Refusal to Perform Same-Sex Marriage Costs Sask. Marriage Commissioner $2500

A Saskatchewan marriage commissioner who refused to perform a same-sex marriage ceremony has lost his appeal of a Human Rights Tribunal decision which ordered him to pay $2500 to one of the grooms. Saskatchewan's Court of Queen's Bench ruled that, in his capacity as a public official, Orville Nichol's religious beliefs do not matter.[1]

Mr. Nichols, a member of First Baptist Church, has been a marriage commissioner since his retirement from the Regina Police Service in 1983.[2] In April 2005, M.J. contacted Nichols to ask that he perform a marriage ceremony the next month. Nichols replied that he was available, but upon learning M.J. intended to marry another man, Nichols said he could not perform the ceremony because of his religious beliefs.[3]

M.J. and his partner were married on May 5, 2005 by a different Saskatchewan marriage commissioner.[4]

The Saskatchewan Human Rights Tribunal ruled Nichol's refusal to perform the same-sex marriage on religious grounds violated section 12 of *The Saskatchewan Human Rights Code*, which prohibits denying public services on grounds such as sexual orientation.[5]

Mr. Nichols appealed this decision before the Court of Queen's Bench, arguing that his "sincere and genuine" religious beliefs should be accommodated; he was entitled to decline performance of a same-sex marriage on religious grounds; and that his right to freedom of religion, protected by the *Saskatchewan Human Rights Code* and the *Canadian Charter of Rights and Freedoms*, was violated by compelling him to perform a same-sex marriage.[6]

Mr. Nichols contended that "service seekers cannot demand service from a particular service provider when the provision of that service is contrary to the core of his religious beliefs and those services are readily available from another service provider."[7] The court ruled that Nichol's religious beliefs could not be accommodated since he was a government actor providing a public service, as opposed to a private citizen whose beliefs could be accommodated.[8]

Relying on the Supreme Court of Canada's ruling in the *Same-Sex Marriage Reference*, Nichols argued that his *Charter* right to freedom of religion protected

him from "compulsory celebration of same-sex marriages."[9] The Supreme Court stated:

[T]he guarantee of religious freedom in s. 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.[10]

The Court of Queen's Bench found that the Supreme Court's statement applied only to religious officials, and not government officials performing a civil marriage.[11]

Mr. Nichols further argued that by applying the *Oakes test* under section 1 of the *Charter*, the infringement of his right to freedom of religion could not be justified as reasonable in a free and democratic society.[12] The court concluded, however, that when Nichols acted as a marriage commissioner "his freedom of religion ought to be limited to exclude discrimination on the basis of sexual orientation."[13]

Mr. Nichols had previously lost a separate Human Rights Tribunal decision in which he alleged his religious freedoms would be violated if he was forced to perform same-sex marriages.[14]

The Court of Queen's Bench decision maintains the status quo where marriage commissioners may not opt-out of performing same-sex marriages because of their religious beliefs. On July 3, 2009, the Saskatchewan government referred draft legislation to the provincial Court of Appeal which would allow marriage commissioners to opt-out on religious grounds.[15] The Court of Appeal has yet to give its advisory opinion as to whether the legislation violates the *Charter*.

Further Reading

Ronalda Murphy, "Same-Sex Marriage and the Same Old Constitution" *Constitutional Forum*.

Dan Shouldice, "Saskatchewan Refers Same-Sex Marriage Question to Courts" *Centre for Constitutional Studies* (3 July 2009).

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[1] *Nichols v. M.J.*, 2009 SKQB 299 at para. 76.
[2] *Ibid*. at paras. 8-10.
[3] *Ibid*. at para. 12.
[4] *Ibid*. at para. 13.
[5] S.S. 1979, c. S-24.1, s. 12; *Supra* note 1 at para. 2.

[6] *Supra* note 1 at para. 7.
[7] *Ibid*. at para. 34.
[8] *Ibid*. at paras. 25-26.
[9] *Ibid*. at para. 28.
[10] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 60.
[11] *Supra* note 1 at para. 29.
[12] *Ibid*. at para. 61.
[13] *Ibid*. at para. 73.
[14] "Commissioner who refused to marry same-sex couple loses appeal" *cbc.ca* (23 July 2009).
[15] Dan Shouldice, "Saskatchewan Refers Same-Sex Marriage Question to Courts" *Centre for Constitutional Studies* (3 July 2009).