

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

– and –

LAW SOCIETY OF UPPER CANADA

Respondent

- and

**ATTORNEY GENERAL OF ONTARIO, ASSOCIATION FOR REFORMED
POLITICAL ACTION (ARPA) CANADA, CANADIAN CIVIL LIBERTIES
ASSOCIATION, THE ADVOCATES’ SOCIETY, INTERNATIONAL COALITION OF
PROFESSORS LAW, NATIONAL COALITION OF CATHOLIC SCHOOL
TRUSTEES’, LAWYER’S RIGHT 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

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FACTUM OF THE INTERVENER,
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)**

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

Appellant

– and –

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Respondents

- and -

LAWYERS' RIGHT WATCH CANADA, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES', 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 FUN, WORLD SIKH ORGANIZATION OF CANADA

Interveners

**CANADIAN ASSOCIATION OF
UNIVERSITY TEACHERS**

2705 Queensview Drive
Ottawa, ON K2B 8K2

Peter Barnacle

Immanuel Lanzaderas

Tel: 613-820-2270 x192

Fax: 613-820-7244

Email: barnacle@caut.ca

lanzaderas@caut.ca

GOLDBLATT PARTNERS LLP

30 Metcalfe Street, Suite 500

Ottawa, ON K1P 5L4

Colleen Bauman

Tel: 613-482-2463

Fax: 613-235-3041

Email: cbauman@goldblattpartners.com

**Counsel for the Intervener,
Canadian Association of University
Teachers (32709 & 37318)**

**Agent for the Intervener,
Canadian Association of University
Teachers (32709 & 37318)**

TO: THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A OJ1

COPIES TO:

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

Robert W. Staley
Ranjan K. Agarwal
Tel: 416-777-4857
Fax: 416-863-1716
Email: staleyr@bennettjones.ca

**Counsel for the Appellants,
Trinity Western University and Brayden
Volkenant (37209)**

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

Guy Pratte
Tel: 416-350-2638
Fax: 416-367-6749
Email: gpratte@blg.com

**Counsel for the Respondent,
Law Society of Upper Canada (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
Email: jewettm@bennettjones.com

**Agent for the Appellants,
Trinity Western University and Brayden
Volkenant (37209)**

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K2P 1J9

Nadia Effendi
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

**Agent for the Respondent,
Law Society of Upper Canada (37209)**

**GALL, LEGGE, GRANT & MUNROE
LLP**

10th Floor, 1199 West Hastings Street
Vancouver, BC V6E 3T5

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

**Counsel for the Appellant,
Law Society of British Columbia (37318)**

KUHN LLP

100 – 32160 South Fraser Way
Abbotsford, BC V2T 1W5

Kevin L. Boonstra
Jonathan D. Baryniuk
Andrew D. Delmonico
Anne S. Cochrane
Tel: 604-864-8877
Fax: 604-864-8867
Email: kboonstra@kuhnco.net

**Counsel for the Respondents,
Trinity Western University and Brayden
Volkenant (37318)**

ATTORNEY GENERAL OF ONTARIO

720 Bay Street
10th Floor
Toronto, Ontario
M7A 2S9

S. Zachary Green
Josh Hunter
Tel: 416-326-8517
Fax: 416-326-4015
Email: zachary.green@ontario.ca

**Counsel for the Intervener,
Attorney General of Ontario (37209)**

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Mark C. Power
Tel: 613-702-5561
Fax: 613-702-5561
Email: mpower@juristespower.ca

**Counsel for the Appellant,
Law Society of British Columbia (37318)**

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
Email: jewettm@bennettjones.com

