Court File No. 37209

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

and

LAW SOCIETY OF UPPER CANADA

Respondent

and

THE ATTORNEY GENERAL OF ONTARIO, ASSOCIATION FOR REFORMED POLITICAL ACTION, THE ADVOCATES' SOCIETY, THE CANADIAN BAR ASSOCIATION, THE CHRISTIAN LEGAL FELLOWSHIP, THE INTERNATIONAL COALITION OF PROFESSORS OF LAW, THE NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES, LAWYERS' RIGHT WATCH CANADA, THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), THE CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CANADIAN COUNCIL OF CHRISTIAN CHARITIES, THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, THE LAW STUDENTS' SOCIETY OF ONTARIO, THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA, THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN HIGHER EDUCATION CANADA, THE BRITISH COLUMBIA HUMANIST ASSOCIATION, THE CANADIAN SECULAR ALLIANCE, EGALE CANADA HUMAN RIGHTS TRUST, THE FAITH, FEALTY & CREED SOCIETY, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, and THE FAITH AND FREEDOM ALLIANCE, THE WORLD SIKH ORGANIZATION OF CANADA, LESBIANS GAYS BISEXUALS AND TRANS PEOPLE OF THE UNIVERSITY OF TORONTO (LGBTOUT), THE UNITED CHUCH OF CANADA, and START PROUD and OUTLAWS

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PARTS I AND II – OVERVIEW AND POSITION

1. The public interest favours a legal profession and a legal system that is diverse, inclusive and reflective of Canadian society as a whole. The legal profession, like other institutions in contemporary Canadian society, has made hard-won progress in dismantling barriers to the full participation of individuals based on personal characteristics such as religion and sexual orientation. It is not in the public interest that preferential access to the legal profession should be given to those who can pass a test of religious or sexual conformity.

2. The Attorney General of Ontario is by statute the guardian of the public interest in all matters having to do with the practice of law in Ontario.[1] In the Attorney General of Ontario's submission, the Law Society of Upper Canada ["LSUC"] reasonably discharged its public interest mandate in reaching its decision with respect to the accreditation of Trinity Western University ["TWU"]. Deference should be shown to the LSUC's assessment of the public interest in determining whether to grant TWU's request for accreditation.

3. Denying TWU the public benefit of LSUC accreditation does not prevent TWU from operating a law school in accordance with its religious values. Even if the Appellants can successfully show that their sincerely held religious beliefs have been limited by the LSUC's decision, the denial of accreditation therefore does not rise to the level of a s. 2(a) breach.

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[1] *Law Society Act*, RSO 1990, c. L.8, s. 13(1): "The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society."

PART III – ARGUMENT

1) DECISIONS ABOUT ENTRY INTO THE PROFESSION LIE AT THE CORE OF SELF-REGULATION AND DEFERENCE SHOULD BE SHOWN TO THE LAW SOCIETY

4. The LSUC's decision should be reviewed with deference by this Honourable Court. The Legislature entrusted the LSUC, and not the courts, with the power to establish qualifications and requirements for entry into the legal profession, having regard to the public interest. As this Court held in *Pearlman*, the "Legislature has spoken, and spoken clearly. The *Law Society Act* manifestly intends to leave the governance of the legal profession to lawyers and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected."[2]

5. Decisions concerning routes of entry into the legal profession, including the decision at issue in this appeal, fall squarely within the mandate and powers of the LSUC. The power of self-regulation entails the power to make decisions about admission to the profession, no less than the power to regulate the conduct of those admitted.[3] As the self-governing body of the legal profession, the LSUC has unique competence to decide whether to approve a particular route of entry into the profession: "the responsible and experienced members of a profession or occupation on whom the power of self-government is conferred should be in the best

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[2] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 888

[3] *Demaria v Law Society of Saskatchewan*, 2013 SKQB 178 at paras. 40-45, aff'd 2015 SKCA 106, leave to appeal dismissed 14 April 2016. See also Court of Appeal at para. 67, Appeal Book, Vol. III, Tab 6, p. 459: "I do not see, and the appellants do not assert, any qualitative difference between decisions of law society discipline tribunals (*Ryan* and *Doré*) and a decision whether to accredit a law school. Both categories of decision are in the wheelhouse of the expertise of the law society."

position to set the standards to be met and the qualifications of anyone who aspires to enter the profession or occupation."[4]

6. The Court should not take a narrow or technical approach to the LSUC's powers to determine the accreditation of law schools. "The legislature has given the Law Society a broad public interest mandate and broad regulatory powers to accomplish its mandate. This mandate must be interpreted using a broad and purposive approach."[5] It would be inconsistent with this broad and purposive approach to find that the decision to accredit a law school may only be concerned with ensuring minimum curricular requirements. The accreditation of law schools is a means towards the end of admitting members to the legal profession. A law school's admissions policies determine the pool of candidates for future admission to the bar and are therefore the legitimate subject of consideration by the LSUC.

