

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,
FAITH, FEALTY & CREED SOCIETY**

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

BENEFIC LAW CORPORTION

1250 – 1500 West Georgia Street
P.O. Box 62
Vancouver, BC
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)**

MICHAEL 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 & 37318)**

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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

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

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

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)**

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

**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 Hunter
Tel: (416) 326-8517
Fax: (416) 326-4015
E-mail: zachary.green@ontario.ca

**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 File 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

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

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

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)**

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 File 37318)**

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 (SCC Files 37209 & 37318)**

**Counsel for the Intervener, National
Coalition of Catholic School Trustees'
Associations (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
E-mail:

**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 Street 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)**

**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)**

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)**

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)**

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)**

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)**

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)**

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@jfkllaw.ca

**Counsel for the Intervener, BC LGBTQ
Coalition (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)**

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)**

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)**

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: wcmillan@hakemiridgedale.com

**Counsel for the Intervener, British
Columbia Humanist Association (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)**

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)**

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)**

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@jfkllaw.ca

**Counsel for the Canadian Secular Alliance
(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)**

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)**

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

Jessica Lithwick

Robyn Trask

Tel: (604) 659-6060
Fax: (604) 687-2945
E-mail: rtrask@bctf.ca

**Counsel for West Coast Women's Legal
Education and Action Fund (SCC File
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)**

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)**

MICHAEL 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 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)**

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)**

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@dglp.ca

**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)**

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)**

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

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)**

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)**

**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)**

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
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)**

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)**

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The intervener, Faith, Fealty & Creed Society (“FFC”) is a registered Canadian charity whose purposes include researching legal trends relating to theology and faith and disseminating that information to the charitable sector and general public. It intervenes to address the question of whether a corporation such as Trinity Western University (“TWU”), which is a legal person and not a human being, is entitled to freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).
2. This Court has applied a purposive approach to determining whether corporations possess *Charter* rights. Applying that approach FFC submits that a corporation does not enjoy freedom of religion. While freedom of religion protects individuals and groups, the collective aspect of the freedom is ensured through liberal standing laws permitting a religious organization to seek relief on behalf of its members and by the members themselves vindicating their personal right to practice as part of a group.
3. If this Court does extend s. 2(a) rights to a corporation, it will be necessary to state the basis upon which a corporation can be said to have a belief system. Recent scholarship has identified two distinct accounts of corporate conscience that courts in other jurisdictions have relied upon to extend religious freedom to corporations, the “mission-operation theory” and the “moral association” theory.¹ If this Court does extend s 2(a) rights to TWU in this case, FFC submits that it should make clear what account of corporate conscience supports the extension, and what evidence is required to support such a claim.

Facts

4. TWU is a university constituted a body corporate by a statute of the British Columbia legislature. Its sole statutory object is set out in section 3(2) of the *Trinity Western University Act*, S.B.C. 1969, c. 44 as follows:

¹ Kathryn Chan, “Identifying the Institutional Religious Freedom Claimant”, 95:3 Can. Bar Rev. [forthcoming in 2017] (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994985) at 5.

The objects of the University shall be to provide for young people of any race, colour, or creed, university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.

5. TWU requires students to sign a “Covenant” which, among other things, prohibits expressions of sexual intimacy between same-sex married couples.
6. Law societies in Ontario, British Columbia and Nova Scotia refused to accredit TWU as a law school for the purpose of gaining admission to the practice of law in those provinces due to the discriminatory nature of the Covenant. These decisions were challenged by TWU in its own right and by a graduate of TWU, Brayden Volkenant, as being contrary to s. 2(a) of the *Charter*.

PART II – STATEMENT OF ISSUES

7. TWU submits that it meets the test “for protecting corporations such as ‘religious educational bodies’ under section 2(a)”² set out in the minority judgment of this Court in *Loyola High School v. Quebec (Attorney General)*.³ However, the majority in *Loyola* left open the questions of whether a corporation enjoys freedom of religion under the *Charter* and, if so, how courts should determine whether a corporation is entitled to freedom of religion on the facts of the case. FFC will address these questions.

