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Religion-Based Claims for Impinging on Queer Citizenship

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Competing claims for legal protection based on religion and on sexual orientation have arisen fairly frequently in Canada in the past decade or so. The authors place such competitions into five categories based on the nature of who is making the claim and who is impacted, the site of the competition, and the extent to which the usual legal and constitutional norms applicable are affected. Three of the five categories identified involve a claim that a religion operate in some form in the public area so as to impinge on the usual protection of equality on the basis of sexual orientation. The authors examine the basis of claims for such religion-based exceptionalism and argue that acceptance of the religion claim in these three public-area categories would involve unjustifiable curtailment of citizenship for queer people and could undermine the equality gains that have been made by this group.

Des revendications concurrentes pour la protection juridique fondées sur la religion et l'orientation sexuelle ont été invoquées avec une fréquence relative au Canada pendant la dernière décennie. Les auteurs divisent ces revendications en cinq catégories, en fonction de la personne qui présente la revendication et de celle qui en subit les effets, du lieu où elle est présentée et de la mesure dans laquelle les normes juridiques usuelles et constitutionnelles applicables sont touchées. Pour trois des cinq catégories ainsi définies, on relève un argument voulant qu'une religion soit activement pratiquée d'une façon ou d'une autre en public, de façon à empiéter sur la protection habituelle d'égalité fondée sur l'orientation sexuelle. Les auteurs examinent le fondement des prétentions d'exceptionnalisme fondé sur la religion et prétendent que la revendication religieuse dans les trois catégories du domaine public entraînerait un empiètement injustifiable sur la citoyenneté des homosexuels et pourrait faire reculer les gains enregistrés par ces derniers en matière d'égalité.

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Introduction

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Introduction

In recent years and in differing contexts, religion-based claims have been asserted that, if accepted, would justify the ability of individuals and groups asserting such claims to deny service, employment or even recognition to queer people and groups.¹ In this paper we examine the emergence of this competition between religion and sexual orientation claims. The paper has two main parts. In the first part, we propose a five-fold categorization of the contexts in which such claims might in practice arise, we suggest that in three of these categories or scenarios an acceptance of the religion claim necessarily means impingement on the constitutional or statutory rights guaranteeing equality on the basis of sexual orientation and a consequent denial of full citizenship to queer individuals. Here, in these three categories, such an impingement results from the use of a religious norm as the determinant for deciding when a public service will be provided (or denied). In the second part of the paper, we examine the arguments that might be made justifying such impingement in these three scenarios and argue that none of the arguments ought to be accepted. The religion arguments are unlike many other arguments for equality and inclusion in that they call for the right to deny equal, inclusive treatment for queer people in certain contexts where services are being offered to, or even on behalf of, the public. We argue that a concession to the religion arguments in these scenarios, all outside the context of actual religious worship and observance, would set a precedent whereby any person could, on the basis of a genuinely-held belief, religious or otherwise, demand an exception to non-discrimination norms in the provision of services to the public.

1. In this paper, the term “queer” is used to include all non-heterosexual sexualities. The terms “gay men and lesbians,” “GLBT” and “homosexual” are used where the context relates to those specific queer sexualities.

I. *Competition between religion and sexual orientation claims*

Equality protection on the basis of sexual orientation—whether the protection is constitutional or “merely” statutory—was bound to generate a contentious response from those asserting certain claims based on religion. Arguments against equality claims for lesbians and gay men are almost exclusively religious in nature. As is examined in the following part of this paper, certain issues have emerged that are emblematic of the competition between sexual orientation and equality claims. Perhaps the most prominent of such issues are same-sex marriage, hiring policies at denominational facilities offering services to the public, and use of or reference to religious standards to set public policy or offer public services—most notably in the educational context and with respect to providing services to people with exceptional needs.

The *religious* character of the opposition to claims of equality based on sexual orientation is exemplified in the same-sex civil marriage context. Here the specific issue has been how, if at all, the provinces would accommodate the views of those marriage commissioners who objected to performing same-sex marriage. While theoretically such objections might be based on non-religious grounds, we know of no instance in which the objection is not religiously rooted. Furthermore, in a Saskatchewan human rights case involving an action against a marriage commissioner who refused to conduct a same-sex marriage ceremony, the marriage commissioner admitted that he had no objection to marrying opposite-sex couples whose conduct was contrary to his religious beliefs—it was with respect only to same-sex couples that he drew the line.² The religious basis of such objection is even written into s. 3.1 of the *Civil Marriage Act* which states as follows:

[n]o person ... shall be ... subject to any obligation or sanction ... solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.³

The *Act* clearly purports to facilitate only objections to *same-sex* marriage. We are not aware of any refusal that was not based on religious views. Furthermore, so far as we are aware, no marriage commissioner in any jurisdiction has been permitted to refuse to solemnize a marriage on the

2. *Nichols v MJ*, 2009 SKQB 299, 339 Sask R 35 at paras 13, 53-54.

3. *Civil Marriage Act*, SC 2005, c 33.

basis of the personal characteristics of those seeking marriage except on the basis that the couple was of the same sex. Nor has there yet been any argument that religious exemptions should be available for other protected grounds enumerated or read into s. 15 of the *Charter*,⁴ such personal characteristics as race, ethnicity, national origin, age and so on—although the Prince Edward Island *Marriage Act* does provide a statutory basis to commissioners to refuse to solemnize a marriage that is not “in accordance with that person’s religious beliefs.”⁵ Saskatchewan proposed similarly-worded legislation.⁶

Despite religious arguments of discrimination or even persecution, religious organisations are on the whole privileged.⁷ The contrast with sexual minorities like gays and lesbians is profoundly striking. Religions frequently have their own educational and social institutions and widespread cultural vindication. Religious individuals—including especially children—have ready-made support systems in the family and the community. By contrast, queer youth often have no family or community support for their sexuality and are sometimes “thrown away” by their families.⁸ Religion is generally protected and even privileged around the world and is the subject of international treaties. Sexual orientation, by contrast, has very limited international protection.⁹

The nature of the claims recently made in Canada by religions and by sexual minorities which is the subject of more specific discussion later in this paper, is instructive. Sexual orientation claims tend to be claims either for benefits or access that others have, or actions seeking an end

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5. *Marriage Act*, RSPEI 1988, c M-3, s 11.1. New Brunswick proposed similar legislation: Bill 76, *An Act to Amend the Marriage Act*, 2nd Sess, 55th Leg, New Brunswick, 2005, cl 12.1.

6. Bill (draft), *An Act to amend the Marriage Act, 1995*, Saskatchewan, 2009. This bill was held to be unconstitutional in *Reference re Saskatchewan (Marriage Act, Marriage Commissioners)*, 2011 SKCA 3, 327 DLR (4th) 669, a decision released after the writing of this article which, therefore, does not consider it.

7. An engagement with more general legal issues relating to religion in Canada is found in the articles in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) [Moon, ed, *Religious Pluralism*]. Among other valuable contributions, those articles document most of the academic literature available on legal-religion issues in Canada. While the contributions in that book take different approaches, on the whole the authors are sympathetic to the idea of religious exceptionalism in Canada and for a special place being reserved for the protection of religious belief as opposed to non-religious belief.

