements and the wording for a civil ceremony—and these are strictly nonreligious. Individuals wanting a civil marriage may receive contact information through the provincial government, following which they can contact a commissioner directly.<sup>160</sup> According to the court, this route would be the only one available to many gay and lesbian couples who want to get married.<sup>161</sup>

The two proposed amendments to the province's *Marriage Act* at issue<sup>162</sup> would have exempted all or some of these civil marriage commissioners from the duty to solemnize a marriage, if doing so would be contrary to their religious beliefs.<sup>163</sup> The court was asked to provide its opinion on the constitutional validity of these proposed exemptions. Applying the established test, the court began its analysis by considering whether the proposed exemptions infringed a *Charter* right or freedom. It concluded that the exemptions did in fact violate the right to equality under section 15 of the *Charter*. It then fell to the court

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<sup>158</sup> *Id.* at para. 90.

<sup>159</sup> *Id.* at para. 9.

<sup>160</sup> *Id.* at para. 8.

<sup>161</sup> *Id.* at para. 9.

<sup>162</sup> The *Marriage Act*, 1995, S.S. 1995, c. M-4.1 (Can.); *see also supra* notes 155–56.

<sup>163</sup> *See supra* notes 151–52 and accompanying text.

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to determine whether the exemptions constituted a reasonable limit on this right such that they could be justified under section 1 of the *Charter*.<sup>164</sup>

Applying the section 1 analysis to the exemptions, the court first considered the purpose of the exemptions. The majority (though not the concurrence) held that the purpose of the exemptions—to protect freedom of religion—was pressing and substantial, thus satisfying this branch of the test.<sup>165</sup> Second, the majority held that the proposed amendments were rationally connected to this purpose, in that the exemptions would indeed protect marriage commissioners' religious freedom.<sup>166</sup> However, on the third—minimal impairment branch of the section 1 analysis—the majority found that the exemptions were more restrictive than necessary to achieve their objective.<sup>167</sup> Given the possibility of an alternative method for matching couples with marriage commissioners—a method that would have harmed equality rights less than the proposed exemptions—the majority concluded that the exemptions were not minimally impairing, not a reasonable limit on the right to equality, and as such, they were unconstitutional.<sup>168</sup> The court decided to provide its opinion as well on the fourth, and final, branch of the section 1 analysis and concluded that the deleterious effects of the exemptions far outweighed their salutary effects. For this reason as well, the exemptions did not constitute a reasonable limit and were unconstitutional.

Aspects of the court's *Charter* analysis raise interesting, insightful, helpful, at times controversial, and even troubling elements, all of which are illuminating in the context of a larger discussion about belief-based exemptions. It is these elements that will be drawn out for a more detailed discussion below.

In the initial stage of its *Charter* analysis, the majority considered whether the proposed exemptions infringed a *Charter*

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<sup>164</sup> For the reasonable limits test, see *supra* notes 7–9 and accompanying text.

<sup>165</sup> *Marriage Comm'rs*, 2011 SKCA 3 at para. 82.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at para. 88.

<sup>168</sup> *Id.* at para. 101.

right. It concluded that the exemptions would curtail the *Charter's* right to equality under section 15. Its conclusion was based on the following findings: an exemption could lead to any number of commissioners refusing to perform same-sex marriages; the impact of such refusals on an LGBTQ couple could be very significant and genuinely offensive; and even if a few commissioners opted out of performing same-sex marriages, LGBTQ couples looking for a commissioner might face some inconvenience, could have to deal with numerous refusals, and they may encounter real difficulty in small or remote locations. Also, in light of historical discrimination and mistreatment of LGBTQ individuals, allowing marriage commissioners to refuse a same-sex couple service “would clearly be a retrograde step—a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions.”<sup>169</sup>

