The Court of Appeal for Bermuda

CIVIL APPEAL Nos. 11 and 12 of 2018

B E T W E E N:

THE ATTORNEY GENERAL FOR BERMUDA

Appellant

v

RODERICK FERGUSON

Respondent

AND B E T W E E N:

OUTBERMUDA

1st Respondent

-and-

MARYELLEN CLAUDIA LOUISE JACKSON

2nd Respondent

-and-

DR. GORDON CAMPBELL

3rd Respondent

-and-

SYLIVA HAYWARD HARRIS

4th Respondent

-and-

THE PARLOR TABERNACLE OF THE VISION CHURCH OF BERMUDA

5th Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: James Guthrie, QC, Melvin Douglas, SG, and Lauren Sadler-Best, Attorney General's Chambers, for the Appellant;
Mark Pettingill, Ronald Myers and Katie Richards for the Appellant Ferguson;

Rod Attride-Stirling, ASW Law Ltd., for the 1st through 5th Respondents

Date of Hearing: **7th, 8th & 9th November 2018**
Date of Judgment: **23 November 2018**

JUDGMENT

Same-sex marriage – legislation banning – whether passed for a religious purpose – test for construing Bermuda Constitution – whether breach of section 8 freedom of conscience and section 12 discrimination due to creed.

BAKER P

Introduction

1. This is the judgment of the Court. Same-sex marriage invokes strong opinions both in those who support it and in those who are against it. It is important to state at the outset that this litigation is not concerned with the correctness of either of those views. This appeal is about section 53 of the Domestic Partnership Act 2018 ("the DPA"), whether it was passed for a religious purpose and whether it offends sections 8 and/or 12 of the Bermuda Constitution ("the Constitution"). Kawaley C.J. held on 6 June 2018 that it was not passed wholly or mainly for a religious purpose but that it does offend both sections 8 and 12 and granted declarations accordingly. The Attorney General for Bermuda has appealed against his decision on sections 8 and 12 and the Respondents have sought to uphold his decision to strike down section 53 on other grounds including that it was passed for a religious purpose.

2. Section 53 of the DPA provides:

> "*Notwithstanding anything in the Human Rights Act 1981, and any other provision of law or the judgment of the Supreme Court in Godwin and DeRoche and others v The Registrar General and others delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female.*"

3. No complaint is made about any other provision in the DPA which, as the heading suggests, implements a comprehensive scheme for domestic partnerships.

4. Separate proceedings were brought under section 15 of the Bermuda Constitution Act against the Attorney General, the first by Roderick Ferguson (2018: No.34) and the second by OutBermuda and Maryellen Jackson (2018: No. 99). The proceedings were consolidated and three additional plaintiffs added to the OutBermuda action on the direction of the Chief Justice; Dr Gordon Campbell, Sylvia Harris and The Parlor Tabernacle of the Vision Church of Bermuda.

The Parties

5. Roderick Ferguson is a Bermudian living in Boston. He is gay and part of a spiritual community. He claims that in taking away the right to enter a same-sex marriage the DPA has deprived him of the ability to form an association with another man under the Marriage Act 1944, when he finds a suitable partner and when he returns to Bermuda. Further, the DPA has prevented him from freely expressing his creed and identity. Apart from contraventions of sections 8 and 12 he also alleged contraventions of sections 1(a), 1(c), 13(1), 3, 9 and 10 of the Constitution. OutBermuda was formerly Bermuda Bred Company and is a charity that addresses challenges faced by Lesbian, Gay, Bisexual, Transgender ("LGBT") Bermudians. Maryellen Jackson is a lesbian Bermudian. Her claim is similar to that of Mr Ferguson; taking away the right to celebrate a same-sex marriage interfered with her freedom of conscience rights as a person who believes in the institution of marriage. Dr Gordon Campbell represents the Trustees of the Wesley Methodist Church. Sylvia Harris has, since 2009, been a Pastor in the Vision Church of Atlanta. She officiated at two same-sex marriages in 2017 and claims that the DPA hinders her religious rights by preventing her from conducting same-sex marriages which is an important part of her religious beliefs. The Parlor Tabernacle of the Vision Church of Bermuda was joined by

the Chief Justice because, as a supporting non-party, arguably, it provided the strongest evidence of interference with conscience rights.

Religious Purpose

6. It is logical to start with the issue on which the Chief Justice found in favour of the Attorney-General, namely whether the section was passed for a religious purpose. If the Respondents succeed on this section 53 is of no effect and must be struck down with the result that the decision in *Godwin* remains the law and same-sex marriage is lawful. In order to understand this issue it is necessary to look at the DPA in the context of what had occurred before it was passed. A brief summary is as follows, although it will be necessary to explore some of the events in more detail.

- **June 2013**. The Human Rights Act 1981 was amended to include sexual orientation as a ground of discrimination. Wayne Furbert, then an opposition M.P. tried unsuccessfully to remove same-sex marriage from this new provision.
- **February 2016**. The Government tabled a bill to make provision for civil unions to include same-sex partners
- **March 2016**. Wayne Furbert introduced a Private Members Bill (the "Furbert Bill") to remove same-sex marriage from the Human Rights Act.
- **June 2016**. The Government held a referendum. The result was that 14.7% voted in favour of same-sex marriage and 32.0% against. 17.2% voted in favour of same-sex civil unions and 29.3% against. However, as the turnout was less than 50% of those entitled to vote the questions were taken to be "unanswered."
- **July 2016**. The Furbert Bill was passed by the House of Assembly but rejected by the Senate. At about the same time the Civil Unions Bill was dropped.

- **August 2016** Godwin and DeRoche started proceedings to establish that marriage between persons of the same-sex was lawful in Bermuda.
- **May 2017** Judgment in the Supreme Court was given by Simmons J in *Godwin and DeRoche v Registrar General and others* [2017] SC (Bda) Civ (5 May 2017) holding that the Human Rights Act 1981, which since 2013 had prohibited discrimination on the grounds of sexual orientation, guaranteed same-sex couples the right to marry. The legal basis for this conclusion was that the Human Rights Act had primacy over inconsistent provisions of statutory and common law, and the prevailing definition of marriage being limited to opposite sex couples discriminated against same-sex couples on the ground of their sexual orientation. The Human Rights Act also expressly empowered the Court to declare that provisions of any law that were inconsistent with that Act were invalid. The decision in *Godwin* was not appealed.
- **July 2017** An election took place resulting in a change of government with the P.L.P. winning with a large majority. In their election manifesto they promised, inter alia, to make same–sex marriage unlawful.
- **February 2018** The DPA received the Governor's assent
- **June 2018** The DPA came into effect.