PART III - ARGUMENT

This Court has generally adopted a purposive approach to determining whether a corporation has a Charter right

8. The question of whether a corporation is the holder of a right enshrined in the *Charter* has been considered by this Court on a number of occasions. The answer has varied depending on the description of the right’s holder in the *Charter* and the Court’s assessment of the nature of the interests sought to be protected by the right in question.
9. The *Charter* describes the holders of rights differently in its various sections. For example, the freedoms in s. 2 are guaranteed to “everyone.” The democratic and mobility rights in sections 3 through 6 are granted to “every citizen.” The rights with respect to criminal and

² Appellant’s Factum in appeal from the judgment of the Ontario Court of Appeal, at para. 67.

³ [2015] 1 S.C.R. 613 [*Loyola*].

penal matters found in s. 11 are available to “any person.” And the right to equality under s. 15 is guaranteed to “every individual”.

10. It seems clear that the framers intended by use of this language to make some rights available only to human beings. The jurisprudence of this Court confirms this view. In *Edmonton Journal v. Alberta (Attorney General)*⁴ a corporation challenged certain restrictions on its ability to broadcast information concerning court proceedings under ss. 2(b) and 15 of the *Charter*. The Court found the s. 2(b) violation made out. However, three judges went on to dismiss the s. 15 claim, holding that “Since s. 15 is limited to individuals, it does not apply to corporations like the appellant.”⁵

11. *Edmonton Journal* implies that corporations are entitled to freedom of expression under s. 2(b) of the *Charter*, though the matter was not addressed by the Court (perhaps because the Attorney General of Alberta conceded that s. 2(a) was violated).⁶ Indeed, as Professor Kislowicz points out, in some cases “the decision that a corporation can assert such a right is either never asked or implicit in the decision.”⁷

12. In those cases where the issue has been squarely confronted the most important consideration seems to be the nature of the right rather than the description of the right’s holder as “person” or “individual” or “anyone”. In *Irwin Toy Ltd. v. Quebec (Attorney General)*,⁸ for example, a corporation brought a section 7 challenge to legislation which prohibited advertising directed to children. Notwithstanding that s. 7 is available to “everyone”, this Court held that a corporation cannot invoke s. 7.

13. The Court considered that section 7, as framed, was intended to apply only to human beings. It pointed out, for example, that corporations cannot be put in jail and thus it was wrong to conceive of corporations as having a liberty interest. The Court acknowledged that a corporation might be said to have an economic liberty interest. However, given that the framers

⁴ [1989] 2 S.C.R. 1326.

⁵ *Ibid.* at 1382.

⁶ *Ibid.* at 1334.

⁷ Kislowicz, Howard, “Business Corporations as Religious Freedom Claimants in Canada” RJTUM [forthcoming] (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3001258)

⁸ [1989] 1 S.C.R. 927.

omitted any reference to property in s. 7 and defined the right as “security of the person”, the Court concluded that a corporation’s economic rights are not constitutionally protected.⁹ This is noteworthy because corporations are considered legal persons under Canadian corporate law statutes.¹⁰ Nevertheless, this Court concluded that under s. 7, “person” means human being.

14. Similarly, in *R. v. Amway*,¹¹ the Court concluded that a corporation did not enjoy the protection against self-incrimination in s. 11(c) of the *Charter*. The Court applied a “purposive approach”, noting that the provision “was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth.”¹² No such affront could be experienced by a corporation, for a legal person, “unlike an individual, cannot suffer the indignities prohibited by the amendment’s protection of the accused’s person and thoughts.”¹³

15. These cases may be contrasted with *R. v. CIP Inc.*¹⁴ where the Court concluded that a corporation is entitled to the right to be tried within a reasonable time under s. 11(b) of the *Charter*. The Court could find “no principled reason for not extending that protection to all accused.”¹⁵ To hold otherwise would be to suggest that society is less interested in bringing corporations to trial in a reasonable time or that status determines whether an accused is entitled to fair or just treatment in the criminal justice system.¹⁶

16. To summarize, in determining whether a corporation enjoys a *Charter* right the focus is less on the description of the right’s holder – person, individual or everyone – and more on the nature and purpose of the interest engaged. Corporations cannot invoke s. 7 because only on a strained interpretation of the section could it be said they possess the characteristics sought to be protected: life and liberty and security of the person. On the other hand, a right such as trial within a reasonable time protects an interest that is shared by all accused regardless of status and

⁹ *Ibid.* at 1004.

