PART I – INTRODUCTION

1. This is a Reference to the Court of Appeal by the Lieutenant Governor in Council for Saskatchewan authorized by Saskatchewan Order-in-Council 493/2009 dated June 30, 2009 ("the Order-in-Council") pursuant to Section 2 of *The Constitutional Questions Act*.

   The Constitutional Questions Act, R.S.S. 1978, c. C-29, *Book of Authorities* ("*B.A.*") Tab 3 [*The Constitutional Questions Act*].

PART II - JURISDICTION

2. This court has jurisdiction to hear and consider the matter referred to it by the Lieutenant Governor in Council pursuant to Section 2 of *The Constitutional Questions Act*.

PART III - SUMMARY OF FACTS

3. The Evangelical Fellowship of Canada ("the EFC") is in substantial agreement with the summary of facts set out in the Factum by Counsel Appointed to Argue in Favour of the Constitutional Questions Referred to the Court (the "GRJ Factum") and the Factum on Behalf of the Opposition to the Questions Referred to the Court of Appeal by the Lieutenant Governor in Council (the "RSP Factum") except for as follows.

4. As to the statement of facts of the GRJ and RSP facta:
   a. With respect to paragraph 15 of GRJ, the EFC agrees that same sex couples have been granted a legal right to enter into marriages, but does not agree that it is a right guaranteed by Section 15(1) of the *Charter*.
   b. With respect to paragraph 16 of GRJ, the EFC notes that the Supreme Court also expressed its opinion in *Reference re Same-Sex Marriage* relating to the compulsory use of sacred places for the celebration of same sex marriages and about being compelled to otherwise assist in the celebration of such marriages stating that "The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same sex marriages, suggests that the same would hold for these concerns."

      Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698, *B.A.* Tab 55 [*Reference re Same-Sex Marriage*], at para. 59.

c. With respect to paragraph 26 of RSP, the EFC states that general human rights jurisprudence when applied to the provisions of Section 15(1) of the *Charter* as set out in *Andrews v. Law Society* (*British Columbia*) is broad enough to include the term "government official" within the ambit of the term "employee."

   Andrews v. Law Society (*British Columbia*) [1989] 1. S.C.R 143 [*Andrews*] *B.A.* Tab 27, at para. 20.

5. Some marriage commissioners in Saskatchewan are and may in the future be opposed, because of sincerely held religious beliefs to solemnizing *inter alia* marriages between persons of the same sex.

6. The Directive places such marriage commissioners (hereinafter referred to as "RMCs" – "religious marriage commissioners in question") in a position of either violating their religious beliefs, thus forfeiting their *Charter* freedoms and rights of religion in order to retain their commissions, or refusing to violate their religious convictions and being in breach of the Directive and being subject to the consequences of such a breach by refusing to perform same sex marriages.

PART IV - POINTS IN ISSUE

7. **Issue 1**: Is Section 28.1 of the *Marriage Act,* as set out in the *Marriage Amendment Act* attached as Schedule A to Order-in-Council 493/2009, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

   The EFC submits that this proposed legislation ("Schedule A") is not consistent with the *Charter*.

8. **Issue 2:** Is Section 28.1 of the *Act* as set out in the *Marriage Amendment Act* attached as Schedule B to Order-in-Council 493/2009 ("Schedule B") consistent with the *Charter*? If not, in what particular or particulars, and to what extent?

   The EFC submits that Schedule B is consistent with the *Charter*.

PART V - ARGUMENT

A. Issue 2 - The Schedule B Legislation

9. The Government of Saskatchewan is required in its legislative enactments and practices to uphold the *Charter* rights and freedoms of all its citizens. It cannot be selective as to whose rights and freedoms and which rights and freedoms under the *Charter* it will choose to uphold. In the absence of remedial action such as set out in Schedule B, the Government of Saskatchewan has violated the *Charter* by failing to uphold the *Charter* rights and freedom of RMCs by requiring them to solemnize all eligible marriages, including those which violate their religious beliefs.

(i) Section 2(a) of the *Charter*

10. Section 2(a) of the *Charter* guarantees the fundamental freedoms of conscience and religion. Freedom of religion is protected robustly in the *Charter* jurisprudence of the Supreme Court of Canada. That freedom is broad, expansive and jealously guarded.

    Reference re Same-Sex Marriage, *supra* at para 53.