8. See Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness* (New York: National Gay & Lesbian Task Force Policy Institute and the National Coalition for the Homeless: 2006).

9. Patrick Worsnip, “UN divided over gay rights declaration” *Reuters* (10 December 2008), online: Reuters <<http://www.reuters.com>>. According to proponents of the French-Dutch statement, homosexuality is illegal in seventy-seven countries and punishable by death in seven of those.

to discrimination; that is, the claims seek the same treatment received by others. Conversely, religion-based claims (though often presented as inclusion claims) usually seek some sort of exceptionalism—so that the religious person or group does not have to abide by the same norms by which others must abide. They are often claims to deny inclusion or services or employment to individuals who have constitutional and statutory rights guaranteeing such inclusion—often gays and lesbians and other queers.

Religion-based claims are put forward primarily on the basis that a particular kind of belief (religious) carries with it an entitlement to particular treatment that other types of belief (political, philosophical, or mere whimsy) do not. Richard Moon writes that “even when the state is pursuing an otherwise legitimate public purpose...it may be required to compromise this purpose and accommodate incompatible religious practices. There is no similar state obligation to accommodate non-religious beliefs and practices.”¹⁰ Religious belief is “special.”¹¹ Religious belief, it would seem to follow, warrants public manifestation to an extent that includes impinging the rights of others in a way that a non-religious belief could not be manifested. The reason for this privileging of religious belief is questionable. If I have racist beliefs and wish not to have to serve members of the public who are from a racial minority, why should the fact that my belief is grounded in “religion,” as opposed to non-religious conviction, matter? In terms of the legislation on same-sex marriage in PEI, why should my belief that I ought not to marry divorced people have to be religious in nature in order to be permitted to refuse to serve such members of the public?

II. *Competition scenarios*

Cases in which there might be competition between a claim based on religious grounds and a claim put forward on the basis of sexual orientation can be divided into four scenarios—meaning four factual contexts in which the competition might in practice arise. There is also a fifth and related scenario where there is not truly such a competition between the claims. These scenarios are:

first: exemption from usual norms granted to a religious *institution* performing a *public* function or providing a service to the *public*;

second: translation of religious *views* and dogma into the *public* arena;

10. Richard Moon, “Introduction: Law and Religious Pluralism in Canada” in Moon, ed, *Religious Pluralism*, *supra* note 7 at 15.

11. *Ibid.*

third: exemption from usual norms for a religious *individual* performing a *public* function or providing a service to the public;

fourth: interjection of constitutional norms into religious *observances* or *doctrine*; and

fifth: accommodation of religious *practices* in a work environment not affecting constitutional protections of others.

The first three scenarios involve a religious element, particularly a religious norm or view, being injected into the public arena in some form. They are ordered (from first to third) in terms of the scope of the involvement. So in the first scenario, the service provided by a religious institution will generally have a large or general impact while, in the third scenario, the service provided by a specific religious individual will have a more specific impact. The first three scenarios are to a certain extent blurred or difficult to differentiate in some situations, but that is not terribly important, we argue that they ought all to be dealt with in the same manner. We argue that the first three scenarios here should be resolved without impingement upon the constitutional and statutory rights protections of the public, particularly queer people. Such a resolution would entail an unacceptable expansion of protection for religion and particularly religious values into spheres and contexts that are not at the core of religion but are in fact part of the public sphere where the rights of others ought not to be affected by religious beliefs those others do not hold. In the fourth scenario, by contrast, the public norms are being injected into the religious arena. In the fifth scenario (as in the first three scenarios) the religious element is being injected into the public arena but in a way that does not diminish the entitlements of others. In this part of the paper we elaborate further on these five scenarios and how the first three differ from the other two. In the next part of the paper we discuss the arguments that are used to justify a resolution favouring the religious claim in a context falling within the first three scenarios.

The *first* scenario relates to claims pertaining to a religious institution in which that religious institution involves itself in the provision of public services or facilities or accepts public money to operate a facility.¹² In this situation, what can arise is a claim to exclude a queer person from the institution in terms of employment or use. Or, the institution insists on “anti-homosexual norms” imposed on those who make use of the

12. See Alvin J Esau, “‘Islands of Exclusivity’: Religious Organizations and Employment Discrimination” (2000), 33 UBC L Rev 719.

institution. There are several cases in this scenario involving education,¹³ social or other facilities,¹⁴ and social services.¹⁵

It is not surprising in a country like Canada, where religious organisations commonly provide public services, that there are a number of examples of the first scenario. One such case is *Heintz v. Christian Horizons*, where a lesbian “of deep Christian faith” resigned her employment with Christian Horizons, an evangelical Christian group that operated homes for the developmentally challenged, when her lesbianism and her lesbian relationship was revealed.¹⁶ If she had not resigned, her employment would have been terminated. When she started work with Christian Horizons she signed a “Lifestyle and Morality Statement” agreeing to refrain from “inappropriate behaviour” which included “homosexual relationships.” Such relationships were contrary to the religious teaching of Christian Horizons.

The case was decided in the context of the Ontario *Human Rights Code* which guarantees equal treatment with respect to employment without discrimination because of sexual orientation.¹⁷ The Ontario *Code* also makes clear, however, that equal treatment with respect to employment is not infringed where “a religious ... institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.”¹⁸ In this case, the services provided by Christian Horizons were not provided primarily for its co-religionists, but for the developmentally challenged—and so it did not meet the requirements for the exemption for discrimination in employment. The Tribunal held, however, that even if Christian Horizons had served mainly its co-religionists, compliance with the “Lifestyle and Morality Statement” was not “a reasonable and bona fide qualification because of the nature of the employment.”¹⁹ Heintz was a support worker

13. See *Hall (Litigation guardian of) v Powers* (2002), 59 OR (3d) 423, 213 DLR (4th) 308 (Sup Ct J) [*Hall*] (high school context); *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [*TWU*] (university context).

14. See *Smith v Knights of Columbus*, 2005 BCHRTD 544, [2005] BCHRTD no 544 (use of community hall); *L'Association ADGQ v Catholic School Commission of Montreal* (1979), 112 DLR (3d) 230 (Qc Sup Ct) (use of school).

15. See *Heintz v Christian Horizons*, 2008 HRTO 22, [2008] OHRTD no 21 [*Heintz*].

16. *Ibid* at paras 27-28.

17. *Human Rights Code*, RSO 1990, c H-19 at s 5(1) [*Ontario Code*].

18. *Ibid* at s 24(1)(a). The Tribunal noted that the language of the special employment exceptions in human rights legislation varies from jurisdiction to jurisdiction.

19. *Heintz*, *supra* note 15 at para 6.

with the residents and not a religious adviser or performing a related religious function as part of her job.