**Agent for the Respondents,
Trinity Western University and Brayden
Volkenant (37318)**

BURKE-ROBERTSON

441 MacLaren Street
Suite 200
Ottawa, ON K2P 2H3

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

**Agent for the Intervener,
Attorney General of Ontario (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

Email: barry.bussey@cccc.org

**Counsel for the Intervener,
Canadian Council of Christian Charities
(37209 & 37318)**

ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

130 Albert Street
Suite 1705
Ottawa, ON K1P 5G4

Andre Schutten

Tel: 613-297-5172

Fax: 613-249-3238

Email: Andre@ARPACanada.ca

**Counsel for the Intervener,
Association for Reformed Political Action
(ARPA) Canada (37209 & 37318)**

BARNES, SAMMON LLP

200 Elgin Street,
Suite 400
Ottawa, ON K2P 1L5

W.J. Sammon

Tel: 613-594-8000

Fax: 613-235-7578

Email: wjs@barnessammon.ca

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

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Tel: 613-695-8855 x 101

Fax: 613-695-8580

Email: emeehan@supremeadvocacy.ca

**Agent for the Intervener,
Canadian Council of Christian Charities
(37209 & 37318)**

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613-695-8855 x 102

Fax: 613-695-8580

Email: mfmajor@supremeadvocacy.ca

**Agent for the Intervener,
Association for Reformed Political Action
(ARPA) Canada (37209 & 37318)**

GOLDBLATT PARTNERS LLP

1039 – 20 Dundas Street West
Toronto, ON M5G 2G8

Marlys A. Edwardh

Vanessa Payne

Tel: 416-979-4380

Fax: 416-979-4430

Email: medwardh@goldblattpartners.com

**Counsel for the Interveners,
Start Proud and OUTlaws (37209)**

STIKEMAN ELLIOTT LLP

5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Alan L.W. D'Silva

Alexandra Urbanski

Tel: 416-869-5204

Fax: 416-947-0866

Email: adsilva@stikeman.com

**Counsel for the Intervener,
Canadian Civil Liberties Association
(37209)**

**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

Email: chris.paliare@paliareroland.com

**Counsel for the Intervener,
The Advocates' Society (37209 & 37318)**

GOLDBLATT PARTNERS LLP

30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: 613-482-2463

Fax: 613-235-3041

Email: cbauman@goldblattpartners.com

**Agent for the Interveners,
Start Proud and OUTlaws (37209)**

STIKEMAN ELLIOTT LLP

1600 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Nicholas Peter McHaffie

Tel: 613-566-0546

Fax: 613-230-8877

Email: mchaffie@stikeman.com

**Agent for the Intervener,
Canadian Civil Liberties Association
(37209)**

GOWLING WLG (CANADA) INC.

2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613-786-0171

Fax: 613-788-3587

Email: jeff.beedell@gowlingwlg.com

**Agent for the Intervener,
The Advocates' Society (37209 & 37318)**

DEWART GLEASON LLP
102 – 366 Adelaide Street West
Toronto, ON M5V 1R9

Sean Dewart
Tim Gleason
Tel: 416-971-8000
Fax: 416-971-8001
Email: sdewart@dglp.ca

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

CHRISTIAN LEGAL FELLOWSHIP
470 Weber Street
Suite 202
Waterloo, ON N2L 6J2

Derek B.M. Ross
Deina Warren
Tel: 416-971-8000
Fax: 416-971-8001
Email: execdir@christianlegalfellowship.org

**Counsel for the Intervener,
Christian Legal Fellowship (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
Email: rahool.agarwal@nortonrose.com

**Counsel for the Intervener,
Law Students' Society of Ontario (37209 &
37318)**

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

**Agent for the Intervener,
United Church of Canada (37209)**

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

Eugene Meehan, Q.C.
Tel: 613-695-8855 x 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

**Agent for the Intervener,
Christian Legal Fellowship (37209 & 37318)**

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

Matthew J. Halpin
Tel: 613-780-8654
Fax: 613-230-5459
Email: matthew.halpin@nortonrosefulbright.com

**Agent for the Intervener,
Law Students' Society of Ontario (37209 &
37318)**

JOHN NORRIS
BREESE DAVIES
100 – 116 Simcoe Street
Toronto, ON M5H 4E2

Tel: 416-596-2960
Fax: 416-596-2598
Email: john.norris@simcoechambers.com

**Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)
(37209)**

**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
Email: sursel@upflaw.ca

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

MILLER THOMSON LLP
3000, 700 – 9TH Avenue SW
Calgary, AB T2P 3V4

Gerald D. Chipeur, Q.C.
Jonathan Martin
Grace Mackintosh
Tel: 403-298-2425
Fax: 403-262-0007
Email: gchipeur@millertthomson.com

**Counsel for the Intervener,
Seventh-day Adventist Church in Canada
(37209 & 37318)**

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

Matthew Estabrooks
Tel: 613-786-0211
Fax: 613-788-3573
Email: matthew.estabrooks@gowlingwlg.com

**Agent for the Intervener,
Criminal Lawyers' Association (Ontario)
(37209)**

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

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

**Agent for the Intervener,
Canadian Bar Association (37209 & 37318)**

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

Eugene Meehan, Q.C.
Tel: 613-695-8855 x 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