11. In *Big M Drug Mart* Chief Justice Dixon found that freedom generally, and therefore the fundamental freedoms set out in Section 2 of the *Charter*, including freedom of religion are founded in "respect for the inherent dignity and the inviolable rights of the human person."

    R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, *B.A.* Tab 40 [*Big M Drug Mart*], at para. 94.

12. Individuals in Canada are protected from being forced to act in a manner contrary to their religious beliefs and conscience. Chief Justice Dixon goes on to state in *Big M Drug Mart*:

    > The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. 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 purposes of the Charter is to protect within reason from compulsion or restraint.

Big M Drug Mart, supra at paras. 94 – 95.

13. In particular, the core religious beliefs and practices of individuals will be protected by the *Charter*. The sanctity of marriage is a core religious belief in protestant evangelical Christianity. Marriage is held to be a divinely originated and sacred institution. Specifically, the definition of marriage as involving one man and one woman to the exclusion of all others is fundamental to the Protestant Evangelical Christian understanding of marriage.

    Affidavit of David Glenn Guretzki, *Materials of The Evangelical Fellowship of Canada* ("*EFC Materials*"), Tab 2, [Guretzki Affidavit], paras. 10-24, 26, 27 and 30.
    Affidavit of Victor Allan Shepherd, *EFC Materials,* Tab 3, [Shepherd Affidavit] paras. 5 – 9.
    Brockie v. Ontario, [2002] O.J. No. 2375, *EFC Materials*, Tab 9 at paras. 56 – 58.

14. There are marriage commissioners in Saskatchewan and in other Canadian provinces who adhere to these views respecting marriage, which form part of their sincerely held religious beliefs.

    Affidavit of Lionel McNabb, *Information and Materials Forming the Record,* ("*Court Record*"), Tab 5 [McNabb Affidavit] at paras. 54 and 60.
    Affidavit of Orville Nichols, *Court Record*, Tab 9 [Nichols Affidavit] at para. 11.
    Affidavit of Kevin Richard Kisilowsky*, EFC Materials,* Tab 4, [Kisilowsky Affidavit] at paras. 4 and 9.

15. It is not for the state or the court to substitute their views for the genuinely held religious beliefs of marriage commissioners relating to marriage. To do so involves unacceptable coercion. The Supreme Court of Canada clearly held in *R. v. Jones* that "a court is in no position to question the validity of a religious belief . . ."

    R. v. Jones, [1986] 2 S.C.R. 284, *EFC Materials,* Tab 12, at para. 57.
    Big M Drug Mart, *supra* at para. 95.

16. The majority of provincial and territorial jurisdictions in Canada recognize and accommodate the religious beliefs of their counterparts to Saskatchewan marriage commissioners either by practice or legislation, by not requiring them to solemnize marriage ceremonies contrary to their religious beliefs.

    Affidavit of Suneil Sarai, *Court Record,* Tab 6*,* paras. 5 – 16.

17. This recognition by other provincial and territorial jurisdictions is consistent with Section 2(a)'s guarantee of freedom of religion, and with the relevant jurisprudence of the Supreme Court of Canada.

    Reference re Same-Sex Marriage, supra at para. 59.

18. The *Saskatchewan Marriage Act* contravenes Section 2(a) of the *Charter* in that it contains no provisions to recognize and protect the religious beliefs of RMCs.

19. The Directive contravenes Section 2(a) of the *Charter* by compelling all marriage commissioners to solemnize same sex marriage ceremonies. Accordingly, the Directive constitutes government coercion with respect to the beliefs of such commissioners contrary to the *Charter* jurisprudence of the Supreme Court.

    McNabb Affidavit, *Court Record*, Tab 5, Sub-tab I.
    Big M Drug Mart, supra at paras. 94 – 95.

20. In *Reference re Same-Sex Marriage* the Supreme Court of Canada stated as follows:

> It therefore seems clear that state compulsion on religious officials to perform same sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under Section 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation would not be justified under Section 1 of the *Charter*.
>
> The question we are asked to answer is confined to the performance of same sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same sex marriages suggests that the same would hold for these concerns (emphasis added).
>
> *Reference re Same-Sex Marriage, supra* at paras. 58 – 59.