If the activities of the institution are more centrally involved in instilling the tenets of the faith, the outcome might be different, but perhaps only in the specific contexts where those tenets are actually being instilled. The case of *Hall* illustrates the education context.²⁰ There, a student, Marc Hall, attending a Roman Catholic school in Ontario, wanted to take his boyfriend as his date to his high school prom. The principal and the school board denied Hall permission to attend the prom with his boyfriend. The principal reasoned that “interaction at the Prom between romantic partners is a form of sexual activity and that, if permission were granted to Mr. Hall to attend the prom with his boyfriend as a same sex couple, this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings.”²¹ R. MacKinnon J. granted an injunction restraining the defendants from preventing Hall’s attendance at the prom with his boyfriend. The Court decided that the prom was not a function with primarily religious significance and so the protection of religion was not of primary importance. The Court kept the impingement on rights on the basis of a religion claim to as narrow a basis as possible. Hall’s request to bring a same-sex date to the prom did not prejudicially impact the central denominational nature of the school. Furthermore, applying the standard set out by the Supreme Court of Canada in *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*,²² the specific right being asserted by the Catholic School Board—namely, the right to regulate extra-curricular activities including the school prom—was not within their protected rights at the time of Confederation and could not, therefore, be claimed by the school or the school board as a constitutionally guaranteed right in 2002.²³

The injection of religious norms into public or civil life can occur when functions normally available from the government are “privatised”—that is, obtainable by the public from religious organisations or other groups. It is worth noting that for lack of anywhere near the equivalent resources, there is little or no engagement in the other direction—a queer rights group

20. *Supra* note 13 at para 4. See Bruce MacDougall, “The Separation of Church and State: Destabilizing Traditional Religion-Based Legal Norms on Sexuality” (2003) 36:1 UBC L Rev 1; David Schneiderman, “Associational Rights, Religion, and the Charter”, in Moon, ed, *Religious Pluralism*, *supra* note 7.

21. *Supra* note 13 at para 4.

22. *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, [1987] 1 SCR 1148, 40 DLR (4th) 18.

23. Since *Hall* was dealing with the issue of whether or not the court should grant an injunction, the full adjudication of these issues awaits for another day.

will rarely if ever be in a position of offering services to those outside the membership of the group. In the marriage context, some argue that governments should entirely “get out of the business” of conducting marriages—leaving marriages to be conducted only by officials of religious groups. Presumably, then, couples that sought an official union, who could not get or did not want a religious ceremony, would have to settle for some make-do civil union. *Heintz* is an example of the problems that can arise when the provision of these types of services is transferred to such interest groups. Care has to be taken that the workplace is not made hostile to queer individuals. In *Heintz*, the Tribunal found that Christian Horizons had allowed a discriminatory environment to pervade the workplace.²⁴ It was wrong for the employer to offer to provide a “restoration” cure for Heintz’s homosexuality and to allow rumours and discriminatory attitudes to poison the workplace for her. The adjudicator, Michael Gottheil, said: “Its policy, based on the belief that homosexuality was unnatural and immoral, engendered fear, ignorance, hatred and suspicion. It sent the message to employees that gays and lesbians were not equal members of the workplace community.”²⁵ When religious (or other) organisations become active in civil life beyond the confines of their own membership, it can be argued that such involvement is quasi-governmental in nature and ought therefore to be subject to the same constraints that would be imposed on a government engaged in such an operation.

The *second* type of case involves religion-based claims asserted by an individual or group to direct the policy of a public service in some way that reflects the religious beliefs of that individual or group. Such policy might be inimical to the equality interests of queer people. This category is different from the first category in that the claim in the first category relates to religious institutions, whereas the context of the cases in the second category relates to a public institution or service. In this second category are cases involving the setting of a public education agenda,²⁶ limitations on access by gay groups to public institutions, and declaration of Pride Days by public authorities.²⁷

24. *Supra* note 15 at para 256.

25. *Ibid.*

26. *Chamberlain v Surrey School District No 36*, 2002 SCC 86, [2002] 4 SCR 710 [*Chamberlain*].

27. See *Oliver v Hamilton (City)*, [1995] OHRBID no 56, 24 CHRR D/298 (Ont Bd Inq); *Hudler v London (City)*, [1997] OHRBID no 23, 31 CHRR D/500 (Ont Bd Inq), *Hill v Woodside*, 1998 CarswellNB 562, 33 CHRR D/349 (NB Bd Inq); *Okanagan Rainbow Coalition v City of Kelowna*, 2000 BCHRT 21, [2000] BCHRTD no 21; *Rainbow Committee of Terrace v Terrace (City)*, 2002 BCHRT 26, [2002] BCHRTD no 26.

This scenario is exemplified by *Chamberlain*, where a resolution, referred to as the “Three Books Resolution”, was passed by the Board of Trustees of the Surrey School District on 24 April 1997, indicating that the Board did not approve the use of three books depicting children with same-sex parents as “Recommended Learning Resources.”²⁸ The British Columbia *School Act* states:

76(1) All schools must be conducted on strictly secular and non-sectarian principles.

(2) The highest morality must be inculcated, but no religion, dogma or creed is to be taught in a school or Provincial school.²⁹

There was evidence at the trial level as to the religious motivation of those who did not want materials sympathetic to homosexuality in the schools. Writing for the majority, McLachlin C.J. said: “The *School Act*’s emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.”³⁰ With respect to the particular context of the case, she said: “[The Board] cannot prefer the religious views of some people in its districts to the views of other segments of the community. Nor can it appeal to views that deny the equal validity of the lawful lifestyles of some in the school community.”³¹

The *third* category involves claims by a religious individual seeking to import religious norms into that person’s performance of a public office, public function or public service. The basis of the claim is that the religious belief and performance are inseparable. The effect of these claims—if they were successful—would be to allow discrimination in a way that would be impermissible for the government itself. This set of cases differs from the second group in that the claimant does not seek to lay down general policy for the public institution or service, but seeks to differentiate the claimant’s role within the institution or service on the basis of a religious claim. Here we find the cases involving those who wish to refuse to officiate at same-sex civil marriages,³² those who wish not to

28. *Chamberlain*, *supra* note 26 at para 50.

29. *School Act*, RSBC 1996, c 412.

30. *Supra* note 26 at para 21.

31. *Ibid* at para 25. The use by McLachlin CJ of the term “lawful lifestyles of some” is somewhat strange. This term has been used to diminish homosexual sexual orientation as a sort of caprice, on par with a choice of décor or degree of house clutter.

32. *Supra* note 2 and *infra* note 33. See Lorraine Lafferty, “Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-Sex Marriage?” (2006), 28 Can Bar Rev 287.

teach or offer services relating to sexual orientation in schools,³³ those who wish to engage in homophobic expression and be identified as holding the public position,³⁴ and businesses who wish to refuse to serve lesbian and gay clients.³⁵

Typifying this third group are the marriage commissioner cases. In several jurisdictions marriage commissioners have been obligated to state their willingness to marry all couples seeking marriage; some commissioners were required to resign because of their refusal to do so. There have been at least two sets of complaints commenced by affected marriage commissioners in Manitoba and Saskatchewan, with all of the initial decisions going against the marriage commissioners.³⁶ Similarly, a complaint was filed by an individual who was denied a same-sex marriage ceremony by a marriage commissioner in Saskatchewan. The Saskatchewan Human Rights Tribunal upheld the complaint and rejected the marriage commissioner's arguments that he ought to be able to decide when to provide the services based on his own religious criteria.³⁷ This decision was upheld by the Saskatchewan Court of Queen's Bench. It agreed that the commissioner had discriminated and that an accommodation of his religious beliefs was not required.³⁸ A marriage commissioner was, the Court held, a "governmental entity" because he or she implements a specific government scheme. As such, the marriage commissioner is "empowered to act only in accordance with" the relevant law, in this case that governing marriages.³⁹ The Court held that when acting as a marriage commissioner, a person's "freedom of religion ought to be limited to exclude discrimination on the basis of sexual orientation."⁴⁰ The Court concluded that the freedom to refuse to perform a ceremony for religious reasons applied only to religious officials performing religious marriages.