**Agent for the Intervener,
Seventh-day Adventist Church in Canada
(37209 & 37318)**

VINCENT DAGENAIS GIBSON LLP

260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
D. Geoffrey Cowper, Q.C.
Kristin Debs
Geoffrey Trotter

Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

**Counsel for the Intervener, Evangelical
Fellowship of Canada (37209 & 37318)**

VINCENT DAGENAIS GIBSON LLP

260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
D. Geoffrey Cowper, Q.C.
Kristin Debs
Geoffrey Trotter

Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

**Counsel for the Intervener, Christian
Higher Education Canada (37209 & 37318)**

ANGELA CHAISSON

MARCUS McCANN

197 Spadina Avenue
Suite 402
Toronto, ON M5T 2C8

Tel: 647-567-3536
Fax: 647-977-9074
Email: law@chaisson.ca

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

FASKEN MARTINEAU DUMOULIN LLP

55 Metcalfe Street, Suite 1300
Ottawa ON K1P 6L5

Yael Wexler

Tel: 613-696-6860
Fax: 613-230-6423
Email: ywexler@fasken.com

**Agent for the Intervener,
Lesbians Gays Bisexuals and Trans People
of the University of Toronto (37209)**

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Tel: 613-695-8855 x 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

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

HAKEMI & RIDGEDALE LLP

1500 – 888 Dunsmuir Street
Vancouver, BC V6C 3K4

Wesley J. McMillan

Tel: 604-259-2269
Fax: 604-648-9170
Email: wcmillan@hakemridgedale.com

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

GOLDBLATT PARTNERS LLP

1039 – 20 Dundas Street West
Toronto, ON M5G 2G8

Steven Barrett

Adriel Weaver
Tel: 416-979-6422
Fax: 416-591-7333
Email: sbarrett@goldblattpartners.com

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

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for the Intervener,
International Coalition of Professors of Law
(37209 & 37318)**

GOWLING WLG (CANADA) INC.

2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald

Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

**Agent for the Intervener,
British Columbia Humanist Association
(37209 & 37318)**

GOLDBLATT PARTNERS LLP

30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

**Agent for the Intervener,
Egale Canada Human Rights Trust (37209
& 37318)**

BENEFIC LAW CORPORATION

1250 – 1500 West Georgia Street
P.O. Box 62
Vancouver, BC V6G 2Z6

Blake Bromley

Tel: 604-683-70006
Fax: 604-683-5676
Email: blake@beneficgroup.com

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

FOY ALLISON LAW GROUP

207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison

Tel: 604-922-9282
Fax: 604-922-9283
Email: gwendoline.allison@foyallison.com

**Counsel for the Intervener,
Roman Catholic Archdiocese of Vancouver
(37209 & 37318)**

FOY ALLISON LAW GROUP

207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison

Tel: 604-922-9282
Fax: 604-922-9283
Email: gwendoline.allison@foyallison.com

**Counsel for the Intervener,
Catholic Civil Rights League (37209 &
37318)**

MICHAEL J. SOBKIN

Barrister and Solicitor
331 Somerset Street West
Ottawa ON K2P 0J8

Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

**Agent for the Intervener,
Faith, Fealty & Creed Society (37209 &
37318)**

VINCENT DAGENAIS GIBSON LLP

260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos

Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

**Agent for the Intervener,
Roman Catholic Archdiocese of Vancouver
(37209 & 37318)**

VINCENT DAGENAIS GIBSON LLP

260 Dalhousie Street
Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos

Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

**Agent for the Intervener,
Catholic Civil Rights League (37209 &
37318)**

FOY ALLISON LAW GROUP
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2

Gwendoline Allison
Tel: 604-922-9282
Fax: 604-922-9283
Email: gwendoline.allison@foyallison.com

**Counsel for the Intervener,
Faith and Freedom Alliance (37209 &
37318)**

JFK LAW CORPORATION
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Tim Dickson
Tel: 604-687-0549
Fax: 604-687-2696
Email: tdickson@jfkllaw.ca

**Counsel for the Intervener,
Canadian Secular Alliance (37209 & 37318)**

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

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

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

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

Albertos Polizogopoulos
Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

**Agent for the Intervener,
Faith and Freedom Alliance (37209 &
37318)**

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

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

**Agent for the Intervener,
Canadian Secular Alliance (37209 & 37318)**

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

Marie-France Major
Tel: 613-695-8855 x 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for the Intervener,
World Sikh Organization of Canada (37209
& 37318)**