The EFC submits that the reference in paragraph 59 above would extend the freedom of religion protection in Section 2(a) of the *Charter* not only to "religious officials," but also to officials who are religious, such as certain of the marriage commissioners in Saskatchewan.

21. The Directive on the one hand facilitates freedom for those members of the Saskatchewan gay and lesbian community whose religious or other beliefs accord with same sex marriage, and on the other, denies freedom of religion to those marriage commissioners whose religious beliefs prohibit them from participation in the performance of a same sex marriages.

22. In enacting Schedule B, the Government of Saskatchewan is taking the necessary steps to rectify its contravention of Section 2(a) as reflected in the Directive and in the failure of the *Act* to recognize and protect the religious beliefs of RMCs.

(ii) Section 7 of the *Charter*

23. The Directive, in conjunction with the failure of the *Act* to recognize the religious beliefs of RMCs, contravenes the provisions of Section 7 of the *Charter* respecting the liberty and security of the person. It does so by presenting RMCs with the alternatives of either violating their religious beliefs by performing ceremonies contrary to such beliefs, or acting on those beliefs and facing the consequences of refusing the Directive (or in the case of those aspiring to become marriage commissioners, declining to apply for a commission in the first place).

24. In *Blencoe v. British Columbia* (*Human Rights Commission*), the Supreme Court of Canada made it clear that s. 7 "can extend beyond the sphere of criminal law," at a minimum where there is "'state action which directly engages the justice system and its administration' [G.(J. at para.66)]." The court went on to quote its own jurisprudence in stating "to trigger its operation there must first be a finding that there has been a deprivation of the right to 'life, liberty and security of the person' and, secondly that the deprivation is contrary to the principles of fundamental justice."

    Blencoe v. British Columbia (*Human Rights Commission*), [2000] 2 S.C.R. 307 *B.A.* Tab 11 [*Blencoe*], at para. 45 – 47.

25. With respect to the liberty interest protected by Section 7, the court notes that it is not restricted merely to freedom from physical restraint but "that 'liberty' is engaged where state compulsions or prohibitions affect <u>important and fundamental life choices</u>" (emphasis added).

Blencoe, supra at para. 49.

26. The Supreme Court in *Blencoe* referring to Wilson J. in *R. v Morgentaler* noting that she had held that "the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being" and includes "the right to make fundamental personal decisions with interference from the state."

Blencoe, supra at para. 50.

27. The EFC contends that few issues engage "decisions regarding an individual's fundamental being" more than do religious beliefs. Included as part of such beliefs of Evangelical Christians are convictions relating to the origin and nature of marriage.

Guretzki Affidavit*, EFC Materials,* Tab 2, at paras. 10 – 24, 26 and 30.
Shepherd Affidavit*, EFC Materials,* Tab 3, at paras. 5 – 6.

28. The liberty of the persons of RMCs is compromised by the *Act* and Directive in that they are forced to choose between their religious beliefs and their vocation. In the event that an RMC solemnizes a same sex marriage, important and fundamental life choices are obviously detrimentally affected in that he or she is practicing a vocation in violation of his or her conscience and beliefs. This is clearly an impairment to the life satisfaction and fulfillment that a vocation can afford quite independently of the remuneration it supplies, and is productive of significant internal conflict.

Nichols Affidavit*, Court Record,* Tab 9, at para. 10.
Kisilowsky Affidavit*, EFC Materials,* Tab 4, at paras. 6, 8 and 9.
Guretzki Affidavit, *EFC Materials,* Tab 2, at paras. 32, 33, 35 and 36.
Shepherd Affidavit, *EFC Materials,* Tab 3, at para. 7.

29. In the case of marriage commissioners who refuse to violate their religious beliefs and are relieved of or proceed to relinquish their commissions, the Directive violates the liberty of their persons by detrimentally impacting their ability to earn or contribute to their livelihoods.

Nichols Affidavit, *Court Record,* Tab 9, at paras. 4 and 6.

30. The liberty of RMCs is further impacted by the Directive in that those commissioners who refuse to surrender their commissions and also refuse to violate their religious beliefs by performing same sex marriage ceremonies are potentially exposed to human rights complaints being initiated against them, as was the case with the marriage commissioner Orville Nichols.

    Nichols Affidavit, *Court Record,* Tab 9, at paras. 12 – 13.