In the next stage, it was necessary to conduct a *Charter* section 1 analysis to determine whether the infringement of the right to equality could be justified as a reasonable limit on this right. If so, the exemptions would be constitutional. To begin the section 1 analysis, the court needed to establish the purpose of the proposed exemptions. These exemptions were drafted broadly and would have allowed a marriage commissioner to refuse to perform any kind of marriage, such as an inter-faith union.<sup>170</sup> And indeed, the majority found that the *purpose* of the exemptions was to protect the religious freedom of marriage commissioners by relieving them of their duty to perform *any* marriage contrary to their religious beliefs.<sup>171</sup> That said, Justice Richards, writing for the majority, focused his analysis specifically on one kind of situation—a refusal to solemnize the marriage of *a same-sex couple*—as there was no evidence of any other kind of refusal and because same-sex marriage was in fact the issue underlying the debate.<sup>172</sup>

The concurrence delivered by Justice Smith went further,

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<sup>169</sup> *In re* Marriage Comm'rs Appointed under the Marriage Act, 2011 SKCA 3, para 45 (Can.).

<sup>170</sup> *Id.* at para. 24.

<sup>171</sup> *Id.* at para. 76.

<sup>172</sup> *Id.* at paras. 104–09.

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considering, clarifying, and redefining the purpose of the proposed exemptions.<sup>173</sup> According to the concurrence, the *objective* of the exemptions was not simply to accommodate the religious freedom of marriage commissioners, but to permit marriage commissioners to refuse to perform *same-sex marriage ceremonies* when doing so would conflict with their religious beliefs.<sup>174</sup> The facts underlying this conclusion were not difficult to demonstrate, particularly given that one of the two proposed exemptions was drafted specifically as a grandfathering option for those marriage commissioners appointed on or before the date that same-sex marriage was recognized in Saskatchewan. The concurring opinion concluded that this objective was not “pressing and substantial,” as required by section 1 of the *Charter*, or at the least it was doubtful whether this objective met the required threshold.<sup>175</sup>

What is particularly useful here is the insistence (by the concurrence, and perhaps in its wake, the majority), that the analysis be situated in its specific context. In this case, the issue was not simply one of religious freedom versus equality. It was squarely about discrimination on the basis of sexual orientation. And those who would be most harmed by the exemptions’ discriminatory effect were LGBTQ individuals. Providing detailed context and considering the identity, circumstances, and history of those who would be impacted by the denial of service will be critical for various stages of the analysis in any belief-based exemption case.

*2. Minimal Impairment and the Single Entry Point System*

As to whether such a limit on equality rights was justifiable, the court found that the exemptions failed the minimal impairment test,<sup>176</sup> as there was at least one alternative system that could harm individuals’ equality rights less than the proposed

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<sup>173</sup> *Id.* at paras. 115–30.

<sup>174</sup> *Id.* at para. 154.

<sup>175</sup> *Id.* at para. 152.

<sup>176</sup> The minimal impairment test requires that for a limit to be reasonable, it must “limit rights no more than necessary.” *Id.* at para. 83.

exemptions.<sup>177</sup> This alternative, known as the “single entry point” system,<sup>178</sup> would allow couples seeking a marriage commissioner to apply through a central office, at which point they would provide information about themselves (i.e., their genders). After this, the Director of the Marriage Unit would provide them with a list of available commissioners. The list provided to the couple would exclude those commissioners not prepared to officiate—all of which could have been established privately and “behind the scenes.”<sup>179</sup> Such a system, the majority held, would be less harmful than the proposed exemptions, as it would accommodate marriage commissioners’ beliefs; the accommodation would not be readily apparent to an LGBTQ couple; and the couple would not risk being refused service because of their sexual orientation. The court, however, was careful to explain that the discussion about the single entry point system did not prove the system’s constitutionality. It only served to prove the lack of constitutionality of the proposed exemptions which would be even more harmful to individuals’ equality rights.<sup>180</sup>

The single entry point system is indeed flawed. While it could mercifully shield LGBTQ couples arranging their weddings from the indignity and pain of a refusal, it would still include a request for information about a person’s gender, which should be irrelevant once same-sex marriage is recognized, and which is always problematic for transgender people. This system would also do nothing to shield the people “behind the scenes” from having to work with and implement this policy. Marriage commissioners and their associates, the Director of the Marriage Unit, and clerical and technical staff may themselves be LGBTQ, have a loved one who is, and/or have a deeply held belief in the equality, dignity, and worth of all people. Being required to work with a single entry point system would require such individuals to fill out forms, enter data, manage lists, and so forth in a context that would facilitate the singling out of LGBTQ people for

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<sup>177</sup> Indeed, there was a suggestion that a system of this kind operated in Toronto. *Id.* at para. 87.