¹⁰ Kislowicz, *supra* note 7 at 11, quoting Bruce Welling, *Corporate Law in Canada: The Governing Principles* (London, ON: Scribblers Publishing, 2016).

¹¹ [1989] 1 S.C.R. 21.

¹² *Ibid.* at 40.

¹³ *Ibid.*, quoting from a text writer who was in turn quoting from *Wigmore on Evidence*.

¹⁴ [1992] 1 S.C.R. 843.

¹⁵ *Ibid.* at 856 (emphasis in original).

¹⁶ *Ibid.* at 858.

it can thus be concluded the framers intended the protection to extend to human beings and corporations alike.

A purposive approach to section 2(a) militates against extending religious freedom to corporations in their own right

17. A corporation is an artificial entity that stands separate and apart from those that run or own the corporation.¹⁷ It would seem to follow from this fundamental character of corporations that they cannot hold religious beliefs or “foster a connection with the divine”.¹⁸ Indeed, in *R. v. Edward Books* Chief Justice Dickson had “no hesitation remarking that a business corporation cannot possess religious beliefs.”¹⁹

18. A purposive approach supports this conclusion. In *Edward Books* Chief Justice Dickson identified the purpose of s. 2(a) as follows (at p. 759):

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.

19. It strains a common sense understanding of the ideas expressed in this passage to say that an artificial entity has any personal beliefs, let alone profound ones, or that it has a “perception” of itself or others. Just as a corporation does not have “life” for the purpose of s. 7 it does not have personal beliefs and thus does not enjoy s. 2(a) protection.

20. The Victorian Court of Appeal in Australia expressed a similar view in *Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd*. In that case, the court concluded that a statutory exemption for “discrimination by a person” on religious grounds did not apply to a corporation. Neave J.A. reasoned that because a corporation “has neither ‘soul nor body’, it cannot have a conscious state of mind amounting to a religious belief or principle.”²⁰

21. This may be contrasted with the decision of the United States Supreme Court in *Burwell v Hobby Lobby Stores Inc.*²¹ In that case, the court had to interpret the *Religious Freedom*

¹⁷ Rajanayagam, Shawn & Evans, Carolyn, “Corporations and Freedom of Religion: Australia and the United States Compared” (2015) 37 *Sydney L. Rev.* 329 at 330.

¹⁸ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para 49.

¹⁹ [1986] 2 S.C.R. 713 at 784.

²⁰ [2014] VSCA 75 at para. 414.

²¹ 134 S Ct 2751 (2014).

Restoration Act which provided that government may not “substantially burden a person’s exercise of freedom of religion.” A number of corporations argued that their religious freedoms were impaired by a requirement to provide health services that included contraceptives with which they disagreed on religious grounds.

22. The Third Circuit rejected the corporate claim on the ground that “business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion.”²² The USSC reversed. Alito J. noted that under the *Dictionary Act* a person was defined to include a corporation and he did not think there was anything in the act which compelled a contrary conclusion.

23. The view of the Third Circuit and the Victoria Court of Appeal are more consistent with the approach of this Court. As noted, in *Edward Books* the majority accepted that corporations are incapable of possessing religious beliefs. Moreover, in *Irwin Toy*, the Court did not accept that corporations enjoy “security of the person”. The context suggested otherwise notwithstanding that a corporation is considered a legal person.

24. In *Loyola* the minority stated that “[t]he communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations.”²³ But this objective is not thwarted by finding that corporations do not enjoy freedom of religion. If the government were to disband a religious organization the individual members could invoke their personal rights to challenge the measure. If the government were to prohibit the meeting of people for the purpose of religious worship then the affected individuals could invoke their freedom of association under s. 2(d). And in both examples the corporation would have standing to challenge the measure on behalf of the

²² *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 at 385 (3rd Cir. 2013).