33. *Chiang v Vancouver Board of Education*, 2009 BCHRT 319, [2009] BCHRTD no 319 [Chiang].

34. *Kempling v British Columbia College of Teachers*, 2004 BCSC 133, 27 BCLR (4th) 139 [Kempling].

35. *Brockie v Ontario (Human Rights Commission)* (2002), 222 DLR (4th) 174 (Ont Sup Ct) [Brockie].

36. These cases are discussed in Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants - A Response to Professor Bruce MacDougall" (2007), 70:1 Sask L Rev 365 at 390-91. See also Manitoba: Ksilowsky, Man Human Rights Comm File No 04 EN 462. Three cases before the Saskatchewan Human Rights Tribunal were, until recently, found at: Nichols: <<http://www.saskhrt.ca/forms/index/Descisions/251006.htm>>; Bjerland: <<http://www.saskhrt.ca/forms/index/Descisions/251006a.htm>>; Goertzen: <<http://www.saskhrt.ca/forms/index/Descisions/251006b.htm>>.

37. *Supra* note 2.

38. *Ibid* at para 77.

39. *Ibid* at para 53.

40. *Ibid* at para 73.

A third scenario case involving a school context is illustrated by *Chiang*.⁴¹ In *Chiang* a teacher-librarian at a public secondary school filed a complaint that she was discriminated against in relation to her employment on the basis of religion, contrary to s. 13 of the *Code*. She had allegedly declined to put up rainbow stickers in her schoolrooms to show support for GLBT students and had been reluctant to catalogue GLBT-related books in the library. She claimed that not putting up the stickers when others had done so would identify her as not supportive of GLBT students—perhaps as a result of her religious beliefs. She had not processed GLBT books donated to the library and claimed that questions about her delay constituted discrimination against her on the basis of her religion. The Tribunal noted that while the public school system must ensure that it provides a learning environment free from discrimination, “it must also respect the religious freedom of students and teachers alike.”⁴² Tribunal Member Lindsay Lyster stated that “[p]ublic school teachers are free to hold the religious beliefs of their choice. Their conduct, however, is a legitimate area of concern for their employers, and must be consistent with the core values of non-discrimination and tolerance.”⁴³ *Chiang* was apparently a lone teacher wishing to opt out of policies and practices designed to foster inclusion for queer people, in particular queer youth. In many geographical areas, of course, she would be among a significant or even dominant group of personnel with such religious views.

Most of the situations included in the third scenario involve a place of work in a direct way. Some courts have even extended equality protection against religion-based claims of public servants in connection with activities outside the workplace, when the service position was implicated in those outside activities. In *Kempling*, the Court considered the case of a teacher/guidance counsellor in a public school who wrote, *qua* teacher/counsellor, virulent homophobic letters in a local newspaper.⁴⁴ The College of Teachers disciplined him. The Court of Appeal held that there had been a justifiable infringement of the claimant’s expressive rights. Lowry J.A. wrote:

In his writings, Mr. Kempling made clear that his discriminatory beliefs would inform his actions as a teacher and counsellor. His writings therefore, in themselves, undermine access to a discrimination-free education environment. Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused

41. *Chiang*, *supra* note 33.

42. *Ibid* at para 22.

43. *Ibid* at para 117.

44. *Kempling*, *supra* note 34 at para 2.

to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment. These statements are therefore inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole.⁴⁵

The next part of this paper addresses the claims made by a religious person or institution in these three categories just discussed. While these three factual scenarios may seem quite different, they have in common a claim to be permitted to inject (discriminatory) religious views and values into the public context. They have in common an impingement on the constitutional rights of the members of some group (i.e. queer people) if the claims based on religion succeed or are facilitated. It will be argued in the next part of the paper that a claim for religious exceptionalism in these three scenarios ought ordinarily to be rejected if it means—as it normally will—a denial or infringement of a claim for inclusion based on sexual orientation equality.

Before we turn to these arguments made for religious exceptionalism, it is worth noting that there are two other scenarios where there can be a competition between religion claims and sexual orientation claims. These are what we call the fourth and fifth scenarios. Here, the injection of religious values into the public context is either non-existent or so slight that the religion claim should prevail over any sexual orientation claim.

The *fourth* possible scenario contains somewhat improbable situations. One situation would involve a queer person's seeking to have equality norms imposed on a religious institution or individual in the religious operations of the institution or religious worship of the individual himself or herself. A clear example would be a claim that the law required a church to accept homosexual clergy. Such a claim has never actually been made in Canada, so far as we know.⁴⁶ Fears that accepting the sexual orientation equality claims in the first three scenarios discussed here is bound to result in

45. *Kempling*, *supra* note 34 at para 79. The Court of Appeal did not consider s 2(a) *Charter* arguments dealing with freedom of religion.

46. There have been a few claims, it is true, where courts have been asked to enter ecclesiastical/theological debates where there is a dispute within the organisation itself or between its members: see e.g. *Bruker v Markovitz*, 2007 SCC 54, [2007] 3 SCR 607. See also Alvin Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups", in Moon, ed, *Religious Pluralism*, *supra* note 7. Unlike us, Esau does not clearly differentiate situations where courts are asked to adjudicate on theological matters and situations where courts are asked to adjudicate on claims of a religion (or a religious person) to discriminate on religious bases in the provision of non-religious facilities and services.

interference with religious worship are alarmist. Such alarmism, however, is arguably the reason for the inclusion of s. 3.1 of the *Civil Marriage Act*, mentioned earlier. There never was a claim that religious institutions ought to be compelled to conduct same-sex marriages in contravention of their own dogma, yet this late-added section in the statute appears designed to address the making of such a claim.

A variation on the fourth scenario is a religion-based claim advanced on the grounds that it is the religious person's whole life (including any time spent performing a public function or offering a service to the public) that comprises that claimant's religious observance or worship. In such a way, a situation that would otherwise be fitted into one of the first three scenarios (the public context) would be slotted into this fourth scenario (the private religious context). It is true that a particular religious view may not support a compartmentalisation between a person's religious life and a person's public/work life.⁴⁷ This would move many scenarios into this fourth category. This characterization of a person's entire day-to-day existence as religious observance that somehow ought to be fully accommodated evidently cannot be accepted as the basis for legal entitlement. In any event, such beliefs cannot be tested or proven.⁴⁸ A court ought to reject outright a claim of a person that all his or her activities of any sort—including employment dealing with the public—is part of a central religious observance.

What we call the *fifth* scenario is anomalous by comparison with the other four because it does not actually present a competition between a religion and a sexual orientation claim. In this scenario, there is a claim for the reasonable accommodation of a religious person on the job, in a way that does not entail the denial of service to, or access for, a member of the public on the basis of a protected personal characteristic. This is simply another way of stating what Bruce Ryder asserts to be the “core idea” that “society must accommodate individuals' religious freedom to hold and express religious beliefs and engage in religious practices *unless doing so would interfere with the rights of others or with compelling social interests.*”⁴⁹ Accordingly, non-availability to work on a religious feast day, a religious

47. See Carl F Stychin, “Faith in the Future: Sexuality, Religion and the Public Sphere” (2009) 29:4 *Oxford J Legal Stud* 729 at 732.