31. The liberty of RMCs is also infringed in the same manner as set out in paragraphs 33, 34 and 35 in circumstances not involving same sex marriage ceremonies, but where such commissioners are asked to perform other kinds of ceremonies that are contrary to their religious beliefs. This is as a consequence of the *Act* as it is currently drafted, failing to permit them to decline to solemnize such marriages. It is submitted that the deprivation of the security of the persons of RMCs is clearly not in accordance with the principles of fundamental justice.

32. Furthermore, RMCs are forced to decide whether or not to disobey the government. As obedience to governing authorities is an important principle of Evangelical Christian beliefs, RMCs are placed by the Directive in a position of being in conflict between two components of their religious convictions, namely the sanctity of marriage and obeying governing authorities. Civil disobedience would be considered theologically appropriate in this circumstance, i.e. refusal to obey the Directive.

    Guretzki Affidavit, *EFC Materials,* Tab 2, para. 34.
    Shepherd Affidavit, *EFC Materials,* Tab 3, para. 8.

33. With respect to security, the breach of this right in Section 7 applies to both the physical and psychological integrity of the individual.

    Khalil v. R. [2007] F.C. 923; Carswell NAT 2910, *EFC Materials,* Tab 10 [*Khalil*], at para. 288.

34. While the psychological harm must be both state imposed and serious it is contended that the impact and consequence of the Directive on the consequences of the Directive on RMCs as outlined above in paragraphs 28 – 33 does violate the security of RMCs contrary to Section 7 at a level "greater than ordinary stress and anxiety."

Khalil, supra at paras. 288 – 289.

35. In accommodating the religious beliefs of RMCs the Schedule B legislation upholds the Section 7 *Charter* rights of such individuals, and removes the threats to the liberty and security of the person of such individuals.

(iii) Section 15(1) of the *Charter*

36. Section 15(1) guarantees the equality of individuals before and under the law and grants them the right to equal protection and benefit of the law without discrimination on the basis of religion. Discrimination involves unlawful differential treatment of an individual relating to protected characteristics. In the case of the *Charter*, these characteristics are outlined in Section 15(1).

Andrews, supra at para. 19.

37. The *Act* and the Directive in combination specifically discriminate against marriage commissioners opposed because of religious beliefs to same sex marriage. This is contrary to Section 15 of the *Charter*. The discrimination is also contrary to Section 4 of the *Saskatchewan Human Rights Code*, and the reasonable accommodation requirements of human rights jurisprudence.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.
British Columbia (*Public Service Employee Relations Commission*) *v. BCGSEU*, [1999] 3 S.C.R. 3, *EFC Materials,* Tab 8 at para. 62.

38. The discriminatory impact of the Act and the Directive against RMCs is revealed when comparing RMCs to gay and lesbian individuals whose beliefs agree with and/or permit them to enter into same sex marriage relationships. The beliefs and practices of those individuals are accommodated in the sanctioning of same sex marriage ceremonies. On the other hand, the Act in conjunction with the Directive refuses to grant the protection and benefit of the law to marriage commissioners by refusing to recognize the religious beliefs of those individuals. Neither the beliefs nor practices of those individuals are currently protected.

39. The discriminatory effect of the *Act* and Directive is also seen when comparing RMCs with marriage commissioners whose religious beliefs are not opposed to same

sex marriage. The latter individuals have no constraints placed on their religious beliefs in favour of same sex marriage whereas severe constraints are placed on the religious beliefs of RMCs opposed to solemnizing same sex marriage.

40. In both examples, the *Act* and the Directive contravene Section 15 of the *Charter*. As a result, an impermissible hierarchy of rights is established contrary to the established Supreme Court of Canada jurisprudence.

> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3. S.C.R. 835; 1994 CanLII 39 S.C.C. *B.A.* Tab 14, at para. 72.

41. Schedule B rectifies the discriminatory effects of the *Act* and the Directive by recognizing the religious beliefs of RMCs. In fact, if the discriminatory effects of the *Act* and the Directive were not rectified, it is submitted that they could be successfully challenged as contravening the *Charter*.

(iv) Section 15(2) of the Charter

42. Section 15(2) permits the enactment of laws to ameliorate the conditions of individuals or groups disadvantaged on the basis of Section 15(1) characteristics, *inter alia*, religion.