7. Nor should the LSUC's duty to protect the public interest be interpreted restrictively to exclude consideration of whether accreditation would result in unequal access to the legal profession. As this Court noted in *Green*, the "meaning of "public interest" in the context of the Act is for the Law Society to determine."[6] The public interest requires the LSUC to consider whether its accreditation decisions would have the effect of perpetuating arbitrary and potentially discriminatory barriers to entry to the profession.

8. In setting out the standard for reviewing discretionary administrative decisions that allegedly impact *Charter* rights, this Court has recognized the need to give great deference to the considered decisions of administrative decision-makers, particularly when those decision-

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[4] Ontario, *Royal Commission Inquiry into Civil Rights* (Report No. 1, Volume 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) at 1172
[5] *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 28
[6] *Green* at para. 29

makers have been granted by the Legislature a broad discretion to make decisions in the public interest. Reviewing courts should recognize the expertise of decision-makers and engage in "an institutional dialogue about the appropriate use and control of discretion, rather than the old command-and-control relationship."[7] Accordingly, this Court has preferred a deferential reasonableness standard of review for individualized discretionary administrative decisions, rather than the correctness standard, which applies under the *Oakes* test to the review of legislation and other rules of general application.[8] Given administrative decision-makers' specialized expertise, deference must be shown to how they apply the *Charter* to the facts of a specific case "so long as the decision, in the words of *Dunsmuir*, 'falls within a range of possible, acceptable outcomes.'"[9]

2) Denial of Accreditation Does Not Engage Section 2(a) of the Charter

A. The Appellants Must Prove They Sincerely Believe They Must Compel Others to Comply with the Community Covenant

9. Before an administrative decision-maker need even conduct a *Doré* / *Loyola* balancing analysis, however, the claimant must first demonstrate that his or her *Charter* rights have been engaged.[10] Establishing s. 2(a) of the *Charter* has been engaged requires showing (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her

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[7] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 35, [2012] 1 SCR 395
[8] *Doré* at paras. 43-54; *Loyola High School v. Québec (A.G.)*, 2015 SCC 12 at para. 42, [2015] 1 SCR 613
[9] *Doré* at paras. 52, 54, and 56-57; *Loyola* at para. 41
[10] *Doré* at paras. 41-42; *Loyola* at para. 39

religious beliefs in a manner that is more than trivial or insubstantial.[11] In order to demonstrate an infringement, a claimant must objectively demonstrate their sincerely held beliefs have been limited by state action, not just say that there has been an infringement.[12]

10. It is therefore not sufficient for the Appellants to prove that they have a sincere belief that "sexual intimacy is reserved for marriage between one man and one woman."[13] Nor is it sufficient for the Appellants to prove that voluntarily complying with the Community Covenant enhances the spiritual life of those who choose to do so. The ability of TWU to teach those beliefs and of members of the TWU community to hold them is not at issue.

11. On the contrary, the LSUC accepts that many members of the TWU community sincerely believe that their religion requires them to live their lives in accordance with the principles set out in TWU's Community Covenant.[14] The LSUC has never taken issue with the fact that many TWU students voluntarily wish to sign the Covenant and structure their lives in accordance with the religious principles it embodies.