48. The issue of the increasingly difficult complexity in (legally) defining what is and is not religion/religious is discussed in Lori G Beaman, “Defining Religion: The Promise and the Peril of Legal Interpretation”, in Moon, ed, *Religious Pluralism*, *supra* note 7. See also c 9 of that same work: Richard Moon, “Government Support for Religious Practice”.

49. Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship”, in Moon, ed, *Religious Pluralism*, *supra* note 7 at 87 [emphasis added].

requirement to wear certain types of clothing⁵⁰ or to observe prayer at particular times of the day, and so on are generally reasonable bases for religious accommodation.⁵¹ These types of accommodation are inclusive accommodation; they have the effect of integrating as many individuals as possible into the social and economic fabric and do no harm other persons. Even if this accommodation makes the religious belief of the person clear to others (whether fellow employees or members of the public), and even if this entails knowledge of the presumptive discriminatory beliefs held by that person, there is no actual or serious infringement on the rights of other people. The religion-based claims should surely succeed in this context. Therefore, we do not deal with this scenario further in the next part of the paper.

III. *Arguments for religious exceptionalism*

There are a number of arguments that can be made supporting the religion-based position in the competitions represented in the first three scenarios above. These arguments have been made in support of claims grounded in religious belief seeking exemption from performing same-sex civil marriages,⁵² but they can be extended to other circumstances where religion and sexual orientation claims also compete. The arguments are as follows:

- (a) refusal to allow an exception for a religious person from the application of the usual equality norms means public servants or those who serve the public are required to personally endorse government policies that conflict with their religious values;
- (b) refusal to allow an exception for a religious person from the application of the usual equality norms amounts to coercion by the state at the behest of “powerful” groups;
- (c) refusal to allow an exception for a religious person from the application of the usual equality norms fails to accommodate religious views held in good faith, namely that homosexuality or homosexual behaviour, or both, are immoral;

50. See *Peel Board of Education v Ontario Human Rights Commission* (1991), 3 OR (3d) 531, 80 DLR (4th) 475; and *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.

51. *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, [1985] SCJ no 74; *Pannu v Prestige Cab Ltd* (1986), 8 CHRR D/3709 (Alta Bd Inq); *Singh v Workmen's Compensation Board Hospital* (1981), 2 CHRR D/459 (Ont Bd Inq); *Multani*, *supra* note 50; *Peel Board of Education*, *supra* note 50; and *c.f.* Trotter, *supra* note 36.

52. See Trotter, *supra* note 36.

- (d) allowing an exception for a religious person from the application of the usual equality norms would not present an undue burden on queer people; and
- (e) the number of people affected by allowing an exception for a religious person from the application of the usual equality norms would be small.

We consider each of these in turn.

- (a) *Refusal to allow an exception for a religious person from the application of the usual equality norms means public servants or those who serve the public are required to personally endorse government policies that conflict with their religious values*

This argument is based on the idea that where beliefs are strongly held by public servants or those who offer services to the public, they ought not to be required to perform actions that conflict with, or in some cases even contradict, those views and values. Such required performance is tantamount, the argument goes, to a governmental requirement of expression by the individual himself or herself—a requirement that would always be improper, but particularly inappropriate when the content of the government-mandated expression is directly contrary to the religious beliefs the person actually holds. This is perhaps the strongest argument against refusing to allow an exception for a religious person from the application of the usual equality norms.⁵³

The problem with this argument is that it is based on the idea that public servants or those who serve the public are somehow said to be endorsing government “policy” when they carry out their duties on behalf of the government or offer their services to the public. Trotter says that it is an “illiberal notion that the persons performing public functions must leave their conscientiously held beliefs at home and church, and personally embrace all state policy when they are at work.”⁵⁴ This quite obviously is not the case. Public servants of all sorts and those who serve the public are daily required to carry out policies that they may find highly distasteful for religious or other reasons. They are also required to serve those who stand for or represent values that may be contrary to their particular religious values. For example, court clerks are required to process divorce

53. Richard Moon expresses this type of concern differently: “The exclusion of religious values from public decision making may limit the individual’s participation in public discourse and decision making and marginalize religious practice and association.” Moon, “Introduction”, *supra* note 10 at 3.

54. Trotter, *supra* note 36 at 366.

applications though their religion might oppose divorce. Welfare officers are required to deny benefits to applicants though they may strongly object to the policy that denies the benefit. Immigration officers are required to process the files of couples of multiple ethnicities, though they might hold strong views against miscegenation for religious or other reasons. Being required to provide services to everybody does not mean that the person providing the service is somehow being required to endorse state policy.

In the civil service context, there may be government positions that require public servants to carry out various types of activities. Focussing on some of these activities, rather than others, might allow an employee to avoid tasks that are objectionable for religious or other reasons. However, a marriage commissioner, for example, is hired to do just one thing—perform marriages. The Saskatchewan Human Rights Tribunal, in one of the marriage commissioner cases, held that a marriage commissioner appointed to perform civil marriage ceremonies devoid of any religious content can be characterized as part of “government” for constitutional purposes.⁵⁵ It is not reasonable in this context to permit such public servants to pick and choose whom to serve based on their own views – any more than it would be permissible for an immigration officer to wave aside a person of a particular ethnic background to stand in a different queue because he or she does not serve people of that background or ethnicity.

Care has to be taken, we argue, to ensure that an employee not be permitted at his or her own discretion to infuse religious significance into government services or the provision of services to the public. There is no shortage of religion-based services in Canada. Religious education is permitted. There is a range of religious social services available. Religious marriages are in almost all cases fully recognized by the state. It might be noted that in *Nichols*, the commissioner who wished to refuse to conduct same-sex civil marriage acknowledged that he could have been appointed to conduct marriages only within his religious institution, but he “did not want to so restrict himself.”⁵⁶ The marriage commissioner is, however, hired to conduct non-religious ceremonies. Public services offered outside the context of the central spiritual rites or ministry of a religion or a religious official ought not to be provided (or denied) on a sectarian basis.

Quite different is the context of an accommodation in employment made for religious reasons, where the rights of members of the public are not directly and personally impinged. These contexts are those included in the fifth scenario discussion in the previous part of the paper.

55. *Supra* note 2 at para 52.

56. *Ibid* at para 10.

Employees may be allowed certain days or times off for religious reasons. They may be allowed certain accommodations related to dress connected to religious views. A government meat inspector, for example, might be permitted to avoid pork inspections because of a religious notion that such meat is “unclean.” Such accommodations do not directly depend on discriminatory views about the public that they are hired to serve. The personal characteristics of the public being served are not involved. Such accommodation merely entails adjustments to scheduling or presentation in the work environment. They impact all members of the public in the same way, if at all. They do not entail a denial of service to certain members of the public because of elements of their character (race, religion, gender, sexual orientation, and so on) that are constitutionally or statutorily guaranteed equal treatment.