<sup>178</sup> *Id.* at para. 85.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at para. 89.

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exclusion. As will be discussed below, the very creation of an official *ex ante* policy allowing people to opt out of performing same-sex marriages sends a problematic message legitimizing this refusal.<sup>181</sup>

3. *Salutary Effects and Defining Religious Beliefs*

On the final branch of the section 1 analysis, the court engaged in a balancing exercise to weigh the deleterious effects of the exemptions against their salutary ones.<sup>182</sup> The exemptions' benefits, the majority stated, were intended to protect marriage commissioners from having to do certain actions contrary to their religious beliefs. While these beliefs may be significant for some commissioners, the majority held that the benefits of the exemptions were less significant than they appear because:

the freedom of religion interests [that the exemptions] accommodate do not lie at the heart of [section] 2(a) of the *Charter*. [The exemptions] are concerned only with the ability of marriage commissioners to act on their beliefs in the world at large. They do not in any way concern the freedom of commissioners to hold the religious beliefs they choose or to worship as they wish.<sup>183</sup>

While agreeing with the majority's conclusion that the exemptions' harms far outweigh their benefits, this Article does not accept the distinction, invoked as well by the concurrence, between acting on beliefs and holding them as an appropriate method of determining the significance of a restriction. More generally, and with respect, the proposition that in defining a person's religious freedom, courts can rely on the distinction between "belief and conduct"<sup>184</sup>—a distinction frequently cited in freedom of religion and equality cases—may be factually

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<sup>181</sup> See *infra* Part II.D.4. This point was made by the concurrence about the exemptions themselves. *Marriage Comm'rs*, 2011 SKCA 3 at para. 107.

<sup>182</sup> *Id.* at para. 90.

<sup>183</sup> *Id.* at para. 93.

<sup>184</sup> See, e.g., *Trinity W. Univ. v. Coll. of Teachers* (1998), 169 D.L.R. 4th 234, para. 36 (Can. B.C. C.A.).



inaccurate and is philosophically unsound. This distinction privileges one subjective understanding of religion over others. While it is true that some religions are based primarily on faith and worship, there is a diversity of religious and spiritual systems, expressions, and practices that should not be overlooked. For some adherents and religions, faith or attendance at a house of worship may be less religiously and spiritually significant than, for example: acts of charity; ethical behaviour (whether others agree or not with aspects of these ethical systems); or ways of being in the world (including dietary regimes, modes of dress, and laws around sexual behaviour). In other words, for many adherents, their core religious freedom may be dependent on the freedom to conduct themselves according to a system of ethics and practices prescribed by their religion. This is not to say that one can never limit religious practices—such limits can and should take place in various situations, including the case under discussion. However, a meaningful analysis should rely on the actual religious worldview of the individual in question, not on the court's subjective beliefs about what constitutes religion.

The concurring opinion also dealt with the questions of how to define—and who should define—religious beliefs deserving of section 2(a) freedom. For instance, given the nonreligious nature of civil marriage and the importance of the civil scheme, the concurrence asked “in precisely what respect being compelled to perform a same-sex marriage can offend the religious freedom of a marriage commissioner.”<sup>185</sup> Justice Smith's intention, she explained, was not to question the sincerity of the belief, but rather to examine the significance of the societal harm the exemptions are intended to remedy and to what extent freedom of religion is offended by requiring marriage commissioners to perform same-sex marriages.<sup>186</sup>

This is, with respect, a strange question. If a person were asked to participate in a ritual that was offensive to their sincere moral or ethical core, surely this would be a violation of section

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<sup>185</sup> *Marriage Comm'rs*, 2011 SKCA 3 at para. 129.