12. Rather, the issue in this case is whether TWU can impose the Community Covenant on students who do not share some or all of the religious beliefs it embodies. The concern the LSUC expressed in denying accreditation to TWU is with the mandatory nature of the Community Covenant and its potential adverse impact on students who might be discouraged from applying to or attending TWU's proposed law school because of it.[15] Failure to comply

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[11] *Alberta v. Hutterian Brethren of Wilson County*, 2009 SCC 37 at para. 32, [2009] 2 SCR 567; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 56 and 59, [2004] 2 SCR 551

[12] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at paras. 23-24, [2012] 1 SCR 235

[13] Community Covenant Agreement, Appeal Book, Vol. IV, Tab 10C, pp. 536-38

[14] See LSUC Factum, para. 80. Given that Mr. Volkenant and other members of the TWU community clearly have religious beliefs to which s. 2(a) can apply, there is no need to determine whether TWU, as a corporation, also has such beliefs. See *Loyola* at para. 34

[15] See LSUC Factum, para. 88

with the Covenant, including its requirement that sexual activity be reserved for opposite-sex marriage, can lead the University to "discipline, dismiss or refuse a student re-admission to the University." "Sexual misconduct" is listed in TWU's student handbook as behaviour for which a student can be suspended, even on a first offence.[16]

13. To meet the first stage of the *Amselem* test, the Appellants must show that they have a sincerely held religious belief that all TWU students, including LGBTQ and non-married students, should be ***compelled***, at the risk of potential suspension or expulsion, to comply with a religious code of permissible sexual conduct they may not personally share in order to improve the ability of other members of the TWU community to practice their own religious beliefs. If the Appellants cannot do so, there is no need to proceed to the second stage and determine whether the LSUC's decision not to accredit TWU burdens those religious beliefs in more than a trivial and insubstantial manner.

B. In Any Event, Denying TWU Accreditation Does Not Impose a Burden on the Appellants' Religious Beliefs that is More than Trivial and Insubstantial

14. This Court has repeatedly held that freedom of religion "does not require the legislature to refrain from imposing any burdens on the practice of religion."[17] Evidence of a state−imposed cost or burden is not sufficient; there must be evidence that such a burden is "capable of interfering with religious belief or practice."[18] The effect of the LSUC's decision not to accredit TWU must be considered in that light.

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[16] TWU Student Handbook, Appeal Book, Vol. IV, Tab 10M, pp. 595-96
[17] *S.L.* at para. 25; *Amselem* at para. 58; *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 759; *R. v. Jones*, [1986] 2 SCR 284 at 314 (per Wilson J. dissenting)
[18] *Hutterian Brethren* at paras. 32-34; *Edwards Books* at 759

15. As the Ontario courts noted,[19] the LSUC cannot compel TWU to do or not to do anything. The issue in this appeal is not whether TWU is free to establish a private law school in a manner consistent with its religious mission; clearly it is. For that reason, this case is different from *Loyola*, where this Court found that a compulsory statute requiring private religious schools to teach their own religion from a neutral perspective infringed the right to freedom of religion.[20]

16. The issue in this case is not whether TWU should be free to establish a law school in accordance with its religious precepts, but whether the *Charter* compels the LSUC to grant its accreditation to that school. Section 2(a) should not preclude the LSUC, which is bound by both the *Charter* and the Ontario *Human Rights Code*, from determining that a university which mandates that its students comply with religious moral norms or potentially face suspension or expulsion is unsuitable to receive a discretionary grant of the public benefit of accreditation.[21] That is particularly the case where, as set out in the LSUC's factum, the religious norms TWU seeks to impose have an adverse impact on minority groups on the basis of gender, marital status, and sexual orientation.

17. As this Court explained in *Loyola*, the state always has a legitimate interest in promoting and protecting Canada's shared values of equality, human rights and democracy. Religious freedom must be understood in the context of a secular, multicultural and democratic society with a strong interest in promoting dignity and diversity, promoting equality, and ensuring the

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[19] Divisional Court at paras. 115 and 120-121, Appeal Book, Vol. III, Tab 4, pp. 427-29; Court of Appeal at para. 97, Appeal Book, Vol. III, Tab 6, p. 470

[20] *Loyola* at paras. 63-64

[21] Especially given this Court's holding that the right to hold and manifest religious belief does not extend to preventing others from holding and manifesting their own beliefs and opinions. *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 346; *Amselem* at paras. 41 and 61-62; *Bruker v. Marcovitz*, 2007 SCC 54 at paras. 71-75, [2007] 3 SCR 607

vitality of a common belief in human rights. In exercising its statutory mandate in the public interest, the LSUC cannot be indifferent to these core values which provide the foundation of our political system.[22]

18. Lack of accreditation in Ontario may make it more difficult for TWU to attract students, but it will not prevent TWU from operating a religious law school or from requiring its students to sign the Community Covenant. Denying accreditation does not prevent TWU from passing on its evangelical Christian values to its students as it sees fit.