7. The sovereignty of Parliament means that legislation in the United Kingdom can never be unconstitutional but the position is different in countries that have a written constitution. As the Chief Justice pointed out in the introductory section of his judgment, the source of the Bermuda Constitution is the Bermuda Constitution Order, a United Kingdom Order in Council. He said: *"That Constitution created an independent judiciary based on the separation of powers and general governance structure which was explicitly secular, thus completing what had been an evolving separation of Church and State."* In Bermuda, Parliament's freedom to legislate is constrained to the extent that it must not pass legislation that is inconsistent with the fundamental rights and freedoms of the Constitution. Nor, because it has a secular Constitution, can it pass laws

wholly or mainly for a religious purpose. This is common ground and beyond dispute. The arbiter of whether the legislature has crossed the permitted threshold is necessarily the judiciary. This is sometimes, as in this case, no easy matter to determine.

8. In order to decide whether section 53 of the DPA ("the revocation provision") was enacted for a religious purpose, it is first necessary to establish how to determine the purpose of the legislation. The Chief Justice said at paragraph 62 that he found that there was no reason why the court should not be guided by the Commonwealth authorities on the secularist approach to governance which constitutions such as Bermuda's require. The authorities supported a principle agreed by all parties, namely that Parliament may not validly promulgate laws which are motivated by a religious purpose. He said that the broadest and clearest statement of the principle was to be found in the judgment of Laws L.J.in *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880:

> *"[22] In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR article 9 offer vigorous protection of the Christians right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.*
>
> *[23] The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the*

objective merits of this or that social policy. And the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claim.

[24] The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking of itself.

[25] So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.

The critical sentence is that "*The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified.*"

9. Even more recently, McLachlin C.J. referred to the position in Canada in *Mouvement Laique Quebecois v Saguenay* [2015] 2 R.C.S. 3 as follows:

> *"The state's duty of religious neutrality results from an evolving interpretation of freedom of conscience and religion. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard, which means that it must neither favour nor hinder any particular belief, and the same holds true for non-belief. The pursuit of the ideal of a free and democratic society requires the state to encourage everyone to participate freely in public life regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity, and it helps preserve and promote the multicultural nature of Canadian society. The state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality.*
>
> *A provision of a statute, of regulations or of a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of neutrality."*

10. The primary submission of Mr James Guthrie Q.C., who appeared for the Attorney General, was that the purpose of the revocation provision has to be considered in the context of the DPA as a whole. The concept of marriage being limited to persons of the opposite sex is not particular to the Christian or any other faith. Different churches with the Christian faith hold different views about it, as this case demonstrates. Legislation which promotes a compromise between persons of different views, and which promotes traditional family values, is not to be struck down because it also coincides with the views of some, but not all, religious people. The DPA was a political compromise to try and accommodate the views of different bodies on same-sex marriage and the purpose of one section

should not be looked at in isolation. The purpose of the legislation was to promote a compromise between persons of different religious views. Alternatively, the revocation provisions are not wholly, or even mainly, for a religious purpose. Given that the revocation provisions coincided with the views of a religious faction it was, nevertheless, not enacted solely for a religious purpose.

11. Mr Attride-Stirling, who appeared for the OutBermuda Respondents, argues in summary thus. The critical question is why the revocation provisions were enacted. They do not interfere with the rights of those who believe there should be no same-sex marriage. Their purpose was religious and not the protection of sexual orientation. The purpose of the rest of the DPA was secular, but that of section 53 was religious, or at least primarily religious. The Chief Justice failed to appreciate that the revocation provision could have a different purpose from the rest of the Act.

12. The Chief Justice said at paragraph 63 that the DPA as a whole clearly had a predominately secular purpose and that the most straightforward way of viewing the matter was to characterise the revocation provisions as having a mixed religious and secular purpose.

13. He concluded at para 70:

> *"In my judgment it would be against the weight of the evidence to find that the revocation provisions were enacted solely or substantially for religious purposes. Clearer evidence would in my judgment be required to justify such a finding in the present circumstances where the Court is being asked to intrude into the privileged sphere of present day Parliamentary debates. Moreover, any such finding, lightly made, could have an unintended effect of making religious lobbyists anxious about the legality of exercising their own constitutionally protected freedom of conscience and freedom of expression rights. As far as Government-*

> *sponsored legislation is concerned, the secularity principle constrains the way in which a bill is promoted by the proposer of the legislation and also the conduct of public office-holders acting in their official capacity. The secularity principle is not intended to restrict the political freedoms of the ordinary citizen or organised lobbyists. This attack on the legality of the revocation provisions fails."*

14. It is necessary to look at the authorities to ascertain the correct test for determining the purpose of the revocation provision, to see what must be taken into account and whether the sole purpose or main purpose is the relevant test.

15. *R v Big M Drug Mart Ltd* [1985] 1 R.C.S. 295 was a decision of the Supreme Court of Canada. Big M Drug Mart was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act. One of the questions was whether the Lord's Day Act infringed the right to freedom of conscience and religion guaranteed in the Canadian Charter. It was held that it did. The power to compel, on religious grounds, the universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multi-cultural heritage of Canadians recognised in the Charter. As Dickson J pointed out at p.314:

> *"A law which itself infringes religious freedom is, by that reason alone inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law not the status of the accused that is in issue."*

16. He characterised the problem at p. 316:

> *There are obviously two possible ways to characterise the purpose of Lord's Day legislation, the one religious, namely securing public observance of the Christian institution of the Sabbath and the other secular, namely providing a uniform day of rest. It is undoubtedly true that both elements may be present in any given enactment, indeed it is almost*

> *inevitable that they will be……in the Anglo-Canadian tradition this intertwining is to be seen as far back as early Saxon times…..”*

17. He went on to say that the presence of both secular and religious elements in Sunday observance legislation was noted by Blackstone before concluding:

> *“Despite this inevitable intertwining, it is necessary to identify the “matter” in relation to which such legislation is enacted and thereby to decide within which of the heads of s. 91 or s. 92 of the Constitution Act 1897 such legislation falls.”*