<sup>186</sup> *Id.* at para. 130.

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2(a). Like equality, freedom of religion is a value. And this value would be harmed if people were required to act against their beliefs (including beliefs as to how they may and may not conduct themselves). It will nonetheless be open to a court to determine whether another conflicting value, such as equality, will receive greater protection in a particular context.

The concurrence also turned to the evidence and analysed the beliefs expressed by various affiants, including the following statement: “[M]onogamous, non-polygamous, heterosexual marriage is . . . a uniquely Christian doctrine. A Christian must always recognize marriage as such, and understand that any attempt on the part of society to define it in any other way is disobedience to the Covenant *and incurs the righteous judgment of God.*”<sup>187</sup> The concurrence attempted to demonstrate that refusals to perform same-sex marriage are not reasonable, plausible, or compliant with the law. Justice Smith also held that performing a same-sex marriage does not necessarily imply approval of the union. And she asserted that “[t]he performance of a civil marriage by a marriage commissioner under the Act is not a religious rite or practice. Nor does the requirement to do so limit or restrict religious belief.”<sup>188</sup>

Justice Smith’s analysis with respect to defining religious beliefs and freedom was erroneous. First, the concurrence was asking itself the wrong questions when it tried to assess the reasonableness, plausibility, or legal coherence of the refusals. Religious beliefs do not become less religiously true just because they may be unreasonable or implausible. Second, Justice Smith held that performing a marriage does not imply approval of the marriage. While this assertion may be true for the respected Justice, it directly contradicts the evidence of the affiants who expressed concerns about condoning or approving of these unions by virtue of solemnizing the marriages, as cited by Justice Smith herself. Finally, the concurrence seemed to suggest that only religious rites can be relevant to an infringement of a person’s religious belief. This suggestion is unfounded. If a person is

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<sup>187</sup> *Id.* at para. 135 (emphasis added).

<sup>188</sup> *Id.* at para. 147.

forced to violate a religious prohibition (such as eating pork, having a blood transfusion,<sup>189</sup> or removing a religiously mandated ritual object),<sup>190</sup> this may well be a violation of their religious freedom even where no religious rite is involved.

The question of how to define “core” religiosity or significant harms to religious freedom is one that recurs in the equality and freedom of religion cases. With respect, the concurrence’s analysis in this regard seemed to demonstrate a conceptual difficulty in grasping the nature of religious or conscientious belief and practice. This was particularly evident from the fact that Justice Smith found only a weak to nonexistent interference with religious freedom, despite having cited to an affidavit expressing an individual’s fear about incurring “the righteous judgment of God.”<sup>191</sup>

Religious beliefs (with respect to worship, conduct, and practice) are subjective and personal. Their range and expression may be diverse, their content may be irrational and idiosyncratic, and they may contain values that are anathema to others. Courts and tribunals adjudicating belief-based exemption cases should engage in a serious contemplation of freedom of religion that allows for the possibility that such beliefs are nonetheless real for the adherent.

It is not the role of the judge to define others’ beliefs based on their own logic and understanding. The role of the court, when freedom of religion is claimed, is to test the evidence with respect to sincerity of belief and the scope of the purported harm to the individual. It is also the courts’ role to limit these sincerely held core beliefs if this is justified under section 1 of the *Charter*.

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<sup>189</sup> See, e.g., *Manitoba v. C. (A.)*, [2009] 2 S.C.R. 181 (Can.).

<sup>190</sup> See, e.g., *Multani v. Comm’n scolaire Marguerite-Bourgeoy*, [2006] 1 S.C.R. 256 (Can.).

<sup>191</sup> *Marriage Comm’rs*, 2011 SKCA 3 at para. 135.

