SCC File No. 37209 & 37318

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

FACTUM OF THE INTERVENER, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES' ASSOCIATIONS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

DOUCETTE SANTORO FURGIUELE
1100 – 20 Dundas Street West
Toronto, Ontario M5G 2G8

Daniel C. Santoro
Tel.: (416) 922-7272
Fax: (416) 342-1766

Counsel for the Intervener, National Coalition of Catholic School Trustees' Associations

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Thomas Slade
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, National Coalition of Catholic School Trustees' Associations

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BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

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

INTERVENERS

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

LAWYERS' RIGHTS WATCH CANADA, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES' ASSOCIATIONS, INTERNATIONAL COALITION OF PROFESSORS OF LAW, CHRISTIAN LEGAL FELLOWSHIP, CANADIAN BAR ASSOCIATION, THE ADVOCATES' SOCIETY, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, LAW STUDENTS' SOCIETY OF ONTARIO, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, BC LGBTQ COALITION, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, BRITISH COLUMBIA HUMANIST ASSOCIATION, EGALE CANADA HUMAN RIGHTS TRUST, FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE, CANADIAN SECULAR ALLIANCE, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, WORLD SIKH ORGANIZATION OF CANADA

INTERVENERS

BENNETT JONES LLP
Suite 3400, P.O. Box 130
One First Canadian Place
Toronto, ON
M5X 1A4

Robert W. Staley
Ranjan K. Agarwal
Jessica M. Starck
Tel: (416) 777-4857
Fax: (416) 863-1716
E-mail: staleyr@bennettjones.ca

BENNETT JONES LLP
World Exchange Plaza
1900-45 O'Connor Street
Ottawa, ON
K1P 1A4

Mark Jewett, Q.C.
Tel: (613) 683-2328
Fax: (613) 683-2323
E-mail: jewettm@bennettjones.com

Ottawa Agent for counsel for Trinity Western University, Brayden Volkenant (SCC Files 37209 & 37318)

KUHN & COMPANY
320-900 Howe Street
Vancouver, British Columbia
V6Z 2M4

Kevin L. Boonstra
Jonathan Maryniuk
Tel: (604) 684-8668
Fax: (604) 684-2887
E-mail: kboonstra@kuhnco.net

Counsel for Trinity Western University, Brayden Volkenant (SCC Files 37209 & 37318)

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Suite 3400
Toronto, ON, Canada
M5H 4E3

Guy Pratte
Tel: (416) 350-2638
Fax: (416) 361-7307

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON
K1P 1J9

Nadia Effendi
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Counsel for The Law Society of Upper Canada (SCC File 37209)

Ottawa Agent for Counsel for The Law Society of Upper Canada (SCC File 37209)

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 4th Floor
Toronto, ON
M7A 2S9

S. Zachary Green
Josh Hunte
Tel: (416) 326-8517
Fax: (416) 326-4015
E-mail: zachary.green@ontario.ca
Counsel for The Attorney General of Ontario (SCC File 37209)

BURKE-ROBERTSON
441 MacLaren Street Suite 200
Ottawa, ON
K2P 2H3

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Ottawa Agent for Counsel for The Attorney General of Ontario (SCC File 37209)

GALL, LEGGE, GRANT & MUNROE LLP
1000-1199 West Hastings Street
Vancouver, British Columbia
V6E 3T5

Peter A. Gall, Q.C.
Donald R. Munroe, Q.C.
Benjamin J. Oliphant
Tel: (604) 891-1152
Fax: (604) 669-5101
E-mail: pgall@glgmlaw.com

Counsel for Law Society of British Columbia (SCC Files 37209 & 37318)

POWER LAW
130 Albert Street Suite 1103
Ottawa, ON
K1P 5G4

Mark C. Power
Tel: (613) 702-5561
Fax: (613) 702-5561
E-mail: mpower@juristespower.ca