18. Dickson J. then went on to consider earlier legislation that prohibited working on Sundays, noting that there was little doubt that it was religious purpose that underlay it. He then referred to a number of cases including the *Hamilton Street Railway case* [1903] A.C. 504 and *Lieberman v The Queen* [1963] S.C.R 643 in which the determining factor appeared to have been the primary purpose of the legislation. He reached the following conclusion at p.336:

> “*While the effect of such legislation as the Lord’s Day Act may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In the result, therefore, the Lord’s Day Act must be characterized as it always has been, a law the primary purpose of which is the compulsion of sabbatical observance.”*

19. More recently in *Saguenay* the Supreme Court of Canada held that a by-law’s primary purpose was religious even though its secondary purpose was secular. See Gascon J. para 127:

> *“A by-law adopted to regulate a discriminatory religious practice that is incompatible with the state’s duty of neutrality must also be discriminatory. Even though the by-law’s preamble indicates an intention “to ensure decorum and highlight the work of the councillors”, it can be seen from the evidence as a whole that this purpose was*

> *secondary. Decorum could have been ensured in many other ways that would not have led the City to adopt a religious belief."*

20. The authorities accordingly lead us to the conclusion that it is the primary purpose of the impugned legislation that matters. If that was religious it is ineffective and must be struck down, even if it was not the only purpose.

21. In the section of his judgment in *Big M* dealing with the purpose and effect of legislation Dickson J. said this at page. 331:

> "*A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country."*

22. Of the argument that it was not the purpose but the effects of the Act which are relevant he said:

> *"In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object, and thus its validity.*
>
> *Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses on scrutiny upon the aims and objectives of the legislature and ensures that they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide*

> *more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact."*

23. Mr Attride-Stirling, who appeared for the OutBermuda Respondents, submits that *Big M* represents the practical application of the *McFarlane* principle in the context of jurisdictions with a written constitution. Another helpful Canadian authority is *R v Edwards Books* [1986] 2RCS 713. It illustrates the investigative exercise that may be necessary to show whether the purpose of legislation is religious. Mr Attride-Stirling drew our attention to two cases in which *Big M* had been considered by the Privy Council. It was referred to briefly by Lord Bingham in *Reyes v R* [2002] A.C. 235, but not in the context of religious purpose. *Reyes* was an appeal from the Court of Appeal of Belize involving a mandatory death penalty and whether that offended the right under the constitution not to be subjected to inhuman and degrading punishment.

24. Of more assistance on this point is *Commodore of the Royal Bahamas Defence Force and Ors v Laramore* [2017] 1 WLR 2752. *Laramore* challenged the constitutionality of a Memorandum requiring all to remain present during ceremonial parades when Christian prayers were said. Petty Officer Laramore had converted from Christianity to the Islamic faith and claimed he had been hindered in the enjoyment of his freedom of conscience guaranteed by article 22(1) of the Constitution of the Bahamas as scheduled to The Bahamas Independence Order 1973. The Privy Council held that he had and we shall return to this case when considering breach of section 8 of the Bermuda Constitution. Mr Attride-Stirling relies on a passage from the judgment of Lord Mance at para 11:

> *"As to the defendants' point (i) (para 9 above), article 9 of the European Convention and articles I and 2 of the*

> *Canadian Charter both contain outright conferrals or guarantees of freedom of conscience and religion, subject to necessary or justifiable limitations. Article 22 of the Bahamian Constitution operates, in contrast, by prohibiting any person being "hindered in the enjoyment of his freedom of conscience". The Board doubts whether this is a difference of substance or likely to have real effect in practice. The conferral or guarantee of freedom of conscience or religion constitutes a promise that such freedom will be protected, and not interfered with by, the state. The language of interference is commonly used when assessing whether article 9 of the Convention is engaged: see e g the citation from Lord Bingham's speech in the Denbigh High School case: para 9(vi) above. The promise in article 22 that "no person shall be hindered in the enjoyment of his freedom conscience" can readily be equated with the concept of interference. Such positive duties as the state may have to confer or guarantee freedom of conscience are more visible in article 9 of the Convention and articles I and 2 of the Charter, but it seems to the Board likely that similar duties would be held to arise implicitly under article 22 of the Constitution."*

25. Article 22 of the Bahamian Constitution is for practical purposes identical to section 8 of the Bermuda Constitution. Mr Attride-Stirling submits that Lord Mance's words apply equally to the Bermuda Constitution and we agree that the religious purpose test as described in Big M is applicable in Bermuda. It seems to us also to be clear that what is relevant is the primary purpose of the relevant legislation even if it has other secular purposes.

26. A further issue that was raised was whether in applying the religious purpose test it was necessary to focus just on section 53 or upon the Act as a whole. In *Saguenay*, Gascon J, giving the judgment of the Court said at para 81:

> *"A provision of a statute, of regulations or a by-law will be inoperative if its purpose is religious and therefore cannot be reconciled with the state's duty of neutrality. The legislation, including its preamble, its structure and its evolution, as well as its context and the legislative debate, are all indicators that can be used to delineate the*

provision's purpose (R. Sullivan, Sullivan on Construction of Statutes (6th ed. 2014), at pp. 284-87)."

27. *Sullivan* also records at p.268 that in its broadest sense legislative purpose refers not only to the material goals the legislature hoped to achieve but also to the reasons underlying each feature of the legislative scheme. It asks the question why: why this legislation? We know that the purpose of section 53 was in order to reverse the decision in *Godwin.* The question is why this was necessary.

28. We gratefully accept Gascon J's quotation as a correct statement of the law and it seems to us that the test involves a wider ranging inquiry than that involved in determining the true construction and meaning of the words in a particular section, article or paragraph. We did not gain much assistance from the various references to which we were taken in *Bennion on Statutory Interpretation 5th Ed.* which seem to us to relate more to the true construction of provisions in legislation rather than the purpose for which that legislation was enacted. The meaning of section 53 of the DPA is clear; there can be no doubt about it. Marriage between persons of the same-sex is void. Only persons of the opposite sex can be parties to a marriage that is effective in law in Bermuda. The real question is why was section 53 included?