43. RMCs are disadvantaged by the *Act* in that no provisions exist to accommodate them. More specifically marriage commissioners unable to solemnize same sex marriages because of their religious beliefs are directly disadvantaged by the Directive.

44. While it should be self evident, it is not merely the right to entertain a religious belief that is protected by Section 15(1) but rather the right, subject to law, to carry it out in practice. This was confirmed by Twaddle J. in *MacKay v. Manitoba*: "Although, in theory, the law may recognize the right to hold an opinion or belief or think a thought, it is the manifestation of the states of mind that the law actually protects."

> *MacKay v. Manitoba* [1986] 39 Man. R. (2d) 274, CarswellMAN 227, *EFC Materials,* Tab 11, at para. 22.

45. Schedule B complies with the affirmative action provisions of Section 15(2) in ameliorating the conditions of such individuals by not requiring them to perform

marriage ceremonies contrary to their religious beliefs. Accordingly, Schedule B complies with both Section 15(1) and Section 15(2) of the *Charter*.

Andrews, supra at para. 16.

(v) Section 26 of the Charter

46. The *Charter* in its guarantees of rights and freedoms does not deny the existence of any other rights and freedoms in Canada. Freedom of religion in Canada pre-existed the *Charter* and has been robustly protected in the jurisprudence of the Supreme Court of Canada. In *Saumer v Quebec (City)* the court declared religious freedom to be "an original and foundational component of Canadian society". Justice Rand, on behalf of the court went on to state as follows:

> From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammeled affirmations of religious belief and its propagation, personal or institutional, remain of the greatest constitutional significance throughout the Dominion is unquestionable.
>
> . . .
>
> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of the community life within a legal order.
>
> *Saumer v Quebec (City)* [1953] 2 S.C.R. 299, *EFC Materials,* Tab 14 at paras. 89 and 96.

47. In *Amselem,* the Supreme Court stated as follows: "This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom."

Syndicat Northcrest v. Amselem [2004] 2 S.C.R. 551, *EFC Materials,* Tab 16 [*Amselem*], at para. 40.

48. These decisions confirm the centrality of religious freedom in Canadian society, and its existence independently of positive law. They underscore the provisions of the *Charter* which have been enacted to protect it, and reinforce the importance of the protection extended to marriage commissioners in Schedule B.

(vi) Section 27 of the Charter

49. Section 27 requires that the *Charter* be interpreted in a manner that preserves and enhances the multicultural heritage of Canada. The term "multiculturalism" has been defined as "various ways of life […] rooted in the authentic life of a people seen as a community bound together by pervasive traditions and moral ties."

    Howard Brotz, "Multiculturalism in Canada: A Muddle" (1980) 6 CAN. PUB. POL. 41, *EFC Materials*, Tab 17 at 41 – 42.

50. Religion is one of the dominant aspects of a culture which, in view of this section, the *Charter* is intended to preserve and enhance. Religious beliefs in fact form an integral part of many cultures and are often the glue that holds cultures or cultural communities together.

51. Section 27 provides that the Canadian society is an open and pluralistic one which must accommodate different religious practices.

    > [A] law infringes freedom of religion if it makes it more difficult and more costly to practice one's religion, [this] is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based.

    R. v. Videoflicks Ltd. et al., (1984), 48 O.R. (2d) 395 (Ont. C.A.); 1984 CarswellOnt 598, *EFC Materials,* Tab 13, at para. 67.

52. It is submitted that the religious beliefs held by RMCs in Saskatchewan, including beliefs relating to the nature and sanctity of marriage are representative of and may represent in the future a broad cross section of the religious and cultural communities in Saskatchewan.

    Nichols Affidavit, *Court Record,* Tab 9, paras. 11 – 12.

53. If the courts are to interpret the *Charter* in a manner that preserves and enhances the multicultural heritage of Canada, they must extend fundamental freedoms like that of freedom of religion to marriage commissioners whose religious beliefs include viewing marriage as an institution ordained by God and to be entered into between one man and one woman.

    Guretzki Affidavit, *EFC Materials,* Tab 2, at paras. 33 and 35.

(vii) Schedule B does not contravene the *Charter*

54. The Schedule B legislative provision must be examined to determine whether or not it will create an impermissible collision of rights. The Supreme Court of Canada in *Reference re Same Sex-Marriage*, referring to its decision in *Trinity Western University v British Columbia College of Teachers* has asserted that the potential for a collision of rights does not necessarily imply unconstitutionality. The contextual facts of actual conflicts must be examined, and it must first be determined whether or not the rights alleged to conflict can be reconciled.