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Daniel C. Santoro

Tel: 613-695-8855 x 101

Fax: 613-695-8580

Email: emeehan@supremeadvocacy.ca

**Counsel for the Intervener,
National Coalition of Catholic School
Trustees' (37209 & 37318)**

GREY, CASGRAIN

1155 René-Lévesque Ouest
Suite 1715
Montréal, QC H3B 2K8

Julius H. Grey

Tel: 514-288-6180 x 229

Fax: 514-288-8908

Email: jhgrey@greycasgrain.net

**Counsel for the Intervener,
Lawyer's Right Watch Canada (37209 &
37318)**

JFK LAW CORPORATION

340 – 1122 Mainland Street
Vancouver, BC V6B 5L1

Karey Brooks

Robert Freedman

Elin Sigurdson

Tel: 604-687-0549

Fax: 604-687-2696

Email: kbrooks@jfkllaw.ca

**Counsel for the Intervener,
BC LGBTQ Coalition (37318)**

SUPREME ADVOCACY LLP

100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Thomas Slade

Tel: 613-695-8855

Fax: 613-695-8580

Email: tslade@supremeadvocacy.ca

**Agent for the Intervener,
National Coalition of Catholic School
Trustees' (37209 & 37318)**

GOWLING WLG (CANADA) INC.

2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald

Tel: 613-786-0197

Fax: 613-563-9869

Email: guy.regimbald@gowlingwlg.com

**Agent for the Intervener,
Lawyer's Right Watch Canada (37209 &
37318)**

GOWLING WLG (CANADA) INC.

2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald

Tel: 613-786-0197

Fax: 613-563-9869

Email: guy.regimbald@gowlingwlg.com

**Agent for the Intervener,
BC LGBTQ Coalition (37318)**

WINTERINGHAM MacKAY
620 – 375 Water Street
Vancouver, BC V6B 5C6

Janet Winteringham, Q.C.

Jessica Lithwick

Robyn Trask

Tel: 604-659-6060

Fax: 604-687-2945

Email: jwinteringham@wmlaw.ca

**Counsel for the Intervener,
West Coast Women's Legal Education and
Action Fund (37318)**

MICHAEL J. SOBKIN
Barrister and Solicitor
331 Somerset Street West
Ottawa ON K2P 0J8

Tel: 613-282-1712

Fax: 613-288-2896

Email: msobkin@sympatico.ca

**Agent for the Intervener,
West Coast Women's Legal Education and
Action Fund (37318)**

TABLE OF CONTENTS

| | |
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PART I – OVERVIEW

1. Academic freedom is a right that attaches to every university teacher and professor, regardless of religious belief, field of study, or affiliation. Academic freedom does not belong to an institution such as Trinity Western University. It belongs to the individual faculty member and is not subject to restriction on the grounds of institutional autonomy.
2. Academic freedom is an important safeguard in the promotion and protection of diversity in post-secondary education. In respect to teaching and scholarship, academic freedom, by its very nature, does not mandate a particular conclusion or prescribed doctrine; it allows for the exploration of ideas without a pre-determined outcome.
3. Academic freedom in teaching and scholarship allows for challenge without fear of reprisal. Academic freedom encourages and provides a safe space for diversity and its restriction is fatal to a free exchange of ideas. In the context of these appeals, infringement on the academic freedom of faculty at the Trinity Western University proposed law school is a fundamental impediment to a legal education respecting all human rights.

PART II – POSITION ON QUESTIONS ON APPEAL

4. CAUT/ACPPU takes the position that a denial of academic freedom in the teaching and scholarship at Trinity Western University should be considered in the proportionate balancing of *Charter* rights and values at issue in these appeals.
5. As demonstrated by its consideration throughout the accreditation processes at issue, academic freedom was recognized as an important factor in assessing whether the proposed legal education at Trinity Western University meets the required standards for faculty at the University. Any conclusion that academic freedom would not be infringed at the proposed law school reflects, in CAUT/ACCPU view, a misunderstanding and misapplication of the concept of academic freedom as it applies in teaching and scholarship.