There is a duty to accommodate a person to the point of undue hardship on the basis of whichever protected characteristic applies to that person. However, as was pointed out in *Nichols*, it is not the duty of a member of the public to accommodate a person acting for the government; rather it is the person acting on behalf of the government who must make the accommodation for the public whom he or she serves. McMurtry J. stated:

M.J. and other members of the public do not have to depend upon encountering a marriage commissioner who has no moral or religious objection to performing a same sex marriage in order to gain access to an entitlement to be married without discrimination. Regardless of the religious basis of Mr. Nichols views, his acting on them in this manner constitutes discrimination in the provision of a public service on the basis of sexual orientation. Any accommodation of Mr. Nichols’ religious views, if the duty to accommodate exists, is not the responsibility of those who seek the services that he is legally empowered to provide. If any accommodation is due to Mr. Nichols for his religious views, it must be accomplished without risking what occurred here—where the complainant sought a service and was expressly denied it on the basis of his sexual orientation.⁵⁷

If the religious accommodation argument extended so as to affect the requirement to provide other services to all citizens, then the implications could be truly astonishing in some sectors such as health and education. There might result a patchwork of implementation of services dependent on the religious (and perhaps other) views of the persons hired to provide the services. If the argument is made that this counter-argument is alarmist

57. *Nichols*, *supra* note 2 at para 57.

and that such opt-outs would in practice affect only homosexuals (since they are the members of the group in today's Canada most regularly affected by religion-based prejudice) then that argument only serves to highlight the need for the members of this group to have the protection of equality guaranteed under the *Charter* and human rights statutes. In fact, however, we suggest that, once allowed, such exceptions for a religious person from the application of the usual equality norms would grow in number and could make service management in some areas and on some matters extremely difficult.

(b) *Refusal to allow an exception for a religious person from the application of the usual equality norms amounts to coercion by the state at the behest of "powerful" groups*

This argument is closely related to the previous argument. It has two aspects to it: that the state is requiring religious people as a group to give up their views and that there are certain powerful groups (perhaps called "the elite" or some such term) that are behind this mandate.⁵⁸ In both circumstances (a) and (b), this is seen as an attack on religion. In argument (a), just discussed, the concern was for the religious views and values of a given individual or institution. In the context of argument (b), the concern is for the position of religion writ-large in society. There is more than a suggestion that religion is under attack or being devalued in society.

This argument for religion writ-large has figured more prominently in Canadian cases involving equality rights for lesbians and gay men in recent years.⁵⁹ The argument has aspects of a zero-sum approach to social value. An increase in provision and protection of equality for homosexuals necessarily entails a diminishment of value for religion and protection for religious views. Canadian courts have been fairly consistent at refusing to accept that religion is somehow diminished when other rights are protected—usually rights such as equality for women or lesbians and gay men, access to medical treatment for children, or freedom from hate speech.

In *Big M Drug Mart*, Dickson J. said: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship

58. Trotter, *supra* note 36 at 372.

59. MacDougall, *supra* note 20.

and practice or by teaching and dissemination.”⁶⁰ But he then added that the concept means more than that. “Freedom means that, *subject to such limitations as are necessary to protect* public safety, order, health, or morals or *the fundamental rights and freedoms of others*, no one is to be forced to act in a way contrary to his beliefs or his conscience.”⁶¹

In the context of educational and social services, access to employment, or to same-sex marriage, it is difficult to accept that “powerful” groups are conspiring to undermine religion. As noted earlier, the ability of religions to operate such services or to conduct marriages, for example, is fully preserved; even their ability to discriminate as to whom to provide that service to is protected in certain contexts.⁶² Some religions in Canada have constitutionally protected positions with respect to running their own publicly-funded schools.⁶³ Concern for religious sensitivities is specifically addressed in legislation such as the *Civil Marriage Act* and the *PEI Marriage Act*.⁶⁴

(c) *Refusal to allow an exception for a religious person from the application of the usual equality norms fails to accommodate religious views held in good faith, namely that homosexuality or homosexual behaviour, or both, are immoral*

There is a problem with accepting that certain public servants can refuse to provide government services they were hired to supply on the basis that they believe some members of the public or their behaviour are immoral (even though constitutionally guaranteed equality on the basis of those very characteristics). The problem is that this position injects those religious attitudes beyond the particular employee and into the government itself. This constitutes an extension of the religious views of a particular person in a manner which directly impacts on others. The fact that sexual orientation is constitutionally entitled to equality protection in the same way that race,

60. *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 99, [1985] SCJ no 17. A useful discussion of the jurisprudence (up to the end of the last century) relating to religion interests in Canada is found in David M. Brown, “Freedom from or Freedom for? Religion as a Case Study in Defining the Context of Charter Rights” (2000), 33 UBC L Rev 551.

61. *Ibid* at para 95 [emphasis added]. See also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 72, [1996] SCJ no 40, in which La Forest J said: “Indeed, this court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without state interference those beliefs and opinions dictated by one’s conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”

62. See e.g. *Caldwell v Stuart*, [1984] 2 SCR 603; *TWU*, *supra* note 13.

63. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 93, reprinted in RSC 1985, App II, no 5.

64. *Civil Marriage Act*, *supra* note 3 at s 3.1; *PEI Marriage Act*, *supra* note 5 at s 11.1.

sex, national origin and so on are entitled to protection should make it immune to any sort of argument based on morality. The government and its public servants ought not in any circumstances to be entitled to qualify its provision of equal services and entitlement based on morality arguments.⁶⁵ The government should not be permitted to, in a sense, privatize these basic constitutional values by delegating their implementation to standards set in accordance with the firmly-held (religious) views of its employees.

For example, allowing certain marriage commissioners to opt out of performing same-sex marriages casts such marriages, and indeed the very idea of equality on the basis of sexual orientation, as morally problematic. These matters ought not to be characterized by the courts or the government as moral issues at all, given their constitutionally protected status. To do otherwise makes such constitutional protection contingent in a way that contradicts the protection itself.⁶⁶

In any event, a public servant is no more being required to participate in what he or she considers immoral homosexual activity by conducting a same-sex marriage than a gay marriage commissioner is being required to participate in heterosexual activity by officiating at an opposite-sex ceremony. Similarly, a person offering a public service such as for example, printing a flyer for a hockey tournament is not implicated in espousing hockey. The objections based on sexual orientation appear on closer examination to have more to do with distaste for homosexual status itself rather than any particular homosexual activity. And this basis for objection arguably even contradicts the distinction between homosexual status (acceptable, often) and homosexual activity (unacceptable, usually) that so many religions themselves claim to be so important.⁶⁷

There is also the suggestion that the government or state is somehow impugning the good faith of the views held by the religious person.⁶⁸ Given the accommodation that is given to religious persons and to religions in

65. See also Moon, "Introduction", *supra* note 10 at 9.

66. Therefore, we criticise statements such as those of Gonthier J, dissenting in *Chamberlain*, *supra* note 26 at para 150, where he stated: "The moral status of same-sex relationships is controversial: to say otherwise is to ignore the reality of competing beliefs which led to this case. This moral debate, however, is clearly distinct from the very clear proposition that no persons are to be discriminated against on the basis of sexual orientation. The appellants, using the courts, seek to make this controversial moral issue uncontroversial by saying that s. 15 and "Charter values" are required to eradicate moral beliefs, because the hypothesis is that possible future acts of discrimination are likely to emanate from such beliefs".