    Reference re Same-Sex Marriage, supra at para. 50.

55. The Court states that only where the rights cannot be reconciled is a true conflict of rights made out, and proceeds to say: "Conflicts of rights do not imply conflict with the Charter; rather the resolution of such conflicts generally occurs within the ambit of the Charter itself by way of internal balancing and delineation."

    Reference re Same-Sex Marriage, supra at para. 52.

56. The Supreme Court of Canada has also made it clear that Section 15 of the *Charter* does not exist for the purpose of eliminating all distinctions. In *Andrews* the court stated as follows:

> It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as s. 27 (multicultural heritage); s. 2(a) (freedom of conscience and religion); s. 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups …
>
> *Andrews, supra* at para. 16.

57. The instant case is one in which identical treatment under Section 15 produces serious inequality. As a result of the *Act* and the Directive, all Saskatchewan marriage commissioners are treated identically with none being granted the right to be exempt

from performing marriage ceremonies, even on the basis of their constitutionally protected rights and freedoms. The effect of this as referred to herein on page 9 **(iii) Section 15(1) of the Charter** is to produce a significant inequality for RMCs *vis á vis* both gay and lesbian individuals and marriage commissioners whose religious beliefs are accepting of or not opposed to same sex marriage.

58. The purpose of Schedule B is to acknowledge and accommodate the constitutionally protected religious beliefs of RMCs. Its purpose is not to deny or limit the legal rights of couples to marry. In Saskatchewan, there are 372 marriage commissioners available to solemnize marriages, and the Government of Saskatchewan is at liberty to appoint as many additional marriage commissioners as it sees fit to meet the demand for such officials. By meeting this demand, the Government of Saskatchewan fulfills its duty to ensure access to civil marriage ceremonies, a duty which is not the duty of individual marriage commissioners. The only limit in Schedule B on the rights of individuals with respect to a civil marriage ceremony is a limit on the right to choose any and every marriage commissioner to perform the marriage ceremony.

    Nichols Affidavit, *Court Record,* Tab 5, paras. 20 and 65.

59. As a consequence, there is no true conflict of rights, as the rights in question can be reconciled. Absent the Schedule B legislation, the constitutional religious rights of RMCs is denied and only the legal rights of couples to marry is preserved. With the Schedule B legislation, both the constitutional rights of RMCs and the legal rights of otherwise qualified couples to be married are preserved.

(viii) If Schedule B contravenes Section 15(1), it is saved by Section 1 of the Charter

60. The tests for whether limits on a *Charter* right can be saved by the provisions of Section 1 as set out in *R. v. Oakes* were further developed in *Alberta v. Hutterian Brethren of Wilson Colony.*

    R. v. Oakes , [1986] 1 S.C.R. 103.
    Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, [*Hutterian Brethren*] *B.A.* Tab 8.

61. The first stage of the test is whether the limit on the *Charter* right is prescribed by law. Schedule B is proposed legislation validly drafted and referred by the Lieutenant Governor to this court. Accordingly, it is submitted that the limit is prescribed by law.

    Hutterian Brethren, supra at 39.

62. The second stage relates to whether the objective in Schedule B is a pressing and substantial concern in a free and democratic society. The religious rights of RMCs were obliterated by the Directive, forcing them to choose between their religious beliefs and their vocation. Both protection of religious beliefs and preservation of job security are pressing and substantial concerns. Accordingly, it is submitted that the legislation meets the first test in *Oakes* and *Hutterian Brethren.*

    Hutterian Brethren, *supra* at para. 41.

63. It is submitted that the decision of the Supreme Court of Canada in *Reference re Same-Sex Marriage* underscores that the objective of the legislation involves a pressing and substantial concern. There, the Supreme Court addressed concerns raised "about being compelled to otherwise assist in the celebration of same-sex marriages." In response to this concern, the court stated "the reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same sex marriages, suggests that the same would hold for these concerns."

    Reference re Same-Sex Marriage, *supra* at para. 59.