PART III - STATEMENT OF ARGUMENT

Academic Freedom as Claimed by Trinity Western University

6. Trinity Western University maintains that it respects academic freedom and relies on its *Academic Freedom* policy and its claimed compliance with the *Statement on Academic Freedom* of the Association of Universities and Colleges of Canada (AUCC, now Universities Canada).¹ The Special Advisory Committee Report to the Federation of Law Societies agreed.² However, the AUCC Statement conflates academic freedom with institutional mission and autonomy:

Unlike the broader concept of freedom of speech, *academic freedom must be based on institutional integrity*, rigorous standards for enquiry and *institutional autonomy*, which allows universities to set their research and educational priorities.

...

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission.

...

The constraint of institutional requirements recognizes simply that the academic mission, like other work, has to be organized according to institutional needs. [emphasis added]³

7. AUCC's institutional focus in defining and applying academic freedom reflects its nature as an organization of institutions, not of faculty. It is from this perspective that institutional mission is a valid filter for its exercise that grounds TWU's claim that academic freedom would be respected in the legal education at its proposed law school. However, such a position is inconsistent with the recognized meaning of academic freedom as a freedom attached to faculty and independent of institutional autonomy and thus institutional mission and faith tests.

¹ *Affidavit of W. Robert Wood*, August 22, 2014, and Exhibits "D" (TWU *Academic Freedom*) and "E" (AUCC *Statement of Academic Freedom*), *Appeal Book of the Appellants Trinity Western University and Brayden Volkenant*, Vol 1, 541-2. Also see Response to the Special Advisory Committee of the Federation of Law Societies of Canada on Trinity Western University's Proposed School of Law, Exhibit "I" to the *Affidavit of Janet Epp Buckingham*, December 15, 2014, *Record of the Respondents Trinity Western University and Brayden Volkenant*, Vol III at 40/52.

² *Special Advisory Committee on Trinity Western's Proposed School of Law Final Report*, December 2013, Exhibit "C" to the *Affidavit of Timothy E. McGee QC*, January 26th, 2015, *Record of the Appellant (LSBC)*, V. 6 at 1034/40

³ *AUCC Statement of Academic Freedom*, *supra*, at 541.

8. Institutional autonomy may be an important protection from *external* pressures in the exercise of academic freedom, but institutional autonomy cannot be used by a university to justify *internal* restrictions on academic freedom. A prescribed outcome is inconsistent with freedom in teaching and scholarship as it directs only one answer; it is the opposite to what academic freedom demands.
9. The effect of restraint or restriction on a freedom is illustrated by Dickson J., as he then was, in *Big M Drug Mart*:

Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* [emphasis added]⁴

Institutional interference undermines the individual exercise of academic freedom.

Academic Freedom in its Appropriate Definition and Application

10. Harry W. Arthurs has described academic freedom as follows:

Academic freedom is a central, arguably the central value, of university life. Anything which interferes with it has to be justified by reference to prior or higher values. I can think of very few, other than perhaps the protection of human life: certainly not institutional solidarity; certainly not institutional reputation.⁵

11. In its application, David Schneiderman, a University of Toronto Professor of Law and Political Science, has stated:

Academic freedom typically is understood as entailing the freedom to teach, research, and write within parameters laid down by one's peers. It also entails an ability to continually renew and reshape knowledge and the standards by which professional knowledge is assessed. Academic freedom enables scholars to be free of outside constraints or considerations other than those expected from those working within the community of scholars. It is, in other words, an association or co-operative activity that insists upon self-regulation.⁶

12. As Wilson J. stated in *McKinney v. University of Guelph*, "The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of

⁴ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

⁵ Jon Thompson, "Preface" in James L. Turk, ed., *Academic Freedom in Conflict* (Toronto: James Lorimer & Company, 2014) 7.

⁶ David Schneiderman, "Academic Freedom and the Federal Idea" in *Academic Freedom in Conflict*, supra, 219.

the free flow of ideas.”⁷ In the same case, LaForest J. made the link between academic freedom and academic excellence:

Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy.⁸

13. As suggested above, the freedom to continually reshape ideas is an essential element of academic freedom. As John Baker, in advancing what he calls, “the theses of the essential desirability of openness to revision,”

...[O]ne would hope that any academics engaging in serious study in preparation for teaching or engaging seriously in research would constantly be willing to pay attention to worries that might be raised not only about the substantial claims and theories that they accept and are teaching, but also about the methods that can and should be used in assessing such claims and theories and to revise these claims if need be in the light of those worries, if those worries turn out on investigation to be well-grounded. No doubt at any given time many of the claims and theories they accept are claims and theories they have no reason to revise or replace, but for any self-respecting academic nothing should be viewed immune to revision or abandonment if evidence, argument, or reason is found or offered for such revision or such abandonment.⁹

In the present context of legal education, we can add “changes in law” to Baker’s above list of those “worries” that would justify reassessment of claims and theories.