²³ *Loyola*, at para. 91.

individuals whose s. 2(a) rights were engaged.²⁴

There are two possible bases upon which this Court could extend s 2(a) rights to TWU

25. In *Edward Books* Chief Justice Dickson questioned “whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons.”²⁵ If this Court were to deem TWU to possess the religious values of certain persons associated with TWU, it would align itself with one of two theories of corporate conscience that some courts in the United States have relied upon to extend religious freedom to corporations. The so-called “moral-association” theory ascribes religious belief to a specified group of individuals, and recognizes the corporation as the vehicle by which those individuals express their religious belief.²⁶

26. There are a number of reasons why this Court should not confer religious freedom rights on corporations on the basis of a moral-association theory. First, such an approach would be inconsistent with the existing *Charter* jurisprudence. As noted above, this Court has consistently answered the question of whether a corporation enjoys a particular *Charter* right by identifying the nature and purpose of the protection in question and considering whether the framers intended corporations to fall within its ambit. An attribution of human values to the corporate form has not been the approach.

²⁴ See *Loyola* at para. 34 (“Loyola is entitled to apply for judicial review and argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision” and thus had standing to argue in favour of “the *Charter*-protected religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education”); *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 314 (permitting a corporation charged with a statutory violation to argue that the law infringes religious freedom); *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at paras. 32-44 (permitting a corporation in civil regulatory proceedings to argue a law violates constitutional rights that the corporation does not enjoy in its own right). See also *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524 at para. 35.

²⁵ *Edward Books*, at 785.

²⁶ See Chan, note 1 at 5 and the articles cited therein.

27. Secondly, attributing the religious beliefs of individuals to a corporation would be contrary to the fundamental principle that “a corporation is a separate legal entity from the natural persons or other corporations that comprise the shareholders.”²⁷ For this reason, the moral-association theory has been criticized as a form of “reverse veil piercing.” Typically, a corporation’s veil cannot be pierced in order to make members of the company liable for the acts of the corporation. There is a strong argument that having taken advantage of the corporate form for this and other reasons, members should not be able to pierce the veil in reverse by attributing their rights to the company.²⁸

28. Third, the adoption of a moral-association theory would raise additional difficult questions of law and fact. As Chief Justice Dickson noted in *Edwards Books*, it would be necessary to decide whose religion is relevant. Is it the directors, shareholders or even employees of the corporation that should be considered? And what happens, the Chief Justice asked, “if there is a divergence of religious beliefs within the corporation?”²⁹

29. The second basis upon which this Court could extend s 2(a) rights to corporations would be by accepting that a corporation may *itself* have a religion or conscience that is expressed in its mission and operational structure. This is sometimes referred to as a “mission-operation” theory of corporate conscience.³⁰

30. A minority of this Court arguably adopted a mission-operation theory of corporate conscience in *Loyola*. In that case, a private Catholic high school for boys challenged the government’s refusal to grant it an exemption from the normal curriculum so as to permit it to teach about other religions from a Catholic perspective. As the school was a corporation, the Attorney General argued it was not entitled to s.2(a) protection.

31. A majority of the Court accepted that *Loyola* had standing to challenge the Minister’s exercise of discretion to ensure that it properly protected the “religious freedom of members of

²⁷ Rajanayagam & Evans, note 17 at 330.

²⁸ *Ibid.* at 341-46.

²⁹ *Edward Books*, at 785. See Chan, note 1 at 15-20 for a discussion of this problem in the context of this case.

³⁰ See Chan, note 1 at 5 and the articles cited therein.

the Loyola community who seek to offer and wish to receive a Catholic education” (at para. 33). It thus found it unnecessary “to decide whether corporations can enjoy freedom of religion in their own right under s. 2(a)” (at para. 34).

32. The minority, however, decided that “religious organizations” may “in a very real sense have religious beliefs and rights.”³¹ It also proposed a qualifying test, stating that an organization should “meet the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with those religious purposes”.³² In contrast to *Edwards Books*, the *Loyola* minority test suggests that a corporation may *itself* have a religion or conscience that is expressed in its mission and operational structure.