29. We turn therefore to consider the various factors that are relevant in ascertaining the purpose of section 53. We begin with the structure of the Act itself. Its name is the Domestic Partnership Act and, as the name suggests and the preamble records, it is to "*provide for the formalisation and registration of a relationship between adult couples, to be known as a domestic partnership, to clarify the law relating to marriage, and to make connected and related provisions."* The first 52 sections of the Act are concerned with the creation of domestic partnerships and these sections could perfectly well stand alone without the addition of section 53. Indeed no complaint is made by the Respondents about any of those provisions. This seems to us to raise the question for what purpose was section

53 added. When asked what the practical difference is between marriage and a domestic partnership under the DPA, Mr Guthrie's response was none as far as the laws of Bermuda are concerned and that it is irrelevant if there are differences elsewhere.

30. Whilst the legislators may have tried to put same-sex couples who enter a domestic partnership on a level playing field with married couples as far as rights and duties in Bermuda are concerned, it is plain from the evidence that they are likely be disadvantaged abroad, for example in certain states in the United States. Why it was necessary to disqualify same-sex couples from the status of marriage is not clear from within the four corners of the Act. For the purpose of section 53 it is therefore necessary to look carefully to the circumstances that led to its passing.

31. Ms Azhar is the Permanent Secretary at the Ministry of Home Affairs. She referred in one of her affirmations to the history of events that we have outlined in para 6 above. She said that in February 2016, which was well before the Supreme Court decision in *Godwin,* the Government tabled for consultation in the House of Assembly the Civil Union Bill and at the same time the then Premier issued a press release outlining that the "issue of same-sex marriage and civil unions is at the forefront of our national conversation." This was following the decision in *Bermuda Bred* giving non-Bermudian same-sex partners of Bermudians, who are in permanent relationships, the entitlement to live and work in Bermuda free of immigration control. The press release also set out the intensive consultation process that the Government had undertaken. The purpose of the Civil Union Bill was secular. It was quickly followed by a Private Members Bill by Wayne Furbert to remove same-sex marriage from the ambit of the Human Rights Act 2013. Ms Azhar said that she could not speak to the motivation behind the Furbert Bill which she regarded as irrelevant. However, the Chief Justice was prepared to assume that it was promoted, albeit ultimately

not enacted, for a religious purpose. The evidence filed makes it difficult to see that it could have been other than for a religious purpose.

32. Mr Hartnett-Beasley, speaking on behalf of the 1st Respondent, OutBermuda, said at para 57 of his affidavit that there was little doubt that the religious motivation of the Furbert Bill was part and parcel of the DPA's revocation provisions; that they and the Furbert Bill have no plausible secular basis. He said that as the Minister, Hon. Walton Brown, himself noted the revocation provision is indistinguishable from the Furbert Bill and accomplishes the same goal. Ms Azhar vigorously denies that the Furbert Bill has any relevance to the revocation provision. The evidence before the Chief Justice was not tested in cross-examination and it is necessary to examine contemporary documents.

33. Mr Attride-Stirling's submission is that the revocation provision in the DPA was included to counter the Furbert Bill and carried with it the same religious purpose as that which had been behind the Furbert Bill. It does not interfere with the rights of those who believe there should be no same-sex marriage. Its purpose was religious and not one of sexual orientation. The Chief Justice fell into error when he failed to appreciate that the revocation provision could have a different purpose from that of the rest of the Act.

34. Since 2015 opposition to same-sex marriage has been coordinated by Preserve Marriage Bermuda ("PMB"), a religious lobby created to oppose same-sex marriage. It has done so through petitions, demonstrations and court interventions as well as lobbying Members of Parliament. Its petition, which attracted over 9,000 signatures said: "We agree that marriage in Bermuda should remain defined and upheld as a special union ordained by God between a man and a woman." Other similar statements appeared on its website. Mr Hartnett-Beasley points out that Mr Furbert's statements in support of his Bill aligned closely with the promotional material of PMB. He says in his affidavit, and this is unchallenged by other evidence:

> *"The evidence clearly shows that PMB is a religious lobby, which has been assisted by even more powerful religious lobbies from the USA. The agenda of PMB, its local supporters, and the organizations that assist it, is a wholly religious one: to enact into law the religious belief that marriage is "a special union ordained by God between a man and a woman." This is significant because Mr Furbert has conceded that he was effectively the instrument of PMB and the religious opposition to same-sex marriage, and that this was the motivation for his Bill."*

PMB has the right to believe but it does not have the right to impose its beliefs on anyone else.

35. The second reading of the DPA took place on 8 December 2017. There are certain passages in the speech of Hon Walton Brown introducing the Bill that throw light on the purpose of the revocation provisions: Hansard p.881:

> "*Mr. Speaker, everyone in this House knows, and the public will know, that in the absence of a clear Government position and leadership on this issue there would be a Private Members' Bill tabled which would have the effect of outlawing same-sex marriage without any rights being given to same-sex couples.*
>
> *Alongside this, Mr. Speaker, this Government, in its election platform made a solemn commitment to the Bermudian people. We said that the issue of same-sex marriage is a matter of conscience for the party. It has been a conscience vote for more than 20 years. It remains a conscience vote Mr. Speaker.*
>
> *Alongside this, Mr. Speaker, our party also made a commitment to ensure that same-sex couples would have a wide raft of legal benefits. It is not an ideal position, Mr. Speaker, but it is a manifestation of leadership based on a totality of facts and the totality of circumstances that we have to deal with. It is not a matter that this Government will leave to another important arm of Government, which is the judiciary. We have a solemn responsibility to pass laws*

that give effect to the positions of this Government and that is what we are doing."

36. The reference to leaving a matter to the judiciary was a reference to the recent decision in *Godwin.* He went on to say at p.882 that LGBT rights in Bermuda are legitimate and that: "*We are along a continuum of a further granting of such rights, we are not in an ideal space for those who support the LGBT rights campaign."*

37. There then follows this important passage:

> *"Now, we also have an evangelical segment within this fundamentalist movement, embraced in part by groups like the Preserve Marriage, Here is the fundamental problem with fundamentalism, Mr. Speaker. First of all, it all emanates from a Christian mind-set. You cannot base policy – and this may come as a challenge for some – but you cannot base policy, you cannot base policy on a particular interpretation of religion. Yes, we may be largely a Christian society, but we are not only Christians here. And our Constitution says we should respect religious beliefs, even those who have no belief. It is embedded in our Constitution. So you cannot just articulate a view that because a particular religious interpretation argues something that requires…that it is valid. It cannot be, Mr. Speaker, because if you say you should adopt a Christian interpretation, well, which version of Christianity should you embrace? Is it Catholicism, is it AME, is it Seventh-day Adventist, which one? They all have nuances, they all have different views."*

38. He concluded by saying that the Bill was not ideal but that it was the result of political circumstances that had to be confronted and that some would view it as a step backwards.

