Frequently Asked Questions about the *Marriage Commissioner Reference*, 2010

1. What lead to this Reference?

On November 1, 2004, the Government of Saskatchewan sent letters to marriage commissioners advising them of the ramifications of a decision to be released the next day by the Saskatchewan Court of Queen's Bench, which if it legalized same-sex marriages, all commissioners would be required to solemnize those marriages or resign.

In 2005, Orville Nichols, a Christian marriage commissioner in Regina, was approached to solemnize a marriage. However, once he realized that it was for a same-sex marriage, he declined performing the marriage and referred the couple to another commissioner.

M.J., as later identified in court submissions, was the man who requested the services from Mr. Nichols. He filed a complaint at the Saskatchewan Human Rights Commission against Mr. Nichols in April 2005. Nichols was fined $2,500 for having violated the *Saskatchewan Human Rights Code*. Mr. Nichols brought his case before the Court of Queen's Bench, where his appeal was rejected. The matter is now waiting before the Saskatchewan Court of Appeal.

During this period, three marriage commissioners, repeatedly requested reasonable accommodation from the province for their religious beliefs, a protected ground under both the *Charter of Rights and Freedoms* and the *Saskatchewan Human Rights Code*. After having their requests refused, Orville Nichols, Bruce Goertzen and Larry Bjerland, commenced a legal action in November 2008 against the provincial government, Attorney General and the Director of the Marriage Unit on the grounds of a *Charter* breach.

In July 2009, the Justice Minister of Saskatchewan asked the Court of Appeal for an opinion on potential legislation which would permit marriage commissioners to decline performing marriages if contrary to their religious beliefs.

The government has proposed two potential legislative options; one permitting marriage commissioners appointed before November 5, 2004 to refuse to solemnize a marriage contrary to their religious beliefs and the second would allow any marriage commissioner the same right. The Court of Appeal is tasked with determining whether either or both meet the constitutional standard of the *Canadian Charter of Rights and Freedoms*.

The EFC supports only the proposed legislation, known as Schedule B, which would protect and ensure the religious and conscience freedoms of all marriage commissioners.

2. Do public sector employees have *Charter* rights? Such as the rights to freedom of religion and freedom of conscience?

Some have argued that the state's duty to accommodate only applies in private settings. They perceive the right to freedom of conscience and religion doesn't apply to an employee in a public role. That position, however, is inconsistent with the *Charter* and prior decisions of Canada's highest courts in regard to the issue of government employees' rights.

Human rights and employment law jurisprudence have well established that a Canadian, whether working in the private or public sector, may object to performing a task if it is contrary to her or his conscience or religious beliefs. To strip all Canadians who choose to serve the public in a government accredited role of their *Charter* rights is inconsistent with Canadian law.

As elaborated in our factum, 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 27 requires that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural

heritage of "Canadians." Marriage commissioners fall within the term "everyone", "individual" and "Canadians", whether or not they have chosen to serve Canadians by entering the public service.

It is the inclusion of individuals from a wide variety of cultures, beliefs and perspective in government positions that ensures and communicates that the state is truly committed to a diverse, multicultural society.

3. Isn't there a separation of Church and State in Canada? Aren't religious beliefs excluded from the public sphere?

No. That happens to be an American legal concept and not a Canadian principle.

Canadian society is 'pluralistic' and its 'public sphere', as confirmed by the Supreme Court of Canada, is a religiously inclusive one.

In fact, in the *Chamberlain v. Surrey School District* decision, the Supreme Court unanimously supported the inclusive nature of the public sphere. Canadian society has never held that our public sphere is a non-religious one. The law in Canada, from before Canada was a nation, has been particularly concerned with religious inclusiveness and has consistently held the right to freedom of religion to exist even before the *Charter* became part of our constitution.

In *Chamberlain*, the key component of the decision was written by Justice Gonthier (with Chief Justice McLachlin concurring on behalf of the other judges). Justice Gonthier wrote:

> … nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that '… Canada is founded upon principles that recognize the supremacy of God and the rule of law.' According to Saunders J. [of the British Columbia Supreme Court where the case was heard at trial], if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of modern pluralism.

The Supreme Court of Canada has consistently noted that the right to freedom of religion is broad and it includes the right to belief and the right to act on those beliefs. To argue that the state protects the right to believe, but not the right to act (or decline to act) on those beliefs would be pointless as the right would then be to think but not to act on one's thoughts. Only corrupt governments undertake to control or change their citizens' belief systems. If religious rights are to be "broad" and "expansive", they must be accompanied by the right to express in practice one's beliefs.

4. Is your interpretation of religious freedom in this context unconventional?

Not at all. As a matter of fact, representatives for the gay and lesbian community shared and stated the same beliefs as recently as 2005.