33. There are a number of reasons why this Court should not confer religious freedom rights on corporations on the basis of a mission-operation theory. We have already seen that it is unnecessary to extend constitutional protection to corporations in their own right in order to vindicate the rights of individuals, and that the extension of religious freedom to corporations would be inconsistent with a purposive approach to s 2(a). In addition, the adoption of a mission-operation theory of corporate conscience would raise difficult questions of law and fact about what qualifies as a (corporate) religious purpose, and whether 2(a) protection should extend equally to organizations constituted for purposes of non-belief.³³ This is addressed below in relation to the facts of this case.

Implications for this case

34. As the entity that wishes to set up an accredited law school program, TWU has standing to challenge an administrative decision denying accreditation. It cannot sue on the ground that its own constitutional rights are infringed because, as a corporation, it does not enjoy s. 2(a) rights. Instead, TWU may be able to bring this challenge on the ground that the decision violated the religious freedom of students who wish to attend the proposed TWU law school or other specified natural persons whose rights are engaged.

³¹ *Loyola*, at para. 99.

³² *Loyola* at paras 100-101.

³³ *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3.

35. In order to be granted standing, however, the corporation “must be able to convince the court that the views put forward by it are a fair reflection of the views of the represented.”³⁴ The evidence of a prospective student is from Brayden Volkenant, a party to both the British Columbia and Ontario proceedings. The question for the Court is whether that evidence meets the test for an infringement of freedom of religion.

36. If contrary to the submissions of FFC this Court finds that a corporation may enjoy freedom of religion in its own right it will be necessary to propose a test for determining whether TWU is entitled to freedom of religion. FFC submits that the claims by corporate entities should be subject to close scrutiny and that evidence relevant to both the mission-operation theory and moral-association theory should be required.

37. FFC submits that the *Loyola* minority test raises difficult questions of law and fact concerning what it means for an organization to be “constituted primarily for religious purposes”. “Constituted” implies reference to the wording of its corporate objects. However, in the courts below TWU’s sole statutory object was never analyzed to determine whether TWU is constituted primarily for religious purposes.³⁵

PART IV – SUBMISSION ON COSTS

38. FFC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

39. FFC does not seek any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2017.

Blake Bromley & Michael Sobkin
Counsel for the Faith, Fealty & Creed Society

³⁴ Cane, Peter, “Standing up for the Public” (1995) *Public Law* 276 at 278, quoted in Chan, note 1 at 19-20.

³⁵ See Chan, note 1 at 9-15 examining the difficulties of applying this theory to TWU.

PART VI – LIST OF AUTHORITIES

<u>Cases</u>	<u>Para</u>
<i>Burwell v. Hobby Lobby Stores Inc.</i> , 134 S. Ct. 2753 (2014)	21, 22
<i>Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society</i> , [2012] 2 S.C.R. 524	24
<i>Canadian Egg Marketing Agency v. Richardson</i> , [1998] 3 S.C.R. 157	24
<i>Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd.</i> , [2014] VSCA 75	20
<i>Conestoga Wood Specialties Corp. v. Sebelius</i> , 724 F.3d 377 (3rd Cir. 2013)	22
<i>Edmonton Journal v. Alberta (Attorney General)</i> , [1989] 2 S.C.R. 1326	10, 11
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927	12, 13
<i>Loyola High School v. Quebec (Attorney General)</i> , [2015] S.C.R. 613	7, 24, 30-32
<i>Mouvement laïque québécois v. Saguenay (City)</i> , [2015] 2 S.C.R. 3	33
<i>R. v. Amway</i> , [1989] 1 S.C.R. 21	14
<i>R. v. Big M. Drug Mart</i> , [1985] 1 S.C.R. 295	24
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<i>Syndicat Northcrest v. Amselem</i> , [2004] 2 S.C.R. 551	28, 32

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Kislowicz, Howard, “Business Corporations as Religious Freedom Claimants in Canada” <i>RJTUM</i> [forthcoming] (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3001258)	11, 13
Rajanayagam, Shawn & Evans, Carolyn, “Corporations and Freedom of Religion: Australia and the United States Compared” (2015) 37 <i>Sydney L. Rev.</i> 329	17, 27

Statutes

<i>Trinity Western University Act</i> , S.B.C. 1969, c. 44	4, 37
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