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4. *Deleterious Effects: Individual Harms and the Broader Context, Ex Ante Permission to Exclude, and the Slippery Slope of Exemptions*

Having established a conflict between religious freedom and equality, the critical phase of the analysis in belief-based exemption cases may well take place in the test that weighs the benefits of a measure against its harms. The majority in *Marriage Commissioners* found that the first deleterious effect of the proposed exemptions was the fact that they would undermine the struggle for equality generally, and

perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome. It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions.<sup>192</sup>

The exemptions' second deleterious effect, according to the majority, was in their harmful impact on individuals. To demonstrate this, the majority cited the testimony—from a different case in which a marriage commissioner denied service to an LGBTQ couple—of an individual who was denied service, giving voice to his experience and reaction. The man, M.J., had testified as follows:

It was actually pretty devastating . . . . So when this happened I was quite devastated. I rehashed this I don't know how much when I couldn't sleep because I actually wound up sleeping very little. I was just crushed about it. I couldn't believe that as a human being I wasn't going to be treated as a real person.<sup>193</sup>

The majority found that the negative and harmful effects of

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<sup>192</sup> *Id.* at para. 94.

<sup>193</sup> *Id.* at para. 95 (quoting *M.J. v. Orville Nichols & Saskatchewan Att'y Gen.* (2008), 63 C.H.R.R. D/145 (Can. Sask.)).

this kind of denial would affect not just those LGBTQ individuals denied services, but the LGBTQ community, their friends and family, and the public as a whole—as many members of the public would be hurt and offended by the idea that a governmental official would deny services to LGBTQ couples.<sup>194</sup>

The third and “in some ways most important” deleterious effect of the exemptions, in the majority’s view, was that they would undermine the principle that the government serves everyone equally without discrimination.<sup>195</sup> Marriage commissioners do their jobs as agents of the province. Individual public office-holders cannot expect to change the way the office interacts with the public to conform to their own beliefs, as this would be inconsistent with the principle of the rule of law.<sup>196</sup>

Concurring Justice Smith discussed additional deleterious effects that the proposed exemptions would cause. She provided a detailed overview of the marriage solemnization regime. This included the fact that, according to her, a significant number of religious organizations disapprove of same-sex marriage, and thus, civil marriage may be the only route to marriage available for same-sex couples.<sup>197</sup> For example, there were 138 religious bodies whose clergy may marry according to their rites and usages in the province, in contrast to the single prescribed form (including a set script) for a nonreligious marriage.<sup>198</sup> And the number of clergy ever registered with the marriage unit (5,713) was contrasted with the number of marriage commissioners (578).<sup>199</sup> These facts told a compelling story about the importance of maintaining an open, accessible, and impartial civil marriage option.

The concurrence also described the impact of discrimination on the basis of sexual orientation and took the time to set out the broader context responsible for the “extreme vulnerability” of

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<sup>194</sup> *Id.* at para. 45.

<sup>195</sup> *Id.* at para. 97.

<sup>196</sup> *Id.* at para. 98.

<sup>197</sup> *Id.* at para 106.

<sup>198</sup> *Id.* at para. 119.

<sup>199</sup> *Id.* at paras. 119–28.

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LGBTQ people to hatred and discrimination.<sup>200</sup> She cited a well-known and painful passage that described the historic and current disadvantages faced by this group, including: public harassment, verbal abuse, violence, exclusion from public life, a need to conceal identities and orientation, rejection by families, and, as a result of these, higher rates of suicide and attempted suicide.<sup>201</sup>

Next, the concurrence explained, the harm goes further than the individual exemptions: “[E]ven if the risk of actual refusal were minimal, knowing that legislation would legitimize such discrimination is in itself an affront to the dignity and worth of homosexual individuals.”<sup>202</sup> Thus, she concluded, what is at stake is not just the right of same-sex couples to marry, but the right of this vulnerable group to be free from discrimination in the provision of a public service, which is provided without discrimination to every other person in society.<sup>203</sup> Justice Smith reinforced this point by demonstrating that there was no other legislative provision in the province explicitly operating in conflict with the provincial Human Rights Code.<sup>204</sup> Her insight provides a coherent and persuasive message, demonstrating why an official policy whose effect is to permit exclusion against a particular group is so problematic:

Astonishingly, this clause [the exemptions] would grant to a public official, charged with the delivery of a public service, an immunity to the antidiscrimination provisions of the Code not enjoyed by any other person in this Province. Moreover, in practice, it would deny to gays and lesbians the protection from discrimination that the Code provides to others. In the words of the Supreme Court’s decision in *Vriend*, . . . this clause would send “a strong and sinister message” that “gays and lesbians are less worthy of

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<sup>200</sup> *Id.* at para. 107.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at para. 108.

<sup>204</sup> *Id.* at para. 161.

protection as individuals in Canada's society."<sup>205</sup>

The existence of an official, ex ante policy allowing discrimination has serious consequences, whether the discriminatory policy at issue is the exemption permitting a marriage commissioner to refuse to marry a couple, or the single entry point system discussed above permitting marriage commissioners to opt out of performing these marriages behind the scenes. Such a policy can be implemented and discussed with co-workers, staff, and supervisors, and effectively conveys the message that this form of discrimination on the basis of sexual orientation is understood, expected, tolerated, and legitimized. Consider, by contrast, whether society would tolerate an official system allowing people, directly or behind the scenes, to discriminate on the basis of race or religion. The institutionalization of discrimination may serve to perpetuate, magnify, and increase it.

Finally, the concurrence asserted, "if the proposed exemptions were constitutionally acceptable, [then] so too would be virtually any legislative [exemption]"<sup>206</sup> allowing service providers to discriminate against same-sex couples, in the public or private sphere, on the basis of religious disapproval of the "same-sex lifestyle."<sup>207</sup> The logic underlying the exemptions, according to Justice Smith, would be to permit marriage commissioners to refuse to solemnize same-sex marriages, since in their view, performing such a marriage would connote approval of same-sex relationships, and this conflicts with their religious beliefs.<sup>208</sup>

On this logic, Justice Smith stated, a wide range of service providers who disapprove of same-sex relationships could also try to justify discriminating against LGBTQ people if the disapproval was on religious grounds, which she found it frequently is.<sup>209</sup> These other service providers could include persons who rent

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<sup>205</sup> *Id.* at para. 158.

<sup>206</sup> *Id.* at para. 103.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at para. 144.

<sup>209</sup> *Id.* at para. 145.

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halls for marriage celebrations, sell marriage licenses, rent living accommodation to married couples, and provide restaurant meals or entertainment, as mentioned above.<sup>210</sup>

It is arguable whether solemnizing a marriage is akin to selling popcorn to a couple at a romantic movie, given the closer nexus of the marriage commissioner and greater degree of personal involvement in the union. However, there is no question that the logic of disapproval on its own could apply in far too many situations of discrimination such as the examples discussed by the court in *Brockie*. Both a printer who refused to print editorial content and a printer who refused to print a business directory aimed at LGBTQ interests would likely have asserted their refusal on the basis of their disapproval.

The conclusion reached by the majority and concurrence in *Marriage Commissioners* was the correct one, and a great deal of their analysis is extremely helpful in advancing the law about belief-based exemptions in the context of discrimination on the basis of sexual orientation. The proposed exemptions, if enacted, would not have been constitutional due to their deleterious effects, the particular harms of official and ex ante policies permitting discrimination, and the role of the marriage commissioners as agents of the province. For all that, it should be recognized that for some individuals, solemnizing a same-sex marriage could go against their sincerely held religious beliefs, and they may choose to leave their position as marriage commissioner rather than be compelled to create the union. Being forced out of work is a significant and coercive result. However, when weighed against the proposed exemptions' serious individual and social harms, these exemptions would not be constitutional, and the court was correct in finding that the right to equality in this case should prevail.

