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, CANADIAN COUNCIL OF CHRISTIAN CHARITIES

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

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TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

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-and-

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AND BETWEEN:

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PART I – OVERVIEW

1. The law societies submit that they cannot and are in fact obligated not to accredit TWU or any other religiously based university.[1] The position of the law societies hinges upon the proposition that regulatory approval, in this case accreditation, necessarily means that the law societies approve and endorse the beliefs and practices of those to which they provide accreditation. Despite the LSUC's appeal to *Saguenay* and *Ross*[2] this position has no basis in law or policy, and such an interpretation would result in a total disruption of the charitable sector, among others, that require regulatory approval.

2. CCCC submits that such an interpretation is simply unworkable and not representative of how regulatory approval operates. Such a position, if left unaddressed, will cause deleterious effects throughout the charitable sector and to Canadian society as a whole as government dictates what is and is not acceptable religious belief and practice. A more coherent view is that the registration of such widely diverse charitable organizations is a recognition that they each meet the established criteria to carry out their charity work as determined under the law without inquiry into what beliefs they hold. This approach ensures that diversity contributes to a healthy civil society, one that is free and democratic.

PART II – POSITION ON QUESTIONS IN ISSUE

3. The CCC submits that denial of regulatory approval solely on the basis of a protected religious belief and practice is a violation of the religious freedoms granted to religious institutions. Furthermore, private religious entities are not burdened with *Charter* obligations as the result of seeking regulatory approval. The contention that receiving regulatory approval means your beliefs and practices are sanctioned or endorsed by the Government is simply wrong and misguided, and it does not reflect the nature or process of regulatory approval.

PART III – STATEMENT OF ARGUMENT

A. Government Grant of Licence or Regulatory Approval Does not Mean State Endorsement

4. The view that regulatory approval of TWU's law school would be tantamount to agreement with TWU's religious teaching and practice of marriage as carried out by TWU's

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[1] LSUC Factum 59, LSBC Factum 25 – 26.
[2] LSUC Factum, 58 – 60.

admission's policy is wrong, in principle and at law. If that were the case, the entire process of government approval, in its myriad areas of jurisdiction, would be recast with an imperative that every person, civic organization, and religious community and association must have correct thoughts, opinions, and practices, as determined by government.

5. Government regulates many things, from the importation of toothbrushes, to the accreditation of university degrees. Each regulatory approval cannot, in principle, be an approval of the religious views (or otherwise) or practices of the entity carrying out the regulatory enterprise. To do so, the government would require a standard, applicable to all, by which to judge who is approved or not; and an efficient system by which to evaluate hundreds of thousands of entities needed for the Canadian economy to work. Such requirements are fraught with dangers.

6. The regulation of law school graduates requires the law societies to enquire about the competence of the school to deliver the education necessary for its graduates to be successful in the practice of law. It has neither obligation nor right to enquire about the religious beliefs of the school as part of the law societies' gatekeeping function in admitting individuals to practise law.

7. At law, a religious university's relationship with its students is contractual. It is a religiously inspired, private enterprise that controls what is and is not acceptable within its campus. It may open its doors to other students who do not believe as the university, but it has the right to limit who attends based on the students' willingness to abide by the religiously based contract. "Self-regulation of group membership could be said to be at the heart of religious group autonomy; it is a group's foremost freedom."[3]

i. Regulatory Approval Does not Allow the Government to Hold a Private Entity to Its Public Obligations

8. Private religious entities are not subject to the *Charter* [4] but are beneficiaries of the *Charter*.[5] This elementary point has been misapplied.[6] The law Societies postulate that because they are subject to the *Charter* and human rights legislation, they cannot grant accreditation to

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[3] Jane Calderwood Norton, *Freedom of Religious Organizations* (Oxford: Oxford University Press, 2016), p. 29. [BA Tab 4]

[4] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitutional Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

[5] *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 265, 2 OR (3d) 319. ("*McKinney*")

[6] LSUC Factum para 62, LSBC Factum paras 25 and 26.