64. Clearly, marriage commissioners who solemnize same sex marriages "otherwise assist" in their celebration. This position was generally accepted at the time of the same sex marriage consultation in 2003 and 2004 by both the Senate Committee and House of Commons Committee relating to Bill C-38, The *Civil Marriage Act*, by both religious communities and LGBT organizations. It is submitted that the legislation meets the second stage of the Section 1 test.

    EFC Materials, Tab 5, Senate Committee Transcript pages 20:39, 20:42 and 20:46.
    EFC Materials, Tab 6, House Committee Transcript pages 14 – 15.

65. It is submitted that the third stage of the Section 1 analysis involving the three branches of the "proportionality" test is also met by the legislation. The first branch of the test, namely that the measures adopted must be rationally connected to the objective is satisfied, in that the objective of the legislation is to protect the religious rights of RMCs. The *Act* relates to the solemnization of marriage and therefore to the persons who can perform such ceremonies. Accordingly, it is legitimate for the government to amend the legislation with respect to persons authorized to perform marriage ceremonies. Currently, the *Act* in combination with the Directive constitutes a breach of these rights, and only corrective legislation can redress this. The effect of the Directive in conjunction with the *Act* is to substantially impair the *Charter* protected beliefs of RMCs in the context of their work.

    Hutterian Brethren, *supra* at 47.

66. It is submitted that the second branch of the Proportionality Test is also met in that Schedule B impairs as little as possible the right or freedom of qualified couples in Saskatchewan to marry. In protecting the religious beliefs of RMCs as stated previously, the legislation only limits the assertions of such couples of an entitlement to be married by any and every marriage commissioner.

    Hutterian Brethren, *supra* at para. 52.

67. Furthermore, as stated in paragraph 57 hereof, the Government of Saskatchewan has the authority to appoint as many additional marriage commissioners as it deems fit in order to satisfy public demand. If a marriage commissioner declines to solemnize a particular marriage for religious reasons, other marriage commissioners are available, and the list of such marriage commissioners are available to the public.

68. It is submitted that the third branch of the Proportionality Test, namely examining the effects of the measures, is also satisfied by the legislation. The salutary effect or benefit of the Schedule B is to redress the violation of the religious rights and freedoms of RMCs by recognizing those beliefs. The further effect of the legislation is to cause the government to cease to be in violation of the *Charter* rights and

freedoms of such persons. Absent the legislation, RMCs are faced with the choices referred to in paragraph 74 herein.

> *Hutterian Brethren, supra* at para. 72.

69. Any deleterious effects on couples whose marriage request is declined are much less significant than the necessary accommodation performed by the legislation. Couples who are declined are not denied their right to marry. The only detriment to a couple whose marriage request is declined is the minor inconvenience of retaining the services of another marriage commissioner from the public list.

70. The only alternatives available to an RMC, absent the legislation are for him or her to solemnize the marriage and violate his or her religious conscience, cease to be or refrain from becoming a marriage commissioner, or to become a member of the clergy. Such options are clearly onerous and a serious impairment of religious rights.

71. When the benefits of Schedule B are compared to any detrimental effect it may have, the balance is clearly weighted in favour of the legislation. The Schedule B legislation provides the only viable solution to balancing the above noted rights and interests. For the same sex couple for example, their legal right to be married is preserved without overriding the constitutional religious rights of others. It is submitted that only this kind of balancing of rights can produce mutual respect and tolerance in the accommodation of a wide variety of beliefs, which the Supreme Court of Canada has noted to be the hallmark of "a truly free society:"

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s.15 of the Charter.
>
> *Big M Drug Mart*, *supra* at para. 94.
> Lorraine P. Lafferty, "*Religion, sexual Orientation and the state: Can Public Officials Refuse to Perform Same-sex Marriage?*" (2006) 85 C.B.R 287, *EFC Materials,* Tab 18, at pages 315 – 316.

72. It is submitted that it is the duty of government of promote such a balancing of rights. The balance achieved by Schedule B reflects "the broader societal context in which

the law operates which must inform the Section 1 justification analysis" as stated by Chief Justice McLaughlin at paragraph 69 of *Hutterian Brethren*.

Hutterian Brethren, supra at para. 69.

73. In summary, it is submitted that in the event that Schedule B contravenes Section 15(1) of the *Charter*, the enactment meets the tests set out in Oakes and is therefore saved by the provisions of Section 1 of the *Charter*.