III. CONCLUSION: CAN FREEDOM OF RELIGION AND EQUALITY BE RECONCILED? GUIDING PRINCIPLES AND CONCLUSIONS

A serious and dedicated approach to equality, freedom of

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<sup>210</sup> *Id.*



religion, and dignity acknowledges that people hold diverse views which will come into conflict from time to time. In addressing belief-based exemption cases, a few themes emerge that may help guide future cases. These can be derived from existing Canadian case law and from a critical analysis of some of the decisions.

First, the issues at play are complex and cannot be resolved in the abstract.<sup>211</sup> Freedom of religion and equality do not lend themselves to reconciliation in many of the belief-based exemption cases, and resorting to higher-order principles will generally not provide a solution, as these principles frequently apply to both rights.

Religion is a subset of equality, as it is one of the prohibited grounds of discrimination. Freedom of religion also embodies elements of freedom of association and liberty. Equality likewise incorporates these elements. Both equality and freedom of religion may relate to a value system, which is sincerely believed in and deeply cherished by many individuals. Indeed, the two are not mutually exclusive. For many religious individuals, a deeply held and cherished belief in the inherent dignity, equality, and worth of all people comes from their religious faith. And numerous religious individuals and groups have been involved in various antidiscrimination causes, including efforts to recognize same-sex marriage in Canada. Finally, the concept of dignity—generally recognized as being at the heart of the right to equality—also underlies the protection of religious freedom, as pointed out by the dissent in *Chamberlain* and the court in *Brockie*. Thus, for example, if one is forced to pray to a foreign deity, touch an impure object, use one's artistry or talents to tell a false story, or have one's children taught an ideology that runs counter to one's deeply held values—this may amount to a violation of dignity.

In the result, where an individual or entity seeks an exemption based on their religious beliefs from the duty to provide services to the public without discrimination on the basis of sexual

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<sup>211</sup> See, e.g., Benjamin L. Berger, *Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed*, 19 CONST. F. CONSTITUTIONELL 41 (2011).

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orientation, a theoretical reconciliation between equality and freedom of religion will often not be possible. Instead, individual exemptions should be examined on the basis of their concrete facts in context and on a case-by-case basis. Courts should consider evidence as to the specific individuals' beliefs, the actual harms that would result from infringing a person's religious freedom, as well as the actual harms from the discrimination. The examination should include not only the impact on individuals, but also the broader social, legal and historical discrimination and context at issue, as considered by the Tribunal in *Eadie* and the court in *Marriage Commissioners*. The section 1 *Charter* test provides a helpful framework for such an analysis and balancing exercise.

Given that reconciliation between the rights is not likely, the second theme that emerges is that one party's fundamental right may be violated, and a coercive solution may be necessary. This conclusion, while uncomfortable, would result regardless of which way the court decided. And coercive solutions are consistent with many other laws that force individuals to act in a manner they might not otherwise have chosen, including the human rights laws that prohibit discrimination.

Third, adjudicators would do well to reflect on their own prejudices. Courts should avoid the kinds of hetero-normative assertions made by the dissent in *Chamberlain*, and focus instead on a respect for diversity on the basis of sexual orientation and gender identity.

The fourth guiding principle, similarly, addresses a particular preconception that may preclude adjudicators from engaging seriously with the rights on both sides of the conflict. Some people sincerely feel that their religion prohibits them from participating in certain events or activities. Courts should not summarily dismiss, as the concurrence did in *Marriage Commissioners*,<sup>212</sup> the difficulties faced by someone required to choose between their work, and their conscience and dignity, if forced to act against their beliefs. Nor should an adjudicative body impose its own understanding of religion on the person

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<sup>212</sup> See *supra* notes 184–90 and accompanying text.

seeking religious freedom. What the court can and should do is examine the evidence concerning both the sincerity of the belief and the possible harms that could occur if a person's religious freedom is infringed. Courts must take seriously the possibility that individuals may be concerned about harming their relationship with their Lord or about the "righteous judgment of God." Such sensitivity and consideration is not the end of the process, but it is necessary to examining and balancing the real issues at stake.