39. The Chief Justice in reaching his conclusion that the revocation provision was not enacted for a religious purpose at para 67 expressly discounted:

- that the traditional definition of marriage prior to *Godwin* was a religious definition
- that the revocation provision was derived from the Furbert Bill
- that the revocation provision was proposed in 2017 in response to religious lobbying.

40. In our judgment whilst he was right that the traditional definition of marriage prior to *Godwin* was irrelevant, both the other matters were not only relevant but important. Whilst it is true that the Act as a whole was a political compromise introducing a comprehensive scheme for same-sex relationships and fulfilled an election promise, what matters is the underlying purpose of section 53, the revocation provision. Without it the Act provided a comprehensive scheme for same-sex relationships. The addition of section 53 was to reverse the decision in *Godwin*. We have paused to consider whether the fact that marriage is important both to those who have religious views and those who do not means that the purpose of the introduction of this section was not religious but have concluded on the evidence that the section was introduced into the Act at least primarily for a religious purpose. One has to look at the underlying reason for the section rather than the reasons for the Act as a whole. The percentage of those voting in the referendum against same-sex marriage was very similar to that of those voting against same-sex civil unions. This fortifies the view that the revocation provision must have been introduced for a religious purpose.

41. The Chief Justice concluded at para 67 that the revocation provision was not made "solely" or even substantially for a religious purpose. He said at para 69 that it was made for mixed purposes which included the following motivations:

- fulfilling an election promise to revoke same-sex marriage;
- introducing a comprehensive scheme for same-sex relationships;
- satisfying the religious demands of opponents of same-sex (couples);
- meeting the expectations of the LGBT community;

- mitigating the adverse publicity for Bermuda flowing from what would obviously be a controversial reversal of the court's decision in *Godwin.*

42. In our judgment in identifying these purposes he has failed to focus on the revocation provision in section 53; it is the purpose of that provision that is critical. These purposes are looking at the DPA as a whole. Introducing a comprehensive scheme for same-sex relationships has nothing whatever to do with section 53. Indeed the remainder of the Act introduces civil partnerships for all couples, not just those of the same-sex. Nor is section 53 in the Act for meeting the expectations of the LGBT community; the reverse is the case. As to mitigating the adverse publicity for Bermuda, this could only apply to the other provisions in the DPA giving same-sex couples, along with others, the right to enter civil partnerships. The one purpose that did relate to the revocation provision is satisfying the religious demands of the opponents of same-sex couples i.e. a religious purpose. It seems to us plain that the underlying purpose of the revocation provision in section 53 was religious.

The Bermuda Constitution

43. If it is established that the revocation provision was passed for a religious purpose that is the end of the case, but the Chief Justice decided the case on other grounds, namely breaches of sections 8 and 12 of the Constitution and it is his decision on those grounds that gave rise to the Attorney General's appeal. The Chief Justice's conclusion was that the Respondents were entitled to a declaration that:

> "*the provisions of the DPA (Domestic Partnership Act) purporting to reverse the effect of this Court's decision in Godwin and Deroche v Registrar-General and others [2017] SC (Bda) Civ (5 May 2017) are invalid because they contravene the provisions of section 8(1) of the Bermuda Constitution and (in respect of Ms Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr Gordon Campbell) section 12(1) as well. The impugned*

provisions of the DPA interfere with the rights of those who believe (on religious or non-religious grounds) in same-sex marriage of the ability to manifest their beliefs by participating in legally recognised same-sex marriages (as parties to marriage or as religious officiants). The impugned provisions of the DPA discriminate against the holders of such belief by according them access to legal protection for same-sex-marriages on different terms to the equal access conferred by Godwin and DeRoche. The revocation provisions also discriminate by giving believers in traditional marriage the advantage of State sanction for their beliefs while withholding such approval from 'non-believers'."

44. The Bermuda Constitution Order became law in 1968. The Constitution is set out in the schedule to the Order. Paragraph 34 provides:

> "*Subject to the provisions of this Constitution, the Legislature make laws for the peace, order and good governance of Bermuda."*

45. It is common ground that Parliament's power to legislate requires it to comply with the Constitution and is subject to the restrictions imposed by it and that any law passed in Bermuda will be void to the extent of any inconsistency with the Constitution. Chapter 1 provides for the protection of fundamental rights and freedoms of the individual and section 1 of Chapter 1, which is headed: "Fundamental rights and freedoms of the individual" provides as follows:

> "*Whereas every person on Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:*
> *life , liberty, security of the person and the protection of the law;*
> *freedom of conscience, of expression and of assembly and association; and*
> *Protection for the privacy of his home and other property and from deprivation of property without compensation,*

> *the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations being designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."*

46. It is also common ground that the correct approach is that articulated by Lord Wilberforce in the seminal authority of *Minister of Home Affairs v Fisher* [1980] A.C. 319, 328:

> *"Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom S.I. 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual.' It is known that this chapter; as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations" Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."*

47. Subsequent assistance is to be found in Lord Hoffmann's speech in *Matadeen v Pointu* [1999] A.C. 98, 108:

> *"It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in State v Zuma, 1995 (4) B.C.L.R. 401, 42: "If the language used by the lawgiver is not ignored in favour of a general resort to 'values' the result is not interpretation but divination."*

48. Lord Bingham of Cornhill in *Reyes v R* [2002] 2 A.C. 335 at para 26, having referred to numerous authorities, said that the court's duty remains one of interpretation. He added:

> *"As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional*

> *provisions protecting human rights. The court has no licence to read its own predelictions and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see Trop v Dulles 356 US 86,101."*

The Chief Justice concluded at para 46 that the practical effect of applying the principle was as follows:

> *The Court should define the legal scope of the relevant right as broadly as possible and set the legal bar for establishing an interference as low as possible with a view to ensuring that the importance of the right in question is vindicated rather than disappointed. The Court should not rifle through its legal deck of cards with a view to finding a 'get out of jail free' card for the Executive. Every judge is in this regard required, as it were, to be a fundamental rights and freedoms activist. This is merely the first stage of the analytical process. And it is important to add an important caveat. Respect for the importance of fundamental rights as a check on the Executive and Legislative branches of Government requires the Court to be careful to avoid giving too much deference to what can fairly be described as frivolous or vexatious complaints."*