Ottawa Agent for Counsel for Law Society of British Columbia (SCC Files 37209 & 37318)

CANADIAN COUNCIL OF CHRISTIAN CHARITIES
1-43 Howard Avenue
Elmira, ON
N3B 2C9

Barry W. Bussey
Philip A.S. Milley
Tel: (519) 669-5137
Fax: (519) 669-3291
E-mail: barry.bussey@cccc.org

Counsel for the Intervener Canadian Council of Christian Charities (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON
K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
E-mail:emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Council of Christian Charities (SCC Files 37209 & 37318)

ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA
1705-130 Albert St.
Ottawa, ON
K1P 5G4

André Schutten
Tel: (613) 297-5172
Fax: (613) 249-3238
E-mail: Andre@ARPACanada.ca

Counsel for the Intervener, ARPA (SCC Files 37209 & 37318)

BARNES, SAMMON LLP
400-200 Elgin Street
Ottawa, ON
K2P 1L5

William J. Sammon
Tel: (613) 594-8000
Fax: (613) 235-7578
Email:

Counsel for the Intervener, Canadian Conference of Catholic Bishops (SCC Files 37209 & 37318)

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
2705 Queensview Drive
Ottawa, ON
K2B 8K2

Peter Barnacle
Immanuel Lanzaderas
Tel: (613) 820-2270 Ext: 192
Fax: (613) 820-7244
E-mail: barnacle@caut.ca

Counsel for the Intervener, Canadian Association of University of Teachers (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON
K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, ARPA (SCC Files 37209 & 37318)

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON
K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Intervener, Canadian Association of University of Teachers (SCC Files 37209 & 37318)

PALIARE, ROLAND, ROSENBERG, ROTHSTEIN, LLP
155 Wellington Stree West 35th Floor
Toronto, ON
M5V 3H1

Chris G. Paliare
Joanna Radbord
Monique Pongracic-Speier
Tel: (416) 646-4318
Fax: (416) 646-4301
E-mail: chris.paliare@paliareroland.com

Counsel for the Intervener, Advocates Society (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON
K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Advocates Society (SCC Files 37209 & 37318)

URSEL PHILLIPS FELLOWS HOPKINSON LLP
1200 - 555 Richmond Street West
Toronto, ON
M5V 3B1

Susan Ursel
David Grossman
Angela Westmacott, Q.C.
Tel: (416) 969-3515
Fax: (416) 968-0325
E-mail: sursel@upfhlaw.ca

Counsel for the Intervener, Canadian Bar Association (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON
K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Bar Association (SCC Files 37209 & 37318)

CHRISTIAN LEGAL FELLOWSHIP
285 King Street, Suite 202
London, Ontario
N6B 3M6

Derek B.M. Ross
Deina Warren
Tel: (519) 601-4099
Fax: (519) 601-4098
E-mail: execdir@christianlegalfellowship.org

Counsel for the Intervener, Christian Legal Fellowship (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON
K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Christian Legal Fellowship (SCC Files 37209 & 37318)

NORTON ROSE FULBRIGHT CANADA LLP
200 Bay Street
Royal Bank Plaza, South Tower, Suite 3800
Toronto, ON
M5J 2Z4

Rahool P. Agarwal
Kristine Spence
Tel: (416) 216-3943
Fax: (416) 216-3930
E-mail: rahool.agarwal@nortonrose.com

Counsel for the Intervener, Law Students Society of Ontario (SCC Files 37209 & 37318)

NORTON ROSE FULBRIGHT CANADA LLP
1500-45 O'Connor Street
Ottawa, ON
K1P 1A4

Matthew J. Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Intervener, Law Students Society of Ontario (SCC Files 37209 & 37318)

MILLER THOMSON LLP
3000, 700- 9th Avenue SW
Calgary, Alberta
T2P 3V4

Gerald D. Chipeur, Q.C.
Jonathan Martin
Grace MacKintosh
Tel: (403) 298-2425
Fax: (403) 262-0007
E-mail: gchipeur@millerthomson.com