TWU[7] as doing so would violate both, and that as TWU requires public accreditation to allow its graduates to practise law, it is then engaged in a public enterprise subject to the public requirements that the law societies are.[8]

9. The law societies' position leads to the conclusion that schools have state "authority" and "duties" by virtue of obtaining provincial accreditation. However, that is an attempt to transform private actors into public actors, which they are not and cannot be. It also skirts the test that imposes public *Charter* obligations on private actors.[9] That is not what accreditation is about. Accreditation standards and procedures are not, at their core, a demand that accredited institutions adopt the responsibilities of the provincial government as mandated by the *Constitution.*

10. Paradoxically, if the TWU law school is denied accreditation, equal access to the profession is being denied to those who wish to practise their faith within a religious context. Such result sidesteps the written *Constitutional* text, all legislative pronouncements, and the common law as expressed by this Honourable Court in *TWU 2001*.[10] What is left to protect religious organizations like TWU when they are faced with an aggressive maneuver that operates not only under the guise of law but also within the very administration of the laws themselves?

11. Ignoring the non-applicability of the *Charter* and the human rights legislation to TWU is detrimental to the exercise of religious freedom in Canada for a number of reasons. First, it grants licence to ignore the law. The law states that TWU is not subject to the *Charter* or to human rights legislation. On a clear reading of the law, there is no obligation on TWU to admit into its religious university those who are not willing to abide by its Community Covenant. TWU has the right to admit those who are in harmony with its religious sensibilities. The appeal to *Charter* values and human rights allows that law to be ignored. Those in opposition to TWU would say, as did the Ontario Divisional Court, that TWU doesn't have to admit those who do not agree with the Community Covenant but should not expect the law societies to accredit the

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[7] LSUC Factum at paras 9, 59 and 62.
[8] LSUC Factum at paras 54. See also Professor Bruce MacDougall, *The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms on Sexuality*, 36 U.B.C. L. REV. 1, 16 (2003). [BA Tab 5]
[9] *McKinney, supra*.
[10] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 25 ("*TWU 2001*").

school. That, however, amounts to denying accreditation because the state does not agree with TWU's religious practice—a practice that is not illegal or out of the mainstream. Indeed, if *Charter* values include equality and human rights,[11] then the LSUC is itself not following *Charter* values in its relationship with TWU. The point is, the public interest has already been decided by the courts and by the legislature. How can it be in the public interest to ignore what is: (1) contained in the *Charter*; (2) contained in the human rights legislation; (3) contained in the *Civil Marriage Act*?

12. Second, removing a religious community's ability to decide who can or cannot be a member destroys religious identity and autonomy; with such removal, the religious community becomes a mirror of the state and its requirements. Difference is not celebrated but assimilated. Conformity becomes the religion of the state, and the equality and inclusion values become the basis for inequality and exclusion.

13. Third, state coercion on fundamental religious principles such as marriage becomes a certainty. The state becomes the Leviathan that has, in Justice Campbell's words, taken on "a secularizing mission."[12] The state is the new arbiter of what can and cannot be accepted as religious dogma and practice. But as Justice Iacobucci noted, "the State is in no position to be, nor should it become, the arbiter of religious dogma."[13]

ii. The Government Does not Endorse the Views of an Organization Merely Because It Allows the Organization to Operate

14. A recipient of government authorization does not, by that authorization, put on the cloak of government actor. It is government that regulates university accreditation and is therefore burdened with the responsibilities of protecting constitutional rights. By authorizing an institution to teach and grant degrees, government is merely recognizing the university's competence to deliver a quality education for the degree it issues. The university is not working on the state's behalf; rather, it is carrying out what it contracted with the students to do. The state is simply recognizing the university competence to do so. The state has no "secularizing mission" to force religious universities to be secular or accede to any current understanding of identity politics.

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[11] *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 46.
[12] *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, at para 19, 381.
[13] *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551, at para. 50

15. This Honourable Court recognized the autonomy of religious communities in their internal regulations concerning same-sex marriage.[14] However, this Honourable Court has also held that Canada is no longer "a society of shared social values where marriage and religion were thought to be inseparable" but "is a pluralistic society."[15] Marriage, from the perspective of the state, is a civil institution." [16]

16. Despite the fact that the religious norms on marriage were discounted in the public arena, they were entitled to remain in the private religious arena. In other words, it is not against public policy for religious institutions to maintain their commitment to traditional heterosexual marriage: the SCC exempted clergy from having to perform marriages against their conscience or the beliefs of their religious community; the federal government passed the *Civil Marriage Act*, which made provision for religious objection by members of the clergy;[17] and the *Income Tax Act* was amended to protect religious charities from losing their registered charitable status for supporting traditional marriage.[18]

17. While religion has no public role in public policy concerning marriage, it is evident that religious communities do have autonomy to decide for themselves how marriage will be practised within their own private institutional framework.