In 2005, in the consultations before the Senate Committee on Legal and Constitutional Affairs, Mr. Laurie Arron, Director of Advocacy for Egale Canada, made strong statements supporting the rights of marriage commissioners.

In referring to the Scott Brockie case, where a Christian printer was found to have a right to refuse to print material that infringed his conscience or religion, if the materials promoted action which was contrary to or in direct conflict with his religious beliefs, Mr. Arron said the following,

> [The Court] said that printing letterhead and business cards is a straightforward service. You are not giving of yourself to do that; you are just putting paper through a machine. They did say that when you do have to do something whereby you are giving more of yourself, there would be a basis for accommodation.
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> Obviously, I think for a marriage commissioner to preside over a same-sex wedding is much more of an imposition than just running letters through a copier. **I think the court clearly laid out the principle by which there would be reasonable accommodation for marriage commissioners. That case is a good one in saying that religious freedom is entitled to expansive protection**. (page 20:46)

This position was echoed by Alex Munter, National Coordinator for Egale Canada, in his appearance before the House of Commons Legislative Committee on Bill C-38. When asked how marriage services should be offered, Mr. Munter replied the following,

> When people show up at the counter to obtain marriage licences—as citizens and taxpayers, to avail themselves of a government service- **the issue is that it be provided. By whom or how doesn't really matter from this side of the counter; it's up to the provincial government**. Mr. Arron gave the example of how in Ontario the provincial government has dealt with that in how it manages its workforce to be able to deliver that service.
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> There is certainly a principle in human rights law in Canada around reasonable accommodation. **There's no reason to believe that it will not be possible to ensure, on the one hand, that there's access to the service and, on the other hand, to ensure that the employer – the municipality, the province, or whoever – ensures access is provided** by whatever mix of workforce that can accommodate that. (page 14-15)

The rights to freedom of religion and conscience and the principles of reasonable accommodation are widely understood and accepted.

5. Shouldn't everyone have a right to marriage in Canada?

Yes, individuals who are seeking to marry, who comply with the few legal requirements, have a legal right to marriage. There is no right to compel someone to perform the ceremony.

The duty to ensure access to marriage rests with government and not with each individual marriage commissioner. 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.

Lastly, there is an important distinction between the right to be married and the right to be married by a particular person. The first is an actual right and the latter is not.

6. Couldn't permitting some commissioners to recuse themselves potentially cause a slippery slope effect? Could this lead to a shortage of marriage commissioners willing to perform certain marriages?

It is unlikely for a number of reasons. First of all, when the Government of Saskatchewan announced that its commissioners would be required to solemnize same-sex marriages, fewer than 3% resigned. Also, in 2009, only 0.4% of marriages solemnized in that province were for same-sex marriages. As one lawyer recently calculated, a same-sex couple has less than a 3% likelihood of being referred to another commissioner. (However, if marriage commissioners are not accommodated, 100% of religious commissioners would be forced to resign from their positions).

Recent examples of accommodation include cases where nurses and physicians have refused to participate in abortion procedures for either religious or conscience reasons. The accommodation took place. The procedures continued.

Medical professionals advise their superiors of their inability to participate in the procedures, and other staff who are willing take their place. We are unaware of any accounts of this causing any type of slippery slope effect nor of a shortage of available professional staff.

The case law demonstrates that it is appropriate to permit government employees to decline or recuse themselves and allow other staff members to complete the task required.

Further, permitting refusal allows citizens of different perspectives and beliefs to co-exist in a multicultural society. Otherwise, one person's beliefs would be condemned and shut out of the public square, making society less plural and less diverse.

7. Have other provinces recognized the commissioners' rights to freedom of religion and conscience?

Yes. A majority of provincial and territorial jurisdictions in Canada have recognized and accommodated the religious or conscience beliefs of their commissioners either by practice or by legislation.

8. What if some of the judges or the government don't share or appreciate the commissioners' religious beliefs?

That's irrelevant. The Supreme Court of Canada has stated on multiple occasions that 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. In 1986, the Supreme Court clearly stated that "a court is in no position to question the validity of a religious belief." To do otherwise would be coercive.

Freedom of religion is robustly protected in the *Charter of Rights and Freedoms*. As the Supreme Court of Canada has said, it is a right that is broad, expansive and jealously guarded and is founded in "respect for the inherent dignity and the inviolable rights of the human person."

Consistent with these founding principles, Canadians are protected from being forced to act in a manner contrary to their religious beliefs.

All that the Court requires in order to complete a religious freedom analysis is to determine that the individual or individuals claiming protection sincerely hold their beliefs. Sincerity is the only requirement and the court cannot judge or pronounce upon those beliefs.