67. See *Trotter*, *supra* note 36 at 371, n 19, where Trotter argues that though Canadian law does not distinguish between homosexual behaviour and identity after *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*], religious persons ought to be able to ignore that legal position because of their religious beliefs.

68. *Trotter*, *ibid* at 369.

general, this is a difficult argument to accept. In fact, the government or state in no way questions the religious views of the person. The person is free to express those views and to engage in any religious activity itself outside the work or service context. These rights for a civil servant are not diminished in any way so long as the person is not using his or her government position as a means to a platform, as occurred in *Kempling*.⁶⁹ Just as the government is within its rights to forbid proselytizing at work or religious ceremonies in the workplace itself, it is right to prevent religious values from dictating what services will be available to which of its citizens.

Trotter objects to the assertion that some religious views are “homophobic” on the basis that “[n]o respectable religious organization advocates homophobia—that is, abuse of persons who engage in homosexual behaviour. At the same time, many respectable religious persons hold a good faith belief that homosexual behaviour is inconsistent with the nature or purpose of humankind, and that it should be avoided.”⁷⁰ It is not at all indisputable that beliefs (whether translated or not into a refusal to provide a service or employment to homosexuals) that denigrate or regard homosexuality, or homosexuals, or both, to be inferior can be called “homophobic.” Just as such beliefs about other races or about women (whether translated into action or not) that diminish those other races or women can be described as racist or misogynist, such beliefs about homosexuals and homosexuality are indeed homophobic.

Another aspect of this good faith accommodation issue is the argument that it is inappropriate to distinguish religious belief and manifestation of religious belief. Trotter notes that Canadian law does not distinguish between behaviour and identity.⁷¹ *Egan v. Canada* effectively equates homosexual identity and homosexual behaviour for the purposes of s. 15 of the *Charter*.⁷² Importantly, however, the acceptance of homosexual behaviour in a context such as *Egan* (availability of benefits for a same-sex couple) does not mean that the rights of others are simultaneously curtailed.

In *Nichols*, it was argued that a marriage commissioner ought to be permitted to refuse to perform a same-sex marriage for religious reasons.⁷³ In terms of *Nichols*’ argument that there was a violation of his s. 2(a) *Charter* rights, the Court accepted that there is a difference between belief

69. *Kempling*, *supra* note 34.

70. *Ibid* at 368-69.

71. *Ibid*.

72. *Egan*, *supra* note 67.

73. *Supra* note 2.

and conduct. The freedom to hold a belief is broader than a right to act upon it. The Court cited *TWU*⁷⁴ and *Big M Drug Mart*.⁷⁵ McMurtry J. stated at para. 73:

It seems to me that when Mr. Nichols acts as a marriage commissioner, his freedom of religion ought to be limited to exclude discrimination on the basis of sexual orientation. I agree with the tribunal that Mr. Nichols, in his capacity as a marriage commissioner acting as government, is not entitled to discriminate, regardless of his private beliefs. Mr. Nichols was wrong to believe he could follow a private policy, not authorized by *The Marriage Act*, which had the effect of discriminating against M.J.⁷⁶

The context in which a person seeks to manifest his or her religious belief is crucial. There are undoubtedly certain services that are in fact part of religious observance and these services will normally be offered to those who are members of a religious group. Thus, human rights legislation permits exceptions to discrimination on a particular basis, for example religion, where a service is in fact offered primarily to members of that group. A public service of the state will never fall into this category, but many private businesses will also fall outside this exception. Thus, in *Brockie*, it was held that a printing business could not refuse work producing stationery for the Canadian Lesbian and Gay Archives on the basis that the owner of the business held a belief that homosexual conduct was sinful and that his doing work for the Archives would implicate him in that sin.⁷⁷ The Court held that performing work for the Archives was not core to the business owner's freedom of religious belief.

Interestingly, some who present the religion claim dispute the ability to detach religious belief from practice deny this unity to sexual identity. Trotter argues, for instance, that:

Many religions do make the behaviour/identity distinction, asserting a duty to love the person unconditionally even while opposing a particular behaviour. The court is not competent to ascribe to religious persons the law's 'belief' that behaviour and identity are identical. That would be exactly the kind of breach of s. 2(a) [of the *Charter*] that it was entrenched to prevent.⁷⁸

Thus according to Trotter, a religious person should be accommodated so as to be able to detach sexual orientation behaviour (such as getting

74. *Supra* note 13.

75. *Supra* note 60.

76. *Supra* note 2 at para 74.

77. *Supra* note 35.

78. Trotter, *supra* note 36.

a same-sex marriage service) and sexual orientation identity. Strikingly, however, this is exactly the detachment that Trotter says is not permitted in the context of the religious person's own belief in terms of translating those beliefs into behaviour/action that constitutes a denial of service or exclusion of gay or lesbian individuals.

(d) *Allowing an exception for a religious person from the application of the usual equality norms would not present an undue burden on queer people*

The argument is made that allowing discrimination based on the religious values of those who offer services or who are employed to provide them does not unduly inconvenience queer people. Thus, same-sex couples are not unduly burdened by having some marriage commissioners refuse to serve them. Trotter contends that permitting marriage commissioners to refuse to perform same-sex marriages will at most involve "one or two" more phone calls on the part of the rejected gay or lesbian person in order to find somebody who will provide the service.⁷⁹ This is an astonishing position in which to place gays and lesbians, and yet another example of the historical trend of disadvantaging queer people by denying them full citizenship in Canada as protected by the *Charter* and human rights legislation. It is true that any couple might be declined service because a particular marriage commissioner is booked or unavailable, but this is quite different from being refused because the marriage commissioner does not serve gay and lesbian people. Carl Stychin thinks that there might be reason to, at times, allow a marriage commissioner to refuse to conduct a service. He says a decision-maker ought to be required "to reflect on ... whether a minimal delay in getting a scheduled date for a marriage ceremony is a significant burden on a same-sex couple."⁸⁰ The impact on such citizens being refused service by public servants, or those who offer services to the public, and sent elsewhere to obtain this constitutionally or statutorily-guaranteed service cannot be minimized. Having to accept even one such refusal of service constitutes significant substantive (and even formal) inequality. The hurt and marginalization such refusal will create is magnified when the historical diminution of homosexuals and homosexuality is considered. The negative impact such a refusal of service can have was illustrated in one of the Saskatchewan marriage commissioner cases. The person denied the marriage service in that case was "devastated and crushed" and suffered "a lot of anxiety

79. *Supra* note 36 at 377.

80. *Supra* note 47 at 752. See also Ryder, "Canadian Conception", *supra* note 49, at 100-02.

and sleepless nights” as a result of the refusal.⁸¹ Even in a city as queer-friendly as Vancouver, it is thought necessary to publicize which marriage commissioners are “gay-friendly.”⁸² Would even the most ardent supporter of religious exceptionalism argue that it would be acceptable to create an environment where it was necessary to publicize which civil servants are “Sikh-friendly,” “woman-friendly,” “black-friendly” and so on? Trotter urges marriage commissioners to exercise their “right” to refuse service in “a respectful and sensitive manner” so as to “minimize” the “emotional pain” to the same-sex couple refused service and to “affirm” their “human dignity.”⁸³

It has to be borne in mind here that in the marriage context these civil marriages are in most cases the only marriages that will be available to same-sex couples, given the unavailability of most religious marriages to them.⁸⁴ Gays and lesbians will represent a disproportionate share of those asking for civil marriages as compared to the percentage of all couples getting married. Similarly, there is often not much choice in many areas where certain educational or social services are offered. In any event, even where there is a great deal of choice in terms of services offered, the exclusion of a member of a constitutionally protected group from access to the services offered to the public generally is never justified.