14. The ability of a faculty member to be open to revisions of claims and theories in teaching and scholarship should not be circumscribed by institutional interference, such as by insistence on teaching through the lens of a prescribed doctrine that permits no deviation. As Baker points out,

...[A]lthough it is essential that it be remembered and acknowledged that universities and institutions of higher learning need the freedom to make autonomous judgments as to how best to fulfill their institutional role as the developers of knowledges and providers of higher education in the community, it is equally essential to realize that in exercising this role they may infringe those very rights that those designated as academic staff in the institution need if they are to be able to fulfill their roles in the institution. The point is that *the needed institutional autonomy of the universities must*

⁷ *McKinney v. University of Guelph*, [1990] 3 SCR 229, at para. 256.

⁸ *McKinney v. University of Guelph*, *supra*, at para. 69.

⁹ John Baker, “Academic Freedom as a Constraint on Freedom of Religion” in *Academic Freedom in Conflict*, *supra*, 137.

*not be allowed to infringe the academic freedom rights of the academic staff in the university.*¹⁰ [emphasis added]

Institutional Autonomy Should Not Be Confused with Academic Freedom

15. In *Pridgen v. University of Calgary*, Paperny J. considered the relationship between academic freedom and institutional autonomy as it relates to the propensity for interference in the free exchange of ideas and opinions:

[114] Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; *the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution.* [emphasis added]¹¹

16. The individual nature of academic freedom and its distinction from institutional autonomy is also reflected in international sources. In *Keyishian v. Board of Regents*, Justice Brennan of the United States Supreme Court stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned... The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] that through any kind of authoritative selection." In *Sweezy v. New Hampshire*, 354 U.S. 234, 354 U.S. 250, we said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. *To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation....* Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." [emphasis added]¹²

17. Section 202(2)(a) of the United Kingdom *Education Reform Act, 1988* supports the individual nature of academic freedom and protection from institutional interference in its exercise. The Act provides for University Commissioners to:

[E]nsure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, *without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions;*... [emphasis added]¹³

¹⁰ John Baker, *Ibid*, 135-6.

¹¹ *Pridgen v. University of Calgary*, 2012 ABCA 139 (CanLII).

¹² *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

¹³ *Education Reform Act, 1988*, Chapter 40, 1988, United Kingdom, Section 202(2).

18. In addressing the tension between academic freedom and institutional autonomy, the authors of a report for the UK's University and College Union, *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context* ("UCU Report"), state:

Individual autonomy and institutional autonomy are often conflated under the heading of "academic freedom"... Although these two concepts are linked, they are different. Wolff's study makes this distinction explicit viz. "academic freedom is the privilege individual academics may claim as the freedom to question and test received wisdom, to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing the jobs or privileges they may have at their institutions. Academic autonomy applies to the institution. It may be defined as the right of academic institutions to decide freely and independently how to perform their tasks."¹⁴

19. A focus of the UCU Report is a comparative review of academic freedom in EU countries in the context of the November 11, 1997 United Nations Educational Scientific and Cultural Organization *Recommendation Concerning the Status of Higher Education Teaching Personnel* ("UNESCO Recommendation"). Again, noting the distinction between academic freedom ascribed to the individual and institutional autonomy, the authors of the UCU Report state,

UNESCO's Recommendation was the first international attempt to provide a detailed description of the necessary parameters for academic freedom, seek international support for their implementation, and provide a mode of redress (via reports to the CEART).¹⁵ The Recommendation specifies the following major critical elements which are considered crucial to academic freedom:

- Individual rights and freedoms - "the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies."¹⁶

¹⁴ Terrance Karran and Lucy Mallinson, *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context: Report for the University and College Union* (UCU Report)(Lincoln, University of Lincoln, 2017) 7-8.

¹⁵ CEART is the Committee of Experts on the Application of the Recommendation concerning Teachers.

¹⁶ UCU Report, *supra*, at p. 22, quoting from paragraph 27 of the *UNESCO Recommendation, infra*.