The fifth principle that emerges from the case law is that official, sweeping, or ex ante exemptions permitting discrimination on the basis of sexual orientation in the provision of services should be avoided. Such exemptions may send a message that discrimination is to be expected, tolerated, and legitimized, as reasoned by the concurrence in *Marriage Commissioners*, and could lead to the institutionalization and perpetuation of the discrimination.

Finally, belief-based exemptions, if allowed at all, must be extremely rare and exceptional. None of the cases discussed in this Article presented a justified belief-based exemption. However, it is possible that such situations may occur. For example, as discussed, if a person is asked to participate in creating a product with which they disagree, an exemption might be justified if the requested product would be derogatory or hateful towards the service provider and/or hateful towards a group protected under the antidiscrimination laws.

New situations may also bring to light the possibility of other exemptions. For instance, services that require the exceptionally intimate and personal involvement of a service provider in a relationship with which they disagree may generate a different conclusion than services requiring a more tenuous connection. For example, a sex therapist who refuses to work with a same-sex couple likely has a stronger argument, on the basis of intimacy, than an electrician who refuses to rewire that couple's home. Even in the case of the sex therapist, however, and assuming that bona fide occupational requirements were not at issue, a case-specific, contextual analysis is required that would consider the reason for the refusal, the question of minimal impairment, and

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the deleterious and salutary effects of granting the requested exemption. Such an analysis may conclude in favour of the sex therapist because of the exceptional intimacy required, or it may reach the conclusion that the therapist should find a less intimate occupation.

The danger of the slippery slope is significant in belief-based exemption cases, and balancing exercises to assess these cases give adjudicators wide discretion. Absent a strict exceptionality standard, there could be too many discriminatory refusals. Thus, for example, even if one were to take the standard from *Brockie*, in which a service provider may be exempt if the material conflicts with their core beliefs, and make it stricter by adding a requirement that the service provider must have a direct and personal involvement in the work, in its outcome, or with the customer, the list of possible exemptions would still be long. After all, many service providers are personally involved in their work and/or with customers, and some individuals do hold beliefs that would lead them to discriminate on the basis of sexual orientation or gender identity. Refusals that meet this description could include (to use recent Canadian and American examples): a florist asked to enhance the beauty of a wedding; bed and breakfast owners renting out a room in their home; or a wedding photographer whose job it is to create a lasting image of love and romance.

It is not difficult to imagine any number of other situations that could also meet this standard, including: an architect asked to design a family home for a family they believe should not exist—or a builder or interior designer with similar views; a lawyer, banker, or investment adviser asked to protect the property of children or a spouse in a family arrangement the service-provider considers invalid; a wedding planner, dress maker, or barber who objects to the wedding, or perhaps a hairdresser or manicurist who objects to the romance; a teacher whose beliefs run counter to parts or all of the curriculum; a police officer whose job may involve risking their own safety to protect an event (a Pride parade), ceremony (a same-sex marriage), or person (a politician active in promoting LGBTQ rights) that the police officer does not believe warrants such protection; a health provider or hospital

worker asked to convey information or provide assistance to the loved one of a patient—or asked to deliver a baby in a family arrangement of which they disapprove.

It is difficult to accept the idea that doctors or police officers might refuse to save or protect individuals in any circumstances. It is also difficult to contemplate a society in which refusals to provide service that single out customers based on their sexual orientation could be commonly tolerated and institutionalized. It is for this reason that exemptions, if any, should be extremely rare and exceptional. After all, the human rights laws were passed because of people's refusal to countenance a society in which discrimination would be tolerated. To countenance it now is deeply concerning in the face of pervasive and often socially accepted discrimination against people on the basis of their sexual orientation or gender identity. Accepting exemptions in any but the most exceptional of circumstances could lead to many acts of refusal and exclusion, and could legitimize and perpetuate this discrimination, undermining the very purpose of our human rights laws. Such a result would be out of balance and would not justify violating the dignity, equality, and fundamental rights of people in Canada.