NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

BETWEEN:		
	DESIREE A. DICHMONT	**APPLICANT**
AND:		
	HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE MINSTER OF GOVERNMENT SERVICES AND LANDS	**FIRST RESPONDENT**
AND:		
	NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION	**SECOND RESPONDENT**

BEFORE: Adjudicator, Robby D. Ash

Place of Hearing:	**Carbonear, NL**	
Dates of Hearing:	**January 5 – 6, 2016**	
Date of Decision:	**May 11, 2017**	
Appearances:	**Philip Fourie; Derek Nowak and Deina Warren**	**Appearing on behalf of the Applicant**
	David G. Rodgers and Mark Sheppard	**Appearing on behalf of the First Respondent**
	Donna Strong	**Appearing on behalf of the Second Respondent**

REASONS FOR JUDGMENT

INTRODUCTION

On December 9th, 1997, Desiree Dichmont was appointed as a Marriage Commissioner for the Province of Newfoundland and Labrador pursuant to the solemnization of the *Marriage Act*, R.S.N.L 1990 c. S-19. On December 21st, 2004 the Supreme Court of Newfoundland and Labrador, Trial Division, in *Pottle v. Canada (Attorney General)*, [2004] N.J. No. 470 issued the following declaration:

> The common law definition of marriage for civil purposes in the Province of Newfoundland and Labrador is declared to be the voluntary union for life of two persons to the exclusion of all others; and that civil marriage between two persons of the same sex who otherwise meet the substantive and procedural requirements of the law of Canada governing capacity to marry and whose applicants otherwise meet the requirements of the solemnization of *Marriage Act*, R.S.N.L 1990 c. S-19, as amended, is lawful and valid in Newfoundland and Labrador.

Following this declaration, the Government of Newfoundland and Labrador sent a letter to all Marriage Commissioners which read, in part:

> We are aware that some service providers may decide not to provide services to same sex couples. However, we must ensure a quality in services under the law. If, after due consideration, you feel that you are unable to provide services to same sex couples, please indicate your decision to us by providing us with your resignation. If it is necessary for you to resign, we wish to express our sincere gratitude for the services you have provided in the past. If you have questions, or if you choose to resign, please advise us by telephone or fax. Your resignation will become effective January 31, 2005.

Ms. Dichmont`s interpretation of the Christian faith causes her to believe that marriage is a sacred institution ordained by God and is defined as a life-long union between one man and one woman. Ms. Dichmont's Affidavit dated November 20th, 2009 sets out the basis for her belief. At paragraph 7 of her Affidavit, she states as follows:

> I believe the teachings of the Bible, as found in numerous passages, clearly prohibit any form of homosexual behaviour as sinful. Thus, I cannot condone or participate in the solemnizing of same sex marriage.

There is no question that Ms. Dichmont`s belief is sincerely held. Neither is there any question that she took great pleasure and pride in carrying out her duties as a Marriage Commissioner. As a result of the aforementioned letter received from the Province, Ms. Dichmont felt that due to her sincerely held religious belief she had no choice but to resign as a Marriage Commissioner. Ms. Dichmont was being told that in order to continue in her role as Marriage Commissioner she

would be required to perform a service which, in her words, "facilitated conduct that my deepest religious convictions hold as amoral and teach to be harmful, not only to participants, but to society as a whole."

In addition to Affidavit evidence filed by the parties, the following agreed facts were before the Board of Inquiry:

Agreed Statement of Facts

1. On December 9th, 1997, the Applicant, Ms. Desiree Dichmont ("Ms. Dichmont") was appointed as a marriage commissioner pursuant to the *Solemnization of Marriage Act* (RSNL 190 c. S-19, now repealed and replaced with the *Marriage Act*, SNL 2009 c. M-1.02) ("*Marriage Act*").

2. In 2004, the Province of Newfoundland and Labrador amended its marriage laws to sanction same-sex marriage. On December 23, 2004, the First Respondent, Her Majesty in Right of Newfoundland and Labrador, through the Department of Government Services and Lands ("HMQ"), sent a letter to all marriage commissioners appointed by the province which advised them that they must provide services to same-sex couples or resign their appointment.

3. On January 14th, 2005 Ms. Dichmont submitted her letter of resignation. On January 25, 2005 she received a letter from HMQ acknowledging her resignation.

4. On June 7th, 2005 a formal complaint was filed by Ms. Dichmont at the Human Rights Commission claiming discrimination on the basis of religious creed contrary to section 9 of the old *Human Rights Code*.