18. What makes this case so crucial to the private/public analysis is that the arguments of the law societies are moving beyond allowing religious communities autonomy on marriage to a view that, even within the internal workings of religious institutions, the religious understanding of marriage must give way to the public secular norm. It is this shift that is particularly egregious for the religious communities going forward.

19. TWU is the educational creation of the Free Evangelical Church of Canada (FECC). The FECC is not government. It and TWU are private religious organizations. As such, they operate within a specific context, one that is fundamentally a religious project within a religious milieu.

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[14] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 57–58 ("*Marriage Reference*").
[15] *Marriage Reference, supra,* at para 22.
[16] *Marriage Reference, supra,* at para 22.
[17] *Civil Marriage Act*, SC 2005, c 33, s 3.
[18] *Income Tax Act,* RSC 1985, c 1 (5th Supp).

It is not a secular campus but a religious campus. That context means that it is not subject to the *Charter* or to the human rights legislation of British Columbia.

iii. If Approval Is Endorsement, the Regulatory Approval Process Is Not Consistent with Democracy

20. CCCC is a Christian umbrella organization that provides information to Christian charities about how best to operate and keep well within charity law. Of the 86,191 registered charities in Canada, 33,114 (38.4%) are religious charities registered under the charitable head of the advancement of religion.[19] Such charities include churches, mosques, synagogues, and a host of other religious entities that are primarily concerned with the advancement of religion. Many more charities that operate under other heads, such as relief of poverty and education, are also based in and operate within a religious community. CCCC has in membership some 3,400 members.

21. It is unworkable to suggest that Canada Revenue Agency's grant of registered charitable status to religious charities, could be, in itself, an endorsement of the respective opinions, beliefs, and practices of each entity. Unworkable because the state would be deemed to support contradictory viewpoints. A more coherent view is that the registered charitable status of such widely diverse organizations is a recognition that they each meet the established criteria for receiving regulatory recognition as determined under the law and regulations of the *Income Tax Act*. This approach ensures that diversity contributes to a healthy civil society, one that is free and democratic.

22. A state practice to evaluate the religious beliefs and practices of religious entities would jeopardize the operation of many religious charities beyond those that advance religion, including religious schools, nursing homes, and radio stations.

B. RELIGIOUS CORPORATIONS ARE ENTITLED TO RELIGIOUS FREEDOM

i. A Corporate Religious Right Follows from the Freedoms to Religion, Expression, and Association

23. These Appeals provide an opportunity to clarify the right of religious corporate entities to religious freedom, which we submit has existed long before the *Charter*. "The Charter does not

[19] CRA reports that as of March 2016, there were 86,191 total charities with 33,114 under the head of religion. See https://www.canada.ca/en/revenue-agency/services/charities-giving/charities-media-kit/charities-program-facts-figures.html?=undefined&wbdisable=true

take away from the *priorness* of rights," as Professor Iain T. Benson notes.[20] A corporate religious right follows from the interaction of the freedoms to religious belief and practice, expression, and association.

24. Despite the long history of protecting religious freedom in Canada, there appears to be an increasing willingness to challenge the historical protections given to religious individuals and institutions. The recognition of the unique nature of religious institutions is absent from the current discussion, which advocates against the privileges that the law has given to religion.[21]

25. The existence of private religious entities such as TWU depends upon an ability to operate in a manner permitted by applicable human rights legislation. Removing this ability from religious institutions would destroy the democratic project of maximizing individual freedom and limit the ability of society to maintain civil peace, because religious individuals would be denied basic rights, such as expressing faith in the institution of their choice.

26. The religious freedom of religious institutions was among those rights taken for granted by Canadians. However, as these appeals demonstrate, that has changed. Writing for the Constitutional Court of South Africa, Justice Albie Sachs expressed the importance of religion to society in the following words:

> [F]reedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. *Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.*[22]

27. It is important to note the communal aspects of religious freedom in the above passage.

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[20] See also Iain T. Benson, "The Limits of Law and the Liberty of Religious Associations," (2017) 79 S.C.L.R. (2d), xxi at xxviii. [BA Tab 2].

[21] See Barry W. Bussey, "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School," 2016 BYU L. Rev. 1127 (2017).

[22] *Christian Education South Africa v Minister of Education,* 2