Counsel for the Intervener, Seventh Day Adventist Church in Canada (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON
K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca23

Ottawa Agent for Counsel for the Intervener, Seventh Day Adventist Church in Canada (SCC Files 37209 & 37318)

JFK LAW CORPORATION
640-1122 Mainland Street
Vancouver, British Columbia
V6B 5L1

Karey Brooks
Robert Freedman
Elin Sigurdson
Tel: (604) 687-0549
Fax: (604) 687-2696
E-mail: kbrooks@jfklaw.ca

Counsel for the Intervener, BC LGBTQ Coalition (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON
K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, BC LGBTQ Coalition (SCC Files 37209 & 37318)

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street
Suite 400
Ottawa, Ontario
K1N 7E4

Albertos Polizogopoulos
D. Geoffrey Cowper, Q.C.
Kristin Debs
Geoffrey Trotter
Tel: (613) 241-2701
Fax: (613) 241-2599
E-mail: albertos@vdg.ca

Counsel for the Intervener, Evangelical Fellowship of Canada/Christian Higher Education Canada (joint) (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Counsel for the Intervener, International Coalition of Professors of Law (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON
K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, International Coalition of Professors of Law (SCC Files 37209 & 37318)

HAKEMI & RIDGEDALE LLP
1500-888 Dunsmuir Street
Vancouver, British Columbia
V6C 3K4

Wesley J. McMillan
Tel: (604) 259-2269
Fax: (604) 648-9170
E-mail: wmcmillan@hakemiridgedale.com

Counsel for the Intervener, British Columbia Humanist Association (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
2600-160 Elgin Street
Ottawa, ON
K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, British Columbia Humanist Association (SCC Files 37209 & 37318)

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1100
Toronto, Ontario
M5G 2G8

Steven Barrett
Adriel Weaver
Tel: (416) 979-6422
Fax: (416) 591-7333

Counsel for the Intervener, Egale Canada Human Rights Trust (SCC Files 37209 & 37318)

BENEFIC LAW CORPORATION
1250 - 1500 West Georgia Street
P.O. Box 62
Vancouver, British Columbia
V6G 2Z6

Blake Bromley
Tel: (604) 683-7006
Fax: (604) 683-5676
E-mail: blake@beneficgroup.com

Counsel for the Intervener, Faith, Fealty & Creed Society (SCC Files 37209 & 37318)

FOY ALLISON LAW GROUP
210-2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Tel: (604) 922-9282
Fax: (604) 922-9283
E-mail: gwendoline.allison@foyallison.com

Counsel for the Intervener, Roman Catholic Archdiocese of Vancouver and Catholic Civil Rights League/Faith and Freedom Alliance (jointly) (SCC Files 37209 & 37318)

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, Ontario
K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Intervener, Egale Canada Human Rights Trust (SCC Files 37209 & 37318)

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON
K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Intervener, Faith, Fealty & Creed Society (SCC Files 37209 & 3731)

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street
Suite 400
Ottawa, Ontario
K1N 7E4

Albertos Polizogopoulos
Tel: (613) 241-2701
Fax: (613) 241-2599
E-mail: albertos@vdg.ca

Ottawa Agent for Counsel for the Intervener, Roman Catholic Archdiocese of Vancouver and Catholic Civil Rights League/Faith and Freedom Alliance (jointly) (SCC Files 37209 & 37318)

JFK LAW CORPORATION
340-1122 Mainland Street
Vancouver, British Columbia
V6B 5L1

Tim Dickson
Tel: (604) 687-0549
Fax: (607) 687-2696
E-mail: tdickson@jfklaw.ca

Counsel for the Canadian Secular Alliance (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
2600- 160 Elgin Street
Ottawa, ON
K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Canadian Secular Alliance (SCC Files 37209 & 37318)