(ix) Charter Rights and Government Officials

74. Section 2(a) of the *Charter* grants the fundamental freedom of conscience and religion to "everyone". Section 7 grants to "everyone" the right to life, liberty and security of the person. Section 15(1) grants equality rights to "every individual" without discrimination on the basis of, *inter alia* religion. Section 15(2) authorizes affirmative action programs relating *inter alia*, to disadvantaged "individuals". Section 27 requires that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of "Canadians."

75. Marriage commissioners fall within the term "everyone", "individual" and "Canadians". Exceptions to these provisions in the case of government or public officials ("government officials") do not appear in the *Charter* since such officials fall within each of the above noted categories. To assert that the role of government official exempts the person holding it from *Charter* protection is to create an artificial distinction that is not justified at law.

76. It is trite law that government action must comply with the provisions of the *Charter*. The Government of Saskatchewan must conform to the provisions of the *Charter* with respect to all persons impacted by government action. The Directive constitutes government action which directly impacts marriage commissioners, including RMCs.

77. RMCs who would exercise their religious rights and freedoms under the *Charter* through the provisions of Schedule B do not exercise them as government officials, but rather as persons within the categories of "everyone", "individuals" and "Canadians." Such RMCs do not breach the *Charter* in exercising these rights and

freedoms any more than the Government of Saskatchewan does by recognizing and so complying with its *Charter* obligations.

78. The artificiality of asserting that individuals titled government officials are denuded of *Charter* protection is further reflected in the jurisprudence of the Supreme Court of Canada to the effect that principles applied under human rights legislation are equally applicable in considering questions of discrimination under Section 15(1).

    Andrews, *supra* at para. 20.

79. Human rights jurisprudence requires that human rights legislation be interpreted broadly and generously. Applied to the term "employee," it has been held that this term is to be broadly construed, and has included within its ambit persons who are independent contractors and even volunteers. It is submitted that the term "employee" is broad enough to encompass "public officials."

    Berg v. University of British Columbia, [1993] 2 S.C.R. 353, *EFC Materials,* Tab 7, at para. 39.
    Sun v. Elections BC, 2009 BCHRT 350, *EFC Materials,* Tab 15, at paras. 36 and 33.

80. The description of marriage commissioners in the Affidavit of Lionel McNabb in paragraphs 26-29 in Tab 5 of the Court Record it is submitted contains many of the hallmarks of independent contractors which reinforces the application of the term "employee" to such positions.

B. Issue 1 - The Schedule A Legislation

81. The EFC submits that this proposed legislation ("Schedule A") is not consistent with the *Charter*. Schedule A applies only to marriage commissioners in Saskatchewan appointed on or before November 5, 2004.

82. As a result it extends Charter rights and freedoms only to those marriage commissioners and not to those appointed or seeking appointment after that date. The post-November 5, 2004 marriage commissioners would still be subject to the discriminatory effect of the Directive.

83. By denying to post-November 5, 2004 marriage commissioners their Section 2(a) freedom of conscience and religion, Section 15(1) equality rights and Section 7 rights to liberty and security of the person, Schedule A has a built in discriminatory effect between these two groups of marriage commissioners. Its effect is to deny the post-November 5, 2004 marriage commissioners their rights to equality before and under the law and the right to equal protection and benefit of the law without discrimination *vis à vis* the pre-November 5, 2004 marriage commissioners.

84. Schedule A also denies the ameliorative provisions of Section 15(2) to the post-November 5, 2004 marriage commissioners. Furthermore, it also fails to comply with the provisions of Section 27 of the *Charter*, by applying its multicultural heritage mandate in a limited and selective manner.

85. In fact, when the generation of pre-November 5, 2004 marriage commissioners no longer is alive, the limited effects of Schedule A will have been exhausted along with the *Charter* religious rights of RMCs. All RMCs will then once again be fully exposed to the discriminatory and coercive effects of the Declaration that existed prior to the enactment of the legislation.

PART VI - RELIEF REQUESTED

86. It is respectfully submitted that this Honourable Court should determine the questions referred to it through the Order-in-Council dated June 30, 2009 by answering Question A in the negative and Question B in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Winnipeg, Manitoba, this 16th day of April, A.D., 2010.

MONK GOODWIN LLP,

Per: ________________________________
J. Scott Kennedy, Counsel for the Intervener
The Evangelical Fellowship of Canada.