19. It is not even clear on the record that TWU's graduates will be unable to gain admission to the practice of law in Ontario even if the LSUC's decision not to accredit TWU is upheld. As the LSUC points out in paragraph 21(b) of its Factum, TWU has never asked the LSUC to provide for a process of individual assessment of its graduates in the event the proposed law school was not accredited. There is therefore no evidence on the record as to how the LSUC would respond to an application from an individual TWU applicant.

20. Denying TWU the public benefit of LSUC accreditation therefore does not prevent it from operating a law school in accordance with its religious values. The denial of accreditation is at most a trivial and insubstantial burden on the Appellants' religious beliefs and their s. 2(a) rights have not been engaged.

3) Denial of Accreditation Does Not Engage Any of the Appellants' Other *Charter* Rights

21. A similar analysis applies to the other *Charter* rights TWU alleges the LSUC's decision infringes. Nothing in the LSUC's decision precludes TWU from teaching, sharing, and

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[22] *Loyola* at paras. 46-47; *S.L.* at paras. 29-41

communicating its religious beliefs as it sees fit and the LSUC's decision therefore does not infringe s. 2(b) of the *Charter*.

22. Similarly, members of the TWU community wishing to associate together at TWU remain free to do so whether or not the LSUC accredits its proposed law school. They simply are not free to compel others to comply with their religious beliefs if they wish to obtain the public benefit of accreditation in Ontario.

23. Nor does denying TWU accreditation in Ontario infringe the s. 15(1) rights of members of the TWU community.[23] As in *Hutterian Brethren*, s. 15(1) does not add anything to the Appellants' s. 2(a) claim:

> Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2(a). There is no breach of s. 15(1).[24]

4) THE PUBLIC INTEREST FAVOURS INCLUSION, NOT BARRIERS BASED ON RELIGION, GENDER, OR SEXUAL ORIENTATION

24. Even if the *Charter* rights of TWU or members of its community were engaged by the LSUC's decision not to accredit TWU's proposed law school, that decision was a proportionate and reasonable balancing of those rights against the important public interest in ensuring admission to the profession of law in Ontario is open to all, without any regard to arbitrary and irrelevant criteria such as religion, gender, or sexual orientation.

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[23] Section 15 only applies to "individuals"; TWU itself therefore does not have s. 15 rights.
[24] *Hutterian Brethren* at paras. 105-08

25. It is in the public interest that membership in the legal profession in Ontario be open to all individuals on the basis of their own merits and capacities, without impediments based on irrelevant personal characteristics such as sexual orientation, gender, or religion. The LSUC's decision supports this important public interest by ensuring that the opportunity to become a lawyer is based on merit, and not on a candidate's willingness or ability to adhere to a particular educational institution's religious code of conduct.

26. The people of Ontario rely on lawyers to uphold their legal rights and interests, to advise them and advocate on their behalf, and to maintain and advance the cause of justice and the rule of law: "The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system."[25] The accessibility of the legal profession – both in terms of the accessibility of lawyers to clients and the accessibility of membership in the Bar to candidates of diverse backgrounds – is an important component of access to justice.

27. Ontario is one of the most diverse places in the world and one of the most multicultural provinces in Canada. The public legitimately expects that the legal profession and the judiciary which is drawn from it will reflect and be enriched by that diversity. Moreover, Ontarians have a right to expect that they or their children can seek to become lawyers without facing impediments because of their religion, gender, or sexual orientation. From the legislative abolition in 1833 of the requirement that persons called to the Bar take a religious oath,[26] to the admission in 1892 (on motion by Ontario's Attorney-General) of Clara Brett

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[25] *R. v. McClure*, 2001 SCC 14 at para. 2, [2001]1 SCR 445

[26] *An Act to dispense with the necessity of taking certain Oaths and making certain Declarations in the cases therein mentioned; and also to render it unnecessary to receive the Sacrament of the Lord's Supper as a qualification for Offices, or for other temporal purposes*, SUC 1833, c. 13

Martin as Canada's first female lawyer,[27] to the enactment of the *Ontario Human Rights Code, 1961-62*,[28] and the addition of sexual orientation and gender identity and gender expression to the *Code* as prohibited grounds of discrimination in 1986 and 2012 respectively,[29] public policy in Ontario is and has been that access to the legal profession should be open to all without discrimination.