49. Mr Guthrie strongly criticises this passage, submitting that misstating the test led the Chief Justice down the wrong path and that the first stage in the analytical process was not to be a fundamental rights and freedoms activist. It seems to me that that the Chief Justice was putting a gloss on the principle enunciated in the authorities. There is no suggestion that the complaints in the present cases are either frivolous or vexatious and the judge's task is fairly to interpret the words in the Constitution in keeping with the modern world. For example 'child' in *Fisher* includes an illegitimate child but could not reasonably be interpreted to mean a grandchild. A word does not mean (Lewis Carroll *Through the Looking Glass Ch. 6 p.205)*: "*just what I choose it to mean – neither more nor less."*

50. Mr Guthrie complains that the Chief Justice approached the question of construction with an unusual degree of judicial activism. He submits that this was apparent from before the hearing began in a case management ruling on 17 May 2018, when three of the Respondents in the OutBermuda case, Sylvia Hayward-Harris, The Parlor Tabernacle of the Vision Church of Bermuda and Dr. Gordon Campbell were added at the judge's instigation without hearing argument. His reasoning was that he had formed certain provisional views including that breaches of sections 8 and 12 of the Constitution '*appear based on their general merit to warrant receiving the benefit of most of the Court's time.'* And that the central issues that arose in this connection were likely to include whether any *prima facie* interference with the protected rights was or was not reasonably required or justifiable in a democratic society; and/or whether section 12(1) of the Constitution did not apply because it is exempted by section12(4)(c) and/or section 12(8) as read with section8(5) of the Constitution. It was on this basis that he raised the possibility of the Attorney General, having omitted to deal with these matters in evidence, referring to it as an 'evidential chasm'. He said: *"The Court has never come across a section 15 case where the Crown is content to pin its colours to a single mast and rely on the Court finding that no prima facie interference with protected rights has occurred."*

51. In our view the Chief Justice was fully entitled to have and express the provisional view that he did and to make a case management ruling to facilitate the expeditious disposal of the litigation. It would be surprising if a judge did not form a provisional view. The critical question is not how the judge saw the case at its commencement but whether he applied the correct test to ascertain the true meaning of sections 8 and 12. It is also the case that the judge's intervention at the case management hearing gave the Defendant an opportunity, if so advised, to run a defence of justification in the event that prima facie interference was established.

52. We accept Mr Guthrie's submission that the test adumbrated by the judge at para 46 of his judgment was not the correct test to be applied in construing the Constitution and the question to my mind is whether his construction of sections 8 and 12 can be reached when applying the correct test as explained by Lord Bingham in *Reyes,* that is considering the substance of the fundamental right at issue and ensuring contemporary protection of that right in the light of evolving standards of decency that mark an evolving society.

53. Mr Guthrie submitted that the words of the sections did not mean what the Chief Justice wanted them to mean and that he had made a similar error to that identified in *Minister of Home Affairs and* The *Attorney General v Williams* Civil Appeal No. 15 of 2015 at para 8 and *Minister of Home Affairs and Ors v Tavares* [2018] COA (Bda) 20 April 2018. In our judgment it is first necessary when considering whether there has been a breach of section 8 and of section 12 to ascertain in each case the ambit of the right protected.

Section 8: Freedom of Conscience

54. Section 8(1) of the Constitution provides:

> *"Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance"*

It is not necessary to recite the other subsections save to say that they are mainly concerned with protection of religious freedom.

55. The section provides generally that no one shall be hindered in his enjoyment of his freedom of conscience and then goes on to say what, for the purposes of

the section, that freedom includes namely freedom of thought and religion and the freedom to change, manifest and propagate those things. The key words seem to us to be "hindered in his enjoyment", so the section is speaking of an interference. It is also pertinent, as Lord Mance pointed out in *Laramore* at para 12, that the use of the word 'includes' indicates that the protected freedoms are not necessarily limited to those mentioned in the section. That seems to us to match what one would expect from the draughtsman of a Constitution that needs to have sufficient flexibility in its wording to meet the developing protections required in a maturing society. (see Lord Bingham in *Reyes,* p. 246).

56. The Chief Justice cited extensively from *Laramore.* He found that section 8(1) does not exhaustively define the ways in which protected beliefs may be enjoyed and that whether or not a person's enjoyment of their freedom of conscience has been hindered has to be judicially assessed by reference to what the relevant beliefs mean to the applicant, not on a purely objective basis. He referred to *Attride-Stirling v The Attorney General* [1995] Bda L.R. 6. This is the one Bermudian case touching on freedom of conscience under section 8. Huggins J.A. said it was not a matter for the Court whether the conscientiously held belief was reasonable. In that case the appellant registered as a conscientious objector to military service and sought a declaration that provisions of The Defence Act 1965 were inconsistent with, inter alia, section 8 of the Constitution as the Act exempted only those who objected to being required to do combatant duty and not those who objected to serving in any capacity. It appears to have been accepted without argument that there was a breach of section 8(1) unless the Defence Act was read, as it should be, as exempting those who objected to non-combative as well as combative duties. The Court of Appeal said nothing about the ambit of freedom of conscience in section 8 but, as the Chief Justice said, appears to have regarded it as of significance that the right claimed was sanctioned by the European Parliament. But we would have thought there could be little dispute but that conscientious objection to military service falls within section 8.

57. The Chief Justice summarised the protected beliefs sought as follows.

- A religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by persons who would like to so marry).
- A non-religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by persons who would like to so marry).
- A religious or non-religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (not held by persons who would like to so marry e.g. friends and family or other same-sex married couples who would like to see future same-sex marriages).
- A religious belief in marriage as an institution recognised by law which same-sex couples ought to be able to participate in (held by ministers of religion and/or churches who would like to conduct such marriages).

He said the sincerity of the beliefs and that others shared them was not disputed.