WINTERINGHAM MACKAY
620 - 375 Water Street
Vancouver, British Columbia
V6B 5C6

Janet Winteringham, Q.C.
Jessica Lithwick
Robyn Trask
Tel: (604) 659-6060
Fax: (604) 687-2945
E-mail: jwinteringham@wmlaw.ca

Counsel for West Coast Women's Legal Education and Action Fund (SCC Files 37209 & 37318)

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON
K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for Counsel for West Coast Women's Legal Education and Action Fund (SCC Files 37209 & 37318)

NANDA & COMPANY
3400 Manulife Place
10180- 101 Street N.W.
Edmonton, Alberta
T5J 4K1

Avnish Nanda
Balpreet Singh Boparai
Tel: (780) 801-5324
Fax: (587) 318-1391
E-mail: avnish@nandalaw.ca

Counsel for the Intervener, World Sikh Organization of Canada (SCC Files 37209 & 37318)

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON
K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, World Sikh Organization of Canada (SCC Files 37209 & 37318)

GREY, CASGRAIN
1155 René-Lévesque Ouest
Suite 1715
Montréal, Quebec
H3B 2K8

Julius H. Grey
Tel: (514) 288-6180 Ext: 229
Fax: (514) 288-8908
E-mail: jhgrey@greycasgrain.net

Counsel for the Intervener, Lawyers' Rights Watch Canada (SCC Files 37209 & 37318)

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON
K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 563-9869
E-mail: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Lawyers' Rights Watch Canada (SCC Files 37209 & 37318)

PARADIGM LAW GROUP LLP
80 Richmond Street West
Suite 1401
Toronto, Ontario
M5H 2A4

Angela Chaisson
Marcus McCann
Tel: (416) 868-1694
Fax: (855) 351-9215
E-mail: ac@plg-llp.ca

Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto (SCC File 37209)

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, Ontario
K1P 6L5

Yael Wexler
Tel: (613) 696-6860
Fax: (613) 230-6423
E-mail: ywexler@fasken.com

Ottawa Agent for Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto (SCC File 37209)

DEWART GLEASON LLP
102 - 366 Adelaide Street West
Toronto, Ontario
M5V 1R9

Sean Dewart
Tim Gleason
Tel: (416) 971-8000
Fax: (416) 971-8001
E-mail: sdewart@dgllp.ca

Counsel for the Intervener, United Church of Canada (SCC File 37209)

SUPREME LAW GROUP
900-275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: (613)691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the Intervener, United Church of Canada (SCC File 37209)

GOLDBLATT PARTNERS LLP
Box 180
1039-20 Dundas Street West
Toronto, Ontario
M5G 2G8

Marlys A. Edwardh
Vanessa Payne
Tel: (416) 979-4380
Fax: (416) 979-4430
E-mail: medwardh@goldblattpartners.com

Counsel for the Interveners, Start Proud/OUTlaws (jointly) (SCC File 37209)

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, Ontario
K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
E-mail: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Interveners, Start Proud/OUTlaws (jointly) (SCC File 37209)

JOHN NORRIS
BREESE DAVIES
100 - 116 Simcoe St.
Toronto, Ontario
M5H 4E2

Tel: (416) 596-2960
Fax: (416) 596-2598
E-mail: john.norris@simcoechambers.com

Counsel for the Criminal Lawyers' Association (Ontario) (SCC File 37209)

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario
K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Criminal Lawyers' Association (Ontario) (SCC File 37209)

STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Alan L.W. D'Silva
Alexandra Urbanski
Tel: (416) 869-5204
Fax: (416) 947-0866
E-mail: adsilva@stikeman.com

Counsel for Canadian Civil Liberties Association (SCC File 37209)

STIKEMAN ELLIOTT LLP
1600 - 50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Nicholas Peter McHaffie
Tel: (613) 566-0546
Fax: (613) 230-8877
E-mail: nmchaffie@stikeman.com

Ottawa Agent for Counsel for Canadian Civil Liberties Association (SCC File 37209)

TABLE OF CONTENTS

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PART I – OVERVIEW & STATEMENT OF FACTS

Who the National Coalition is

1. The National Coalition of Catholic School Trustees' Associations (the "Coalition") is interested in the present appeals to the extent they could impact education delivered from a religious perspective in Canada.