5. On September 21st, 2005, Ms. Dichmont filed her first submission with the Commission.

6. On September 28, 2005, due to similar fact situations being litigated in other Canadian jurisdictions, it was decided by the Commission and agreed by the parties that Ms. Dichmont's matter would be held in abeyance until such time that the other decisions were rendered.

7. On March 21st, 2011 the Commission requested that HMQ provide a formal written response to Ms. Dichmont's complaint following the release of the Saskatchewan Court of Appeal's decisions in *The Marriage Act* (Re) 2011 SKCA 3.

8. On April 14, 2011 the Commission received a copy of the HMQ's Response.

9. On November 3rd, 2011 Ms. Dichmont provided comments to HMQ's Response.

10. On March 2nd, 2012 Ms. Dichmont filed a Supplementary Response to Ms. Dichmont's complaint.

11. On April 2nd, 2012 Ms. Dichmont filed a Supplementary Response to HMQ's Supplementary Response.

12. On June 4th, 2012, Brianna Hookey of the Commission completed her Investigation Report into Ms. Dichmont's complain and copies were forwarded to the parties.

13. On September 27, 2012, the Commission, after a review of the materials filed by Ms. Dichmont and HMQ and the Investigative Report, dismissed the Complaint having concluded that there was insufficient evidence to proceed to a Board of Inquiry.

14. Ms. Dichmont sought judicial review of this decision and on September 20th, 2013 the matter was heard before the Honourable Justice Faour of the Supreme Court of Newfoundland and Labrador.

15. On February 9th, 2015, Justice Faour released his decision and ruled that the Commission's decision not to refer the matter to a Board of Inquiry was unreasonable in the circumstances and he therefore ordered that the matter be referred to the Board.

POSITIONS OF THE PARTIES

Ms. Dichmont alleges that the Province`s requirement that civil Marriage Commissioners marry same sex couples discriminates against her and other people who share the same interpretation of the Christian faith who desire to be civil Marriage Commissioners, but due to their sincerely held beliefs do not wish to participate in the solemnization of same sex marriages. Ms. Dichmont argues that the Province has a duty to accommodate her religious belief.

The Province, as represented by the minister of the Department of Government Services and Lands, along with the Newfoundland and Labrador Human Rights Commission, take the position that the state is required to exercise religious neutrality in the provision of government services. It is argued that while acting as a marriage commissioner, Ms. Dichmont is a public official who

is required to exercise the duties of that office in accordance with the *Canadian Charter of Rights and Freedoms*. Accommodating Ms. Dichmont's religious views, the Province contends, would violate its duty of religious neutrality and impinge upon its duty to uphold the rule of law.

LAW

Ms. DIchmont's complaint was received by the Human Rights Commission on June 7, 2005. At the time, the governing legislation was the *Human Rights Code*, RSNL 1990, c. H-14, specifically subsection 9(1) of the *Code* which read:

> An employer … shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of (a) that person's … religion, religious creed … but this section does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

The *Code* has since been replaced by the *Human Rights Act, 2010*, SNL 2010, c. H-13.1, section 14 of which addresses the same issue:

> An employer … shall not refuse to employ or continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination … [with the exception] that it does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

The relevant grounds remain the same, namely religious creed and religion.

If a *prima facie* case of discrimination is made out by Ms. Dichmont, the burden shifts to the First Respondent to show that the "limitation, specification or preference" is based upon a good faith occupational requirement and demonstrate that it has attempted to accommodate her to the point of undue hardship. In determining whether a discriminatory standard is a good faith occupational qualification, I am instructed by the Supreme Court of Canada in *British Columbia*

(Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEW), [1999] 3 S.C.R. 3 at paragraph 54 to apply a three- part test:

> An employer may justify the impugned standard by establishing on a balance of probabilities:
>
> 1. That the employer adopted the standard for a purpose rationally connected to the performance of the job;
> 2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> 3. That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *Syndicat des employe-e-s de techniques professionnelles & de bureau d'Hydro-Quebec, section 2000 (SCFP-FTQ) v. Corbeil*, 2008 SCC 43 at paragraphs 16 and 19, the Supreme Court of Canada provided further clarification regarding the third prong of the test it set out in *BCGSEW*:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> . . .
>
> The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to

> accommodate ends where the employee is not longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

ANALYSIS

Has the Complainant established a *Prima facie* Case of Discrimination?

The present matter was referred to this board of inquiry by order Faour J. of the Supreme Court of Newfoundland and Labrador, General Division in *Dichmont v. Newfoundland and Labrador (Minister of Government Services and Lands)*, 2015 NLTD(G) 14. At paragraph 96 of his reasons for decision, Faour J. held that "the complainant [Ms. Dichmont] made out a *prima facie* case of discrimination on the basis of religious belief". The same parties present the same facts before this Board of Inquiry. I also find that Ms. Dichmont has discharged her burden to establish a *prima facie* case of discrimination.