58. As pointed out above, section 8 is in similar terms to article 22 of the Bahamian Constitution which was under consideration in *Laramore*. As Lord Mance observed at para 11, the promise in article 22 that "*no person shall be hindered in the enjoyment of his freedom of conscience"* can readily be equated with the concept of interference. He added that the duties of the state to confer or guarantee freedom of conscience, whilst more visible in article 9 of the European Convention on Human Rights and articles 1 and 2 of the Canadian Charter, similar duties would be held implicitly to arise under article 22. That obviously applies equally to section 8 in the present case.

59. *Laramore* was a case about religious freedom but many of the observations of Lord Mance are relevant to the present case. He said at para 14:

> *"Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment, but it only arises once the nature of the individual's particular beliefs has been identified."*

And a little later:

> *"A requirement to take part in a certain activity may be incompatible with a particular person's conscience, however much his or her internal beliefs are otherwise unaffected."*

60. It is true that in *Laramore* the court was concerned with a positive act of interference in requiring attendance on the parades whereas in the present case the complaint is of depriving someone of the opportunity to take part in an activity. The Chief Justice thought that at first sight they were opposite sides of the same coin. To see whether this is so, it is necessary to look further into the authorities. Lord Mance mentioned at para 22 that Sir Michael Barnett C.J. had aptly cited a passage from the judgment of Dickson J in *Big M Drug Mart* at page 336:

> "*Freedom can primarily be characterised by the absence of coercion or restraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."*

Lord Mance then added:

> *"Big M Drug itself concerned a challenge by a company charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act. The freedom affected was that of persons prevented by the Act from working on a Sunday. Even that was held to constitute a relevant restriction by the court. It is not necessary to go so far in the present case, but the first two sentences of the quotation from Dickson J's judgment are in the Board's view in point."*

61. Whilst the latter part of Dickson J's dictum was not necessary for the decision in *Laramore* Lord Mance was certainly not disagreeing with it and it seems to us to be powerful authority for the proposition that depriving someone of the opportunity to take part in an activity is as much a hindrance of enjoyment as a positive act of prevention such as occurred in *Laramore.*

62. The paragraph in Dickson J's judgment in *Big M Drug Mart* continues with a statement that is of particular importance in the present case:

> *"Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the rights and freedoms of others, no one is forced to act in a way contrary to his beliefs or conscience."*

63. The final passage of his judgment to which it is necessary to refer is at p. 350:

> *In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for*

> *those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to."*

64. The thrust of Mr Guthrie's submission is that both *Big M Drug Mart* and *Laramore* are cases that are concerned with freedom of religion and that they are nothing to the point when considering whether belief in same-sex marriage falls within freedom of conscience and that belief in same-sex marriage simply does not fall under the freedom of conscience umbrella and is therefore not protected under section 8. He submits that the Respondents' beliefs identified by the judge do not fall within the language of the section as *'freedoms of thought and religion'* and/or freedoms for persons to *'manifest and propagate their religion and belief in worship, teaching, practice and observance.'* Furthermore, in none of the European cases on same-sex marriage has a breach of Article 9 of the ECHR been established: see *Schalk v Austria* (2011) 53 E.H.R.R. 20, *Hamaleinen v Finland* [2015] F.C.R.379 and *Oliari v Italy* (2017) E.H.R.R. 26. He argues that the Chief Justice's approach to construction amounts to distorting the meaning of the words in section 8, which the Privy Council said was impermissible in *Marshall v The Deputy Governor of Bermuda* [2010] UKPC 9. He gave the words of section 8 a wider meaning than they bear and therefore failed to identify the substance and extent of the fundamental right in issue. Accordingly, section 53 of the DPA does not contravene the constitutional guarantee of freedom of conscience.

65. Mr Guthrie relied strongly on *Halpern v Attorney General of Canada and Ors* (2003) 65 O.R. (3d) 161. The Chief Justice did not find this case to be persuasive. The Ontario Court of Appeal dismissed the complaint of a church that its freedom of conscience rights were being infringed by being prevented from performing same-sex marriages. The Court held:

> *"[53] In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a*

religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.

[54] Even if we were to see this case as engaging freedom of religion, it is our view that MCCT has failed to establish a breach of s. 2(a) of the Charter. In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 at p. 336S.C.R., Dickson J. described freedom of religion in these terms:

> *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 [page178] openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.*

[55] Dickson J. then identified, at p. 337 S.C.R., the dual nature of the protection encompassed by s. 2(a) as the absence of coercion and constraint, and the right to manifest religious beliefs and practices.

[56] MCCT frames its submissions regarding s. 2(a) in terms of state coercion and constraint. We disagree with MCCT's argument that, because the same-sex religious marriage ceremonies it performs are not recognized for civil purposes, it is constrained from performing these religious ceremonies or coerced into performing opposite-sex marriage ceremonies only.

[57] In Big M Drug Mart, the impugned legislation prohibited all persons from working on Sunday, a day when they would otherwise have been able to work. Thus, the law required all persons to observe the Christian Sabbath. In sharp contrast to the situation in Big M Drug Mart, the common law definition of marriage does not oblige MCCT to abstain from doing anything. Nor does it prevent the manifestation of any religious beliefs or practices. There is nothing in the common law definition of marriage that obliges MCCT, directly or indirectly, to stop performing marriage ceremonies that conform with its own religious teachings, including same-sex marriages. Similarly, there is nothing in the common law definition of marriage that

obliges MCCT to perform only heterosexual marriages."

66. The Chief Justice noted that the main result of the case was that several individuals succeeded in establishing, just as the applicants did in *Godwin,* that the common law definition of marriage discriminated against same-sex couples on the ground of sexual orientation. Thus the church could celebrate same-sex marriages. The freedom of conscience issue was peripheral to the main decision. The case is distinguishable for two reasons. First the complaint of the Ontario church was a somewhat diluted version of the complaint in the present case in which legally recognised marriages were possible until removed by section 53 of the DPA. Secondly, the beliefs said to be hindered in the present case are not simply a belief in marriage as a religious ceremony but also marriage as a legally recognised civil ceremony as well. We agree with the Chief Justice, who also said that the restrictive approach in *Halpern* was inconsistent with the more generous approach commended by the Privy Council in *Laramore.* Mr Attride-Stirling made the point that *Halpern* has been referred to in numerous subsequent cases but never relied on for this point either in Canada or elsewhere. The evidence in *Halpern* on this issue was never examined by the Ontario Court of Appeal and, in contradistinction the evidence in the present case, was both powerful and uncontroverted. We are not persuaded that *Halpern* advances the Appellant's case.