2. The Coalition is a comprehensive alliance of representative associations from the provinces and territories, where separate schools have constitutional status, as well as a national association:

   a. *Alberta Catholic School Trustees' Association* ("ACSTA") (membership includes Yellowknife Catholic Schools and the Catholic Education Association of Yukon);
   b. *Ontario Catholic School Trustees' Association* ("OCSTA");
   c. *Association franco-ontarienne des conseils scolaires catholiques* ("AFOCSC");
   d. *Saskatchewan Catholic School Boards Association* ("SCSBA"); and
   e. *Canadian Catholic School Trustees Association* ("CCSTA").

3. In total, the Coalition members represent approximately 61 school boards, 460 trustees, who in turn serve more than 750,000 students. Given the constitutional history of denominational schools in Canada – operating since the 1800s – Catholic schools provide an example of a religious entity which has stood the test of time and continues to successfully function with a distinct religious identity in a society becoming increasingly secular.

4. While operating in a different context (in terms of level of education and religious denomination), the Coalition shares a general interest with TWU to the extent they both have a commitment to religious education. For the Coalition, to maintain the Catholic education system and preserve Catholic identity, schools must have the ability to educate students in an environment that is consistent with their faith which includes the determination of policy and admission.

5. The Coalition agrees with the facts as stated by the parties.

PART II – POSITION ON QUESTIONS IN ISSUE

6. The Coalition submits:

   a. There is a need for predictability when engaging in adjudicating fundamental freedoms.

   b. As government actors, law societies must apply carefully defined "public interest" criteria, having regard to the following principles:

      - there is no hierarchy of fundamental rights;
      - there is a duty of state neutrality; and
      - there is a communal or associational aspect central to religious belief.

7. Troubling implications flow from allowing a public body to refuse accreditation simply because of the religious character of the individual or groups seeking approval. This is particularly so in the context of education, where individuals who choose or have chosen to attend religious schools run the risk of having their credentials stripped from them by operation of public law. A public body cannot directly use the *Charter* to regulate constitutionally protected activities within the private sphere. Neither can they do so indirectly by invoking amorphous "*Charter* values" in the "public interest".

PART III – STATEMENT OF ARGUMENT

Need for predictability when adjudicating fundamental freedoms

8. Both the courts of appeal below found that the law societies' decisions infringed TWU's freedom of religion.[1] With freedom of religion engaged, the analysis turned to balancing *Charter* rights – freedom of religion and equality – and whether a decision against TWU was therefore reasonable.

9. The state regulation of religious schools, as explained in *Loyola*, "poses the question of how to balance robust protection for the values underlying religious freedom with the values

[1] *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 ("*TWU BCCA*") at para. 190; *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 ("*TWU ONCA*") at para. 101.

of a secular state."[2] These values are often framed as the public interest and include equality considerations.

10. Let's speak plainly, there is no easy answer to this question of balancing and the Coalition recognizes the limits of certainty and predictability in this area. Abella J. described this difficulty in *Bruker v. Marcovitz*:

> The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright- line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.[3]

11. That being said, consistency and certainty can be ensured by strictly applying the *Oakes* criteria when determining whether constitutional rights have been properly balanced.

12. The Coalition also hopes with its submissions to provide insight into principles which are of significance to entities that have a commitment to religious education. These types of organizations would greatly benefit from an approach which provides some measure of predictability with respect to decisions involving religious considerations and which potentially implicate other rights.