28. Preferential access to the legal profession for those individuals who are prepared to commit to the terms of TWU's Community Covenant is inimical to this important public interest. Entry to Canadian law schools is competitive and there are many academically qualified applicants for relatively few law school seats. The effect of accrediting TWU would be that persons who are willing to sign the Community Covenant would be provided with greater access to the legal profession in Ontario than persons who will not sign it because of their gender, sexual orientation, or religious beliefs.

29. The issue in this case is therefore different from private religious education at the elementary or secondary school level,[30] where the ubiquitous availability of a secular, public alternative means that no student is denied an educational opportunity for reasons of religion or sexual orientation. Given that space in accredited law schools is limited, the establishment of an accredited law school that some candidates cannot access because of their sexual

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[27] Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991) at 307-08

[28] *Ontario Human Rights Code, 1961-62*, SO 1961-62, c. 93

[29] *Equality Rights Statute Law Amendment Act, 1986*, SO 1986, c. 64, s. 18; *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012*, SO 2012, c. 7

[30] Such as that at issue in *Loyola*.

orientation or religion means a diminution of the equal access to law schools that LGBTQ and non-evangelical students currently enjoy.[31]

30. This differential access on the basis of sexual orientation and religion should not be minimized, as the appellant seeks to do, by contending that "the impact on LGBTQ applicants would be 'insignificant in real terms,' as TWU creates only 60 out of about 2500 law school spaces in Canada per year."[32] It is not a matter of counting whether 60 places among accredited law schools reserved for persons who will agree to the Community Covenant is large in numerical terms, any more than it would be if it were 60 courtrooms or 60 judicial appointments that were reserved exclusively for persons who could agree to the Community Covenant. As the Divisional Court put it, "discrimination is not evaluated on a numbers basis."[33] Equality rights are guaranteed to every individual, not where numbers warrant.

31. Nor is it correct to say that "the distinction made by LSUC is between students expressing their religious beliefs by aligning themselves with the evangelical values and practices embodied in the Covenant, and those who do not."[34] While some LGBTQ (and non-Christian) students would face a religious barrier to attending TWU, no student who is willing to agree to the Community Covenant will face a religious barrier in attending one of the accredited law schools. Students who wish to adhere to the commitments outlined in the TWU Community Covenant are free to do so at any of the existing accredited law schools.

32. TWU is not, however, free to compel every member of its law school to conform to a particular set of religious beliefs if it wishes to receive the public benefit of LSUC

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[31] Robert E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34 NJCL 173 at 193
[32] Appellants' Factum, para. 177
[33] Divisional Court at para. 134, Appeal Book, Vol. III, Tab 4, p. 432
[34] Appellants' Factum, para. 98

accreditation. Law graduates will join a profession (and indeed a society) characterized by a "diversity of belief and non-belief"[35] and a range of religious and sexual identities and practices.[36] Law school is not too early to begin to experience these realities. As this court has repeatedly emphasized, teaching mutual respect and toleration of such differences enhances rather than detracts from religious freedom.[37]

33. For these reasons, and the reasons set out in the LSUC's Factum, the Attorney General of Ontario submits that the LSUC's decision not to accredit TWU was in accordance with the public interest that the Ontario Legislature has expressly mandated the LSUC to protect in carrying out all of its functions, duties, and powers.[38] The LSUC took into account the religious freedom concerns raised by TWU, balanced them against the public interest in ensuring admission to the Bar of Ontario is determined by candidates' merit, not their religion, gender, or sexual orientation, and came to a reasonable and proportionate decision.

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[35] *Big M* at 351
[36] *S.L.* at paras. 39-40
[37] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at paras. 65-66, [2002] 4 SCR 710; *S.L.* at paras. 39-40; *Loyola* at paras. 71-80
[38] *Law Society Act*, s. 4.2

PARTS IV AND V – COSTS AND REQUEST FOR ORAL ARGUMENT

34. The Attorney General of Ontario does not seek costs. In accordance with the Order of Justice Wagner dated July 28, 2017, he will present oral argument not exceeding five (5) minutes at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10TH DAY OF AUGUST, 2017

S. Zachary Green / Josh Hunter

Of Counsel for the Intervener,
The Attorney General of Ontario

PART VI – TABLE OF AUTHORITIES

Cases	**Paragraph(s) Referred to in Factum**
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