67. Mr Attride-Stirling submits that a conscientiously held belief is a belief that a person holds as a matter of conscience. There is no strict definition of what is or is not caught by the term. Nor is there a comprehensive list of beliefs that are included or excluded. Each time an application is made for the protection of a belief the court must consider it on the specific facts and merits of the case.

68. *R (Williamson) v Secretary of State for Education and Employment* [2005] 2AC 246, although concerned with article 9 of the ECHR is helpful as to the correct approach. The House of Lords held that parents who believed in corporal

punishment, and therefore wanted their children's school teachers to be able to beat them, did have a belief that was held sufficiently deeply to qualify for protection of conscience under the freedom of conscience provisions of the ECHR. Interference with that protection was however justified in view of section 548(1) of the Education Act 1996, as amended. Accordingly the balancing act fell on the side of the Government. Lord Nicholls noted that article 9 embraced freedom of thought, conscience and religion, as indeed in our view does section 8 of the Bermuda Constitution. He said at para 24:

> *"The atheist, the agnostic and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found within religious beliefs." Article 9 is apt, therefore, to include a belief such as pacifism: Arrowsmith v United Kingdom (1978) 3 EHRR 218."*

69. Lord Nicholls had earlier noted that that the modest threshold for a religious belief was that the belief must be consistent with the basic standards of human dignity or integrity, that the belief must relate to matters more than merely trivial and must possess an adequate degree of seriousness and importance. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.

70. The Chief Justice does not refer to *Williamson* in his judgment but in our view it adds support to his conclusion on section 8. It is true that *Williamson* is concerned with article 9 of the ECHR and not section 8 of the Constitution but the underlying issue is the same, namely which non-religious beliefs qualify for protection. He outlined the Respondent's beliefs for which protection was sought

at para 79 of his judgment. None is challenged and he went on at para 80 to say, not only was same-sex marriage legally recognised in Bermuda in *Godwin,* it is also recognised in various parts of the, primarily Western, world. He continued that:

> *"The battle over ownership of the very idea of marriage in Bermuda and elsewhere is irresistible proof of the fact that a belief in marriage matters. It is self-evident that beliefs (as regards same-sex marriage) qualify for protection; indeed Azar affirmations acknowledged the Applicants entitlement to hold their beliefs, contesting that the DPA infringed them in any meaningful way."*

Belief in marriage is, in our judgment, a fundamental one, whether in opposite sex marriage or same-sex marriage and, following the decision in *Godwin,* Bermuda law drew no distinction between the two until the DPA became law.

71. We are indebted to Mr Attride-Stirling for the depth of his research on the significance of same-sex marriage, elsewhere in the world, in particular in the United States. This simply fortifies our clearly held opinion that the Chief Justice was correct in holding that the Respondents' section 8 rights under the Constitution were violated by section 53 of the DPA. Prior to that Act same-sex couples had the same right to marry as opposite sex couples. Section 53 expressly disapplied the Human Rights Act with the result that they were henceforth entitled to be discriminated against. We agree with the Chief Justice that the State cannot pass a law of general application that favours those who disagree with same-sex marriage. Section 8 of the Constitution is there to protect the beliefs of minorities and their freedom of conscience. Their freedom of conscience matters and is not lightly to be interfered with. Indeed no evidence has been advanced by the Appellant to justify that interference in the present case.

72. It is true that the draughtsman of the Bermuda Constitution 50 years ago is unlikely to have had same-sex marriage in the forefront of his mind, or indeed in his mind at all, but that is not the point. It was drafted with sufficient flexibility to protect everyone's freedom of conscience in a changing world. Interference with that freedom can be by both positive and negative acts, in this instance by the negative act of preventing same-sex couples having the right to marry

Section 12

73. Section 12 of the Constitution, so far as relevant, provides:

> *"(1) Subject to the provisions of subsections (4), (5) and (8) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.*
>
> *"(2) Subject to the provisions of subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."*
>
> *"(4) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*

74. The issue on section 12 turns on the meaning of "creed." The Respondents contend that it should be broadly construed to include non-religious beliefs. The Chief Justice said his personal linguistic bias was to a narrower definition of creed because at first blush it signified a religious belief. He observed that the issue was somewhat academic as the Respondents' case, viewed as a whole, to a significant extent complained about an interference with a religious belief in marriage. In the end he opted for the wider meaning for three reasons.

- The narrow definition would run counter to the principles for interpreting a Constitution, described above.
- Having found that the Constitution is a secular one it would be inconsistent and illogical to conclude that section 12 only prohibited discrimination on the grounds of religious beliefs and did not prohibit discrimination on grounds of other beliefs (unless they qualified as political opinions).
- "Creed" broadly corresponded to the beliefs protected by section 8.

75. Although "creed" is ordinarily associated with religious belief or the absence of a religious belief it can have a wider meaning, in particular a set of opinions or principles on any subject; see. e.g. The New Shorter Oxford English Dictionary. In accordance with the principles in *Fisher* and the later cases we are satisfied that "creed" should be given its broader meaning. The problem for the Respondents however is that all the broader definitions refer to a system or set of beliefs rather than a single belief. Their case was based on a single belief, namely a belief in marriage recognised by law in which same-sex couples ought to be able to participate. This point does not appear to have been argued before the Chief Justice but in our judgment is determinative of the section 12 issue.

Other Provisions of the Constitution

76. Mr Pettingill, on behalf of Roderick Ferguson, submits that the DPA is void for additional reasons. He submits that his constitutional rights have also been breached under sections 1(a), protection of law, 9 freedom of expression and 10, freedom of association. Section 1(a) is not an independently enforceable right, see *Inchup (trading as Alexis Entertainment and Plush) v The Attorney General* [2006] Bda L.R. 44 and breach of the other sections was, as the Chief Justice said, virtually unarguable.

Conclusion

77. The revocation provisions in section 53 of the DPA were passed for a mainly religious purpose to meet the wishes of the PMB. They are therefore invalid and must be struck down. We dismiss the appeal and uphold the decision of the Chief Justice but on that ground. We uphold the decision of the Chief Justice that there is a breach of section 8 of the Constitution but not his decision on section 12. There is no substance in any of the other alleged breaches on which we agree with the Chief Justice. We dismiss the appeal and vary the order of the Chief Justice accordingly.

Baker P

Kay JA

Bell JA