Public interest

13. The balancing in the TWU matter has been described by the B.C. Court of Appeal as a balancing of *Charter* rights with the statutory objectives of the Law Society, namely the "public interest in the administration of justice" and "preserving and protecting the rights and freedoms of all persons".[4] Similarly, the Court of Appeal for Ontario has said that determining whether accreditation is in the public interest requires balancing "the statutory objectives of promoting a legal profession based on merit and excluding discriminatory classifications with the limit that denying accreditation would place on the appellants' religious freedom."[5]

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[2] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 43.
[3] *Bruker v. Marcovitz*, 2007 SCC 54 at para. 2 [Emphasis added].
[4] *TWU BCCA* at para. 165.
[5] *TWU ONCA* at para. 112.

14. In both instances, the "public interest" is at play – a concept at risk of becoming nebulous and chameleon-like, invoked in order to impose limitations on fundamental freedoms. Care must be taken in determining the extent to which state institutions and actors can be permitted to infringe the religious rights of a minority in the name of the public interest. The concept of public interest, it is submitted, must be cautiously circumscribed and closely tied to the governing legislation and *Charter* considerations.

15. While the definition of "public interest" is determined on a case-by-case basis, some boundaries of what constitutes the "public interest" can be identified. The B.C. Court of Appeal was clear that the public interest could not be simply equated with the majority's interest: "Acting in 'the public interest' does not mean making a decision with which most members of the profession or public would agree."[6]

16. Furthermore, the "public interest" should be informed not only by statutory objectives, but by a fulsome consideration of *Charter* rights. Regardless of the mandate of a particular administrative decision-maker, it ought to always be in the public interest to protect and promote *Charter* rights and it cannot be said to be in the public interest to allow for the infringement of those rights.

There is <u>no</u> hierarchy of rights

17. To promote consistency, it is already clear that a balancing of rights in the public interest should be approached from the following mindset: the *Charter* does <u>not</u> create a hierarchy of rights and one right is <u>not</u> to be treated as more important than another. As this Honourable Court in *Gosselin (Tutor of) v. Quebec (Attorney General)* stated, "Equality rights, while of immense importance, constitute just part of our constitutional fabric."[7] The same of course can be said of the right to freedom of religion.

18. As Justice Campbell in *Trinity Western University v. Nova Scotia Barristers' Society* noted, this Honourable Court in *TWU v. BCCT* was clear on the principle that *there is no hierarchy of rights* and *one right is not privileged at the expense of another*.[8] As he discussed

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[6] *TWU BCCA* at para. 165.
[7] *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at para. 26.
[8] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 at para. 187.

the continued applicability of *TWU v. BCCT*, Justice Campbell stated, "Equality rights have not jumped the queue to now trump religious freedom. That delineation of rights is still a relevant concept. Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus."[9]

19. Not privileging one *Charter* right over another encourages the protection of all rights as society changes and we experience shifting social attitudes.[10] Giving meaning to this principle may result in some discomfort, but that is justified where the exercise of individual or communal rights are at stake. This is especially true when religion is treated as a cultural identity and central to a person's life rather than a personal choice or political or moral judgment.

State neutrality

20. State neutrality in religion requires the state to not interfere in religion and beliefs and to neither favour nor hinder a particular belief.[11] Government regulatory approval of entities with differing beliefs is a reflection of state neutrality in a diverse and pluralistic society. As this Honourable Court stated in *Mouvement laïque québécois v. Saguenay (City)*, while the *Charter* does not expressly impose a duty of religious neutrality on the state, a "duty results from an evolving interpretation of freedom of conscience and religion".[12]

21. The Coalition members have experienced this evolution first hand. Catholic school trustees in Canada are, in part, a product of the constitutional rules relating to educational

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[9] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 at para. 196. See also Dwight Newman, "Judicial Method on Rights Conflicts in the Context of Religious Identity, *The Supreme Court Law Review* (2d) Volume 79, p. 256 in which he argues in favour of a methodology that seeks to respect all rights.