20. The *UNESCO Recommendation* represents an international consensus on the rights of academic staff to academic freedom based on faculty as persons and professionals. Further, the right to education, Article 13 of the United Nations *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), has also been determined to include protection for academic freedom.

21. At its Twenty-ninth Session in Paris (1997) UNESCO adopted the *Recommendation concerning the Status of Higher-Education teaching Personnel* based on ICESCR Article 13 (*UNESCO Recommendation*). The *UNESCO Recommendation* addressed interference with academic freedom as follows:

20. Autonomy should not be used by higher education institutions as a pretext to limit the rights so higher-education teaching personnel provided for in this Recommendation or in other international standards set out in the appendix.¹⁷

...

27...Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without restriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution in which they work, *freedom from institutional censorship and freedom to participate in professional or representative academic bodies*. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source...[emphasis added]¹⁸

22. As stated by James L. Turk, in his introduction to *Academic Freedom in Conflict*,

Commonly the institutional autonomy of the university has been described as the basis of academic freedom – that which insulates academic staff from the inappropriate intrusion of outside forces. While there is a measure of truth to that – university autonomy helping make possible the academic freedom of its academic staff – *it is important not to conflate university autonomy with academic freedom*. To the extent that autonomy of the university as an institution is translated into “institutional academic freedom,” the stage is set for the institution to assert its institutional right to limit the academic freedom of its academic staff and to deny them any redress outside the institution. [emphasis added]¹⁹

¹⁷ United Nations Educational, Scientific and Cultural Organization, *Recommendation concerning the Status of Higher-Education teaching Personnel*, Twenty-Ninth Session (Paris: United Nations Educational Scientific and Cultural Organization, 1997), Volume 1 Resolutions, Articles 20 & 27.

¹⁸ *UNESCO Recommendation, supra*, Article 28.

¹⁹ James L. Turk, “Introduction” in *Academic Freedom in Conflict, supra*, 14.

Religious Doctrine and Academic Freedom

23. In “Academic Freedom as a Constraint on Freedom of Religion,” John Baker notes,

It is reasonably clear that a religious sect could endow and in various ways support a university without *necessarily* generating serious problems for the exercise of academic freedom.

It is much less clear that an institution could with plausibility claim that it respects the academic freedom of its academic staff even though it espouses (perhaps in a mission statement) specific religious tenets and in its various rules and practices requires, as a condition of employment or of continuation of employment, that its academic staff accept and comply with these tenets.²⁰

24. William Bruneau considers the state of academic freedom at Canada’s faith-based universities and colleges in the context of a faith test, based on an institution’s doctrinal mission. In the author’s view, “a faith test for faculty will have fatal consequences for academic freedom.” Moreover, Bruneau concludes that faith tests promote, “ideologically homogeneous communities. That homogeneity explains why presidents of faith-based institutions can reasonably say that ‘nobody complains at our place.’”²¹ Of course, deviation would not be an option in any event if employment is contingent, as at TWU, on continued support for the doctrine.

25. It need not be so. Bruneau notes that other religious based universities and colleges in Canada have demonstrated “a strong commitment to academic freedom.” Examples include Université St-Paul (Ottawa), St. Thomas Moore (University of Saskatchewan) and St. Francis Xavier, which have all agreed to academic freedom clauses in their collective agreements consistent with the accepted definition of academic freedom as discussed above.²²

26. An expert review panel was commissioned in British Columbia to review the proposed law degree program at TWU. The subsequent report included concerns over the TWU *Statement of Faith* and *Community Covenant* in respect to impact on academic freedom.

²⁰ John Baker, *supra*, 127.

²¹ William Bruneau, “Academic Freedom and Religious Conviction at Canada’s Faith-Based Universities and Colleges” in *Academic Freedom in Conflict*, *supra*, 149.

²² William Bruneau, *Ibid*, 157.