Furthermore, it is clear that in some geographical areas, if public servants or those who offer services to the public, are allowed to decide for themselves whether to offer such services, there may be few who will be willing to provide the service. There might be more than one or two phone calls that will need to be made. This is particularly injurious to the lesbian or gay person in those communities where they are already subject to discrimination and marginalization. In such areas, it may not only be those who hold strong personal religious views that will refuse to provide the services. Others may face strong pressure to refuse to provide such services or themselves face ostracism from their society. Allowing choice as to whether to provide a particular service or not, in fact, politicizes individual service positions. The refusal to allow an exception for a religious person from the application of the usual equality norms prevents such pressure in the first place.

81. *Supra* note 2 at para 15.

82. “Marriage Commissioners” online: GayVancouver.net <<http://gayvancouver.net/marriage.htm>>.

83. *Supra* note 36 at 376, n 36.

84. As in *Nichols*, *supra* note 2 at para 12, in which the complainant was Roman Catholic and so could not have a religious marriage.

- (e) *The number of people affected by allowing an exception for a religious person from the application of the usual equality norms would be small*

This issue is related to the last one. It is based on the fallacy that denial of equality is somehow more acceptable the fewer the number of persons affected is. This is the notion that discrimination against two Jews is less egregious than discrimination against four. Trotter appears to think that the possibility of a same-sex couple's being refused service is a hypothetical or "abstract" issue; yet, as mentioned earlier, there has already been one successful case brought against a marriage commissioner in such a situation.⁸⁵

In *Central Okanagan School District No. 23 v. Renaud*, Sopinka J. said:

[M]ore than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.⁸⁶

Trotter cites this as justification for the "minor inconvenience" that same-sex couples will face when refused service by a marriage commissioner because of that person's religious views. *Renaud* was, however, about the refusal to accommodate work shifts around an employee's religious observance day. It is a situation that fits into the fifth scenario discussed in Part II of this paper. Such accommodation would indeed constitute a minor inconvenience to other employees. That is quite different from a refusal to provide a service to a member of the public on the basis of a protected characteristic.

The fact is that equality protection is most needed where numbers are small. This is true both on a national and a local level. With the exception of discrimination against women, where other historical factors come into play, discrimination against certain races, religions, disabilities and so on exists largely because of the minority status of members of certain groups. Once a critical number has been attained a group is better able to protect its interests politically. The smaller the group the less likely this is to occur. The possibility of historical hostility may also be a factor in

85. *Supra* note 2.

86. *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at para 27, 95 DLR (4th) 577.

any case. Queer people have both history and numbers working against them. Numbers are kept even smaller by the invisibility of membership in many cases. It is exactly because of the small numbers that protection is needed.

Protection of equal rights in the context of dominant local hostility (often religiously generated) was a legitimate legal and governmental objective stressed by the majority of the Supreme Court of Canada in the case of *Chamberlain*. At the local level, the reason why in some areas (probably the more conservative areas) the numbers of queer people are particularly small is that they are figuratively or literally driven out because of the particular hostility they face in those areas. School boards rejecting lesbian and gay themed books, as in *Chamberlain*, is one device designed to exclude queers. The case of *Chiang*, also involving a public school, illustrates the dangers of exclusion if a critical number of persons with religious views hostile to homosexuality are allowed to bring those views into a school.

Trotter makes the case that “there are reasonable alternatives to a rule which compels all marriage commissioners to perform same-sex marriages. The most obvious alternative is the recruitment of further marriage commissioners who are willing to perform such marriages.”⁸⁷ The extraordinary nature of this claim to reasonableness is evident if “same-sex” is replaced by “mixed-race” or “lower caste.”⁸⁸ Likewise, Trotter criticises the use of hypotheticals and notes that there have been very few actual refusals to perform same-sex marriage services. Thus, it would seem that there is no “real” problem that needs to be addressed. But again, if one employs analogies to a person who refused such services to members of certain racial groups, or religions or to women, it would seem extraordinary to argue that the paucity of actual cases of complaint means the problem is hypothetical and can simply be worked around.

Permitting the withholding of services to queer people is just another reason to make queer people feel unwelcome and perhaps even unsafe in a given area. It is in those areas that full provision of services is most needed and most valuable for those with a homosexual or other queer status. Such services must be provided in a way that is unqualified and un-begged for. In fact, the small numbers of queer people who will be asking for service or the small number of homosexual couples who will be seeking a same-

87. *Supra* note 36 at 368.

88. Note that apartheid in South Africa was justified on religious grounds: Saul Dubow, *Scientific Racism in Modern South Africa* (Cambridge: Cambridge University Press, 1995) at 258ff. The diminished role ascribed to women by many religions needs no citation.

sex civil marriage in comparison with the numbers of opposite-sex couples militates in favour of a no opt-out policy, if the “minor inconvenience” point discussed above holds any weight. If it can be argued that the rights of gays and lesbians would be acceptably infringed because all they had to do was make “one or two” additional phone calls to find a public servant who would serve them, it might be similarly argued that most marriage commissioners would have to conduct only “one or two” same-sex marriage ceremonies a year in most communities—if that.

Conclusion

Canada’s sexual minorities (especially lesbians and gay men, less so transgendered and other queer persons) have benefited enormously from constitutional protection from unequal treatment by the state on the basis of sexual orientation, they have also benefited from protection from discrimination in the public sphere available under human rights legislation. The law has profoundly impacted the legal and social position of queer people in Canada as they strive to achieve full citizenship. But these improvements have not by any means eliminated the prevalence of prejudicial attitudes that seek to marginalize and denigrate minority sexual orientations by devices such as the denial of services or converting legal issues into moral controversies.⁸⁹

Vigilance is needed to prevent the equality gains of Canada’s queer citizens from being hollowed out under the guise of protecting the religious beliefs of those who provide government or other services in all areas of day-to-day life. Religious accommodation is desirable when it facilitates inclusion and does not entail exclusion for others. As such, it is important to accommodate religious practices where feasible in the workplace. It is not, however, acceptable to accommodate a claim to entitlement to refuse to serve, deal with or employ persons (because of their sexual orientation) for religious or any other reason. This latter situation constitutes a claim for exceptionalism and an ability to exclude others from the usual social and economic fabric. We argue that the goals of accommodation and inclusion are not served by accepting demands that the accommodation and inclusion of one can occur only on the basis that one is entitled to deny the ordinary provision of a service, employment and so on to another. A person ought not to be permitted to make his or her inclusion dependent on the exclusion of another.

89. See Donn Short, “Am I Safe Here? Queers, Bullying and Safe Schools” (2007) 19:3/4 *Journal of Gay & Lesbian Social Services* 31; “Conversations in Equity and Social Justice: Constructing Safe Schools for Queer Youth” (2010) 8:2 *J for Critical Education Pol’y Studies* 329.