[10] Ian Leigh, "Conceiving Freedom of Religion in Terms of Obedience to Conscience", *The Supreme Court Law Review* (2d) Volume 79, pp. 188-193 (addressing the objection to recognition of conscience-based claims that beliefs are a matter of choice and so less worthy of respect).

[11] *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3, 2015 SCC 16 at para. 72.

[12] *Ibid.* at para. 71.

rights originally found in s. 93 of the *Constitution Act, 1867*. The concept of state neutrality has allowed Catholic educators in Canada to play an important role in debates in the public space where the state acts as a neutral intermediary.[13]

22. The comments in *Mouvement laïque québécois v. Saguenay (City)* as to the importance of participation in public life regardless of beliefs are particularly apt. The Court stated:

> The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.[14]

23. Professor Richard Moon describes the requirement of state neutrality as being a pragmatic recognition that religious issues are difficult to resolve within the political process. The state remaining neutral contributes to social stability and avoids the "political marginalization of minority religious communities."[15]

24. From an education perspective, the state achieves a degree of neutrality by providing even-handed support to different religious practices or institutions in the community as well as to non-religious alternatives. In *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, this Honourable Court held that the *Charter* does not preclude the state from providing financial support to religious schools or acknowledging the practices or celebrations of different religious groups as long as it does so in an even-handed way.[16]

25. To ensure that religious neutrality is effective, it needs to be enforced in a consistent manner. This means that religion is treated as a cultural identity and integral to an individual rather than as a personal choice that can be subject to political decisions.

26. The dangers of not following religious neutrality are powerfully described by Mark A. Witten:

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[13] See comments by LeBel J. dissenting in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 SCR 650, 2004 SCC 48 at paras. 66-67.
[14] *Mouvement laïque québécois v. Saguenay (City)*, *supra* at para. 75.
[15] Richard Moon, "The Requirement of Religious Neutrality: Civic Action and Institutional Autonomy", *The Supreme Court Law Review* (2d) Volume 79, p. 156.
[16] *Ibid*. at p. 157 citing *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at para. 62.

> [F]or communities bound together by a common belief in an unchanging truth, state sanction for failing to "get with the times" strikes at the fabric of their identity. A single objectionable belief cannot be surgically targeted without publicly condemning and, to some extent marginalizing, the entire religious community. Ultimately, a religion's identity and narrative are integrally linked to its ability to prescribe values and set criteria for membership. When the power of the state is used to shape a religion's values and boundaries it, in a very real sense, destroys the religion's vision of itself, and its ability to tell its story. The state blindly enters the religious domain and remakes religion in its own image. Such interference might be warranted for an oppressive and coercive cult. But if the state resorts to such measures in anything less than exceptional circumstances, it becomes difficult to see how the internal religious harm poses a greater threat to society than that of governmental overreach.[17]

Communal aspects of religious belief

27. While religion is often explained in individualistic terms, courts have moved towards consistently recognizing that religion has an equally significant communal dimension and there is a strong collective aspect to religious freedom.[18]

28. In *Mounted Police Association of Ontario v. Canada (Attorney General)*[19] this Honourable Court made clear that the *Charter* "does not exclude collective rights" and that "recognizing group or collective rights complements rather than undercuts individual rights. It is not a question of either individual rights or collective rights. Both are essential for full *Charter* protection."

29. *Mounted Police Association of Ontario* was about the fundamental freedom of association under s. 2(d), which the Court noted "has its roots in the protection of religious minority groups."[20] In this context, the Court specifically discussed freedom of religion, stating:

a. "The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567)."

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[17] Mark A. Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" 79 Sask. L. Rev. 215 (2016) at 262.
[18] Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45(2) Osgoode Hall L.J. 10; *Loyola*, *supra* at paras. 60, 91-96.
[19] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 65.
[20] *Ibid.* at para. 56.

b. "And while this Court has not dealt with the issue, there is support for the view that 'the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection' of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)."[21]

30. As a private and voluntary religious, educational, and vocational association, the association of TWU sits at the very core of what is protected by s. 2(d) of the *Charter*.[22] The association is also protected by s. 2(a), freedom of religion. By forming such associations, "individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live."[23]

31. Similarly, this Honourable Court in *Loyola* recognized that religion is about relationships as well as beliefs.[24] The *Charter* right to freedom of religion "must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."[25] The recognition of the communal and institutional aspects of religion is essential to fully protect freedom of religion. The trajectory of the law in this regard ought to be maintained.

32. When the state exerts "indirect forms of control which determine or limit alternative courses of conduct available to others"[26] there is an infringement of freedom. This limit manifests itself in the present case with respect to TWU being denied accreditation. While TWU can still create a school and train students in the law, when these students cannot be licensed to practise as lawyers, they are being excluded in a practical sense from the profession. This exclusion is closely connected to the decision of those students to join a private, voluntary, religious, educational association with its own "rules, mores and

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[21] *Ibid*. at para. 64.
[22] *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*") at para. 85
[23] *Ibid.* at para. 86, quoted with approval in *Mounted Police Association of Ontario*, *supra* at para. 35 [Emphasis added].
[24] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 59.
[25] *Ibid*. at para. 60.
[26] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94-95 [Emphasis added].

principles" of life. Thus, in the Ontario Divisional Court below, it was held that TWU graduates would need to be accommodated by the Law Society, who "would be obliged to provide them with a timely, open, and efficient, accreditation process in order to minimally impair their freedom of religion and association."[27] Otherwise there would be an infringement of their freedom of association and freedom of religion.

Conclusion: Religious education context

33. For the Coalition and religious education providers, having the ability to determine policy and admission is essential to creating an educational environment for students consistent with their faith. In *Loyola*, this Honourable Court recognized that an administrative decision-maker state actor is bound to exercise its discretion in a way that respects the values underlying the grant of its decision-making authority, including the *Charter*-protected religious freedom of the members of an affected community.[28]

34. Where freedom of religion is being balanced against the "public interest", a contextual approach should be taken to defining the "public interest". Public interest is not synonymous with what the majority would decide. Instead, the public interest must take into account the importance of protecting minority interests and the right to freedom of religion. The state has a duty of religious neutrality and that duty applies in determining the content of the public interest. Defining the public interest as being a secular interest would be tantamount to favouring a particular belief.

35. There are troubling implications which flow from refusing to accredit a religious law school because its communal moral rules are offensive to the majority. First, as this Court in *Trinity Western University v. British Columbia College of Teachers* recognized, "if TWU's community standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church."[29] This flows from the doctrine that freedom of association protects

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[27] *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 121, 128

[28] *Loyola*, *supra* at para. 34 citing *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 71.

[29] *Trinity Western University v. College of Teachers*, 2001 SCC 31 at para. 33.

"the right to do collectively what one may do as an individual."[30] The meaningful exercise of the constitutional guarantee of freedom of religion and association would allow for Evangelical Christian lawyers to be trained in an Evangelical Christian law school.

36. Second, by allowing accreditation to be conflated with agreement, affirmation or approval, public actors would be empowered to refuse to recognize the diplomas, certificates and degrees of the great number of Canadians who have attended religious institutions, if the policies or practices of the institutions are deemed contrary to the evolving understanding of what is in the "public interest."

PART V – ORDERS SOUGHT

37. The Intervener takes no position on the disposition of the within appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of September, 2017

Eugene Meehan Q.C.

Eugene Meehan, Q.C.
Daniel Santoro
Counsel for the Applicant

[30] *Mounted Police Association of Ontario*, *supra* at para. 36, quoting Dickson J. in the *Alberta Reference* at para. 172.

PART VI – TABLE OF AUTHORITIES

Cases **Para.**

Secondary Sources

PART VII – STATUTES, REGULATIONS, RULES, ETC.

N/A