The Expert Panel Report noted, *inter alia*, the TWU “assertion that TWU faculty members are in fact free to challenge established doctrine and to pursue any line of critical scholarly inquiry they might wish to pursue.” The Expert Panel challenged the claim:

However, it is clearly inconsistent with the provisions of the Statement of Faith and Community Covenant set out above. This inconsistency is reinforced by the requirement that each faculty member must explicitly reaffirm annually that he or she agrees with the terms of the Statement of Faith and also agrees, “to support that position at all times before the students and friends of Trinity Western University.”²³

27. The Expert Panel Report noted that TWU “acknowledged that Canada had no law schools which impose a religious test on current or prospective faculty members.” The Panel went on to note the religious-based universities in the United States would be allowed to “extend a hiring preference to prospective faculty members who adhere to a particular religion, but not to have a blanket exclusion of other faculty members or a religiously based quota system.”²⁴

28. CAUT/ACPPU submits that the faith test arising from the TWU *Statement of Faith* and *Community Covenant* required to be met on appointment of faculty and thereafter confirmed every year as a condition of employment²⁵ constitutes a violation of academic freedom.

Thus,

a. The *Statement of Faith* requires a commitment to “historic orthodox Christianity,” where Scriptures must be believed and obeyed in their entirety;²⁶

b. The *Community Covenant* is

[A] solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond...It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.²⁷

²³ *Affidavit of Janet Epp Buckingham*, Record of the Appellant (LSBC), *supra*, at pp. 458-460, paras. 47-51 and para. 52; and Exhibit “Q”, *Degree Program Review Quality Assessment Report Workbook*, April 13, 2013, at 485-486.

²⁴ *Degree Program Review Quality Assessment Report Workbook*, *supra*, at 487.

²⁵ *Affidavit of Robert Wood*, August 22, 2014, *supra*, 509-525 at 512, paras. 12 and 13.

²⁶ *Statement of Faith*, Exhibit “B” to the *Affidavit of Robert Wood*, *supra*, at 532.

²⁷ *Community Covenant Agreement*, Exhibit “C” to the *Affidavit of Robert Wood*, *supra*, at 535-539.

c. Failing to abide by the *Statement of Faith* or *Community Covenant* may result in discipline or sanction.²⁸

d. Academic Freedom Policy requires doctrinal adherence:

Trinity Western University rejects as incompatible with human nature and revelational theism a definition of academic freedom which arbitrarily and exclusively requires pluralism without commitment, denies the existence of any fixed points of reference, maximizes the quest for truth to the extent of assuming it is never knowable, and implies an absolute freedom from moral and religious responsibility to its community.

*Rather, for itself, Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible... [emphasis added]*²⁹

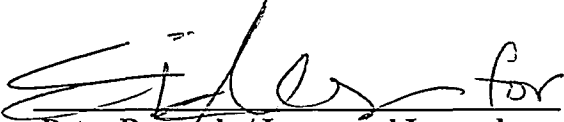
PART IV - SUBMISSIONS ON COSTS

29. CAUT/ACPPU does not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – ORDER REQUESTED

30. CAUT/ACCPU takes no position on the terms of the Order in these appeals.

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


Peter Barnacle / Immanuel Lanzaderas
Counsel for the Intervener,
Canadian Association of University Teachers

²⁸ *Community Covenant Agreement, Ibid*, at 535-539.

²⁹ *Academic Policies, Academic Freedom*, Exhibit “D” to the *Affidavit of Robert Wood, supra*, at 540.

PART VI - TABLE OF AUTHORITIES

| | Name | Paragraph(s) Cited |
|-----------|---|-----------------------|
| A. | Cases | |
| | <i>McKinney v. University of Guelph</i> , [1990] 3 SCR 229 | 12 |
| | <i>Pridgen v. University of Calgary</i> , 2012 ABCA 139 (CanLII) | 15 |
| | <i>R. v. Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295 | 9 |
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| | <i>Keyishian v. Board of Regents</i> , (1967) 385 U.S. 589 | 16 |
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| C. | Secondary Sources | |
| | David Schneiderman, “Academic Freedom and the Federal Idea” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 218-228. | 11 |
| | James L. Turk, “Introduction” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 11-20. | 22 |
| | Jon Thompson, “Preface” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 7-10. | 10 |
| | John Baker, “Academic Freedom as a Constraint on Freedom of Religion” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 127-144. | 13, 14, 23 |
| | William Bruneau, “Academic Freedom and Religious Conviction at Canada’s Faith-Based Universities and Colleges” in James L. Turk, ed., <i>Academic Freedom in Conflict</i> (Toronto: James Lorimer & Company, 2014) 145-171. | 24, 25 |

PART VII – STATUTES AND REGULATIONS

| Tab | Name | Paragraph(s) Cited |
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| 12. | <i>Education Reform Act</i> , 1988, Chapter 40, 1988, United Kingdom. | 17 |