Reasonable Accommodation

Ms. Dichmont was appointed a marriage commissioner in 1997 pursuant s. 10(1) of the now repealed *Solemnization of Marriage Act*, RSNL 1990, c. S-19, which read:

> The minister may appoint persons 19 years of age or older and living in the province as marriage commissioners for the province. (emphasis added)

The power to solemnize civil marriages rests solely with the legislature of the Province. The Province appoints officials for the purpose of carrying out the legislated scheme of marriage solemnization. Therefore, a marriage commissioner solemnizing civil marriages is, on behalf of the Province, implementing a specific government scheme. Simply put, a marriage commissioner "acts as government": Nichols v. M.J. and Saskatchewan Human Rights Commission, 2009 SKQB 299 at para 52.

In acting "as government" in their capacity as public officials, marriage commissioners must respect the rule of law, the *Charter* and the principle of state neutrality. With respect to the latter, the Supreme Court of Canada in *Mouvement laique Quebecois v. Saguenay (City)*, 2015 SCC 16 at paragraphs 72 and 74 notes the following:

> … the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief . . . it requires that the state abstain from taking any position and thus avoid adhering to a particular belief.
> . . .
> By expressing no preference, the state ensures that it preserves a neutral public space that is freed from discrimination and in which true freedom to belief or not to believe is enjoyed by everyone equally, given that everyone is valued equally … The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the Canadian Charter. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the Canadian Charter, but also with a view to promoting and enhancing diversity.

The Province and Commission argue that if the Province were to accommodate Ms. Dichmont's religious beliefs by acceding to her request to solemnize the marriages of opposite sex couples only, the Province would be in breach of its duty of neutrality.

As noted earlier in these reasons, there is no question that Ms. Dichmont's religious belief is sincerely held. The evidence before this Board of Inquiry indicates that she very much enjoyed performing the public service of solemnizing civil marriages. In 2004, however, the legal definition of marriage changed with the result that it extended the right to marry to a class of persons for whom Ms. Dichmont did not wish to provide the service, namely same-sex couples. For her, providing marriage solemnization services to this class of persons offended her sincerely held religious belief.

As noted by the court in *Nichols*, supra, a public official acting as government such as Ms. Dichmont is at the same time an individual whose religious views demand respect. However, the degree to which a public official's religious views can be accommodated is limited by virtue of the fact that they are "acting as government":

> … a public official has a far greater duty to ensure that s/he respects the law and the rule of law. A marriage commissioner is, to the public, a representative of the state. She or he is expected by the public to enforce, observe and honour the laws binding his or her actions. If a marriage commissioner cannot do that, she or he cannot hold that position: *Nichols*, supra, at paragraph 74.

The role of marriage commissioners as public officials is further discussed by the Saskatchewan Court of Appeal in *Marriage Commissioners Appointed under the Marriage Act (Re)*, 2011 SKCA 3 at paragraph 98:

> Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic (note that is not what is being requested by the complainant). It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.

When holding oneself out to the public as a government official, as in the capacity of a marriage commissioner, one's personal religious beliefs do not matter when it comes to the execution of one's duties as a representative of the state: *Nichols*, supra, at paragraph 76. There is an indivisible, intrinsic link between the marriage commissioner and his or her role acting "as government" carrying out the legislated scheme for the solemnization of civil marriages, which carries with it the duty of neutrality. When acting as a marriage commissioner, Ms. Dichmont acts not in her personal capacity, but as an agent of government vested with authority, and carrying out the legislative purpose, of the Act. The role of a marriage commissioner is to solemnize the marriages of people who qualify to be married in accordance with the *Marriage Act*, SNL 2009 C. M-1.02.

The basic obligation associated with Ms. Dichmont's position as a marriage commissioner is to marry any individual who meets the statutory criteria. To accommodate Ms. Dichmont's personal religious beliefs by modifying her role as a marriage commissioner to one in which she uses her statutory authority to marry opposite sex couples only, to the exclusion of same sex couples, would be to fundamentally alter the role of a civil marriage commissioner. The Province does not have a duty to change the role or obligations of a marriage commissioner in a fundamental way. The duty to accommodate ends where Ms. Dichmont is no longer able to fulfill the basic obligations associated with her appointment as a marriage commissioner. As such, accommodation of Ms. Dichmont's religious belief by relieving her from the obligation to perform same sex marriages is not required.

I agree with the submissions of the Province and the Commission that in the context of a public official who, because of a sincerely held religious belief, wishes to perform his or her duties in a manner contrary to the rule of law, the *Charter* and/or the Province's duty of neutrality, accommodation is not required. If Ms. Dichmont is not willing, for whatever reason, to abide by and honor the current state of the law governing the solemnization of civil marriages while carrying out her duties as a marriage commissioner, she simply cannot act in that capacity as an agent for the Province.

If I am wrong, I further find that accommodation is not required because the Province has satisfied the *Merion* test. I agree with the Province's submission that the requirement for marriage commissioners to marry both opposite sex and same sex couples is rationally connected to the performance of the role of marriage commissioner in carrying out the legislative objective of the Act. I also find that the Province adopted this requirement in an honest and good faith belief that it was necessary to the fulfillment of the purpose of the appointment of marriage commissioners. Unless each of the Province's marriage commissioners are subject to this requirement, the Province would be in breach of its duty of neutrality. The Province, through the use of its marriage commissioners, is required to solemnize both same sex and opposite sex

unions. Relieving a particular marriage commissioner of this requirement would be to fundamentally alter the basic conditions of their appointment. The Province's duty to accommodate, should one exist in this case, does not extend so far as to require it to fundamentally alter the basic conditions of the appointment.

Ms. Dichmont argues that she herself is not seeking to deny services to anyone. She argues that if the Province were to establish a "single point entry" system it would ensure that the Province makes civil marriage ceremonies available to everyone while at the same time accommodating the beliefs of people like herself who do not wish to solemnize same sex marriages. In such a system, the Province would reply to a request for marriage services by first privately taking into account the religious beliefs of commissioners and then providing to the couple a list of commissioners who would be prepared to officiate. Although for the reasons noted above the Province would not be required to establish such a system for those applying to have their civil marriage solemnized, such a system would still, nevertheless, be problematic and offensive to the duty of state neutrality.

Ms. Dichmont submits that such a "single point entry" system would allow the Province to appoint an alternate marriage commissioner to perform a same sex ceremony if a particular commissioner objected to performing the ceremony on the basis of their religious belief. Such an option was discussed in Saskatchewan (Marriage Act, Marriage Commissioner) (Re), 2011 SKCA 3. It is argued that such a system would accommodate Ms. Dichmont's beliefs and would not cause the Province to discriminate against those seeking to have a same sex marriage solemnized. The Commission argues that this approach takes a very simplistic view of discrimination. I agree.

The Commission refers the Board to the case of *Korn v. Potter*, 134 DLR (4th) 437 (BCSC). In *Korn*, a doctor refused to provide artificial insemination services to a same-sex couple. The couple seeking the service had not specifically asked that it be performed by Dr. Korn personally. However, Dr. Korn made it known to the couple that he, personally, would decline to provide the

service if they were to ask him to provide it. He then proceeded to provide the couple with a list of names of other physicians who would be willing to provide the service. I find the actions of the doctor in *Korn* similar in spirit and intent to that of Ms. Dichmont: While Ms. Dichmont is not looking to prevent or discourage same sex couples from marrying, she herself does not wish to be involved in the act of solemnizing the union. In *Korn*, the court notes the following:

> To tell someone you believe wishes a certain service that you will not provide it, before they have the chance to make a formal request, is an anticipatory refusal as efficacious as one made after the request.
>
> The fact that Dr. Korn provided the names of two physicians he believed would assist them in obtaining artificial insemination services supports the fact that he was personally denying that service to them, and does not absolve him from discrimination arising from that denial. The fact other providers exist cannot sanction discrimination prohibited under the Act by any one provider.

While it is true that the single point entry system proposed by Ms. Dichmont would avoid the situation arising in *Korn* where the doctor made the anticipatory refusal personally, it would simply shift responsibility for carrying out that action to the Province and conceal it from the view of those applying for the service.

To borrow a phrase from the Ontario Court of Appeal in *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301 at paragraph 39, requiring minorities to reveal their differences for the purposes of accommodating those who oppose what makes them different only serves as a "subtle and constant reminder" of unacceptance and intolerance. A "single point entry" system would do just that.

Each marriage commissioner in Newfoundland and Labrador is acting "as government" individually. Each marriage commissioner is the face of the Province to its citizens and therefore each marriage commissioner individually is subject to the duty of neutrality. Each marriage commissioner, vested with the authority of the state, is required to provide the service on behalf of government to all those eligible under law to receive the service. To allow any marriage

commissioner who personally disagrees with the solemnization of same-sex marriages to decline or be exempted from providing marriage solemnization services to same-sex couples for the sole reason that the couple seeking the service is a same-sex couple would run contrary to the duty of the Province to be truly neutral in its provision of public services.

Ms. Dichmont's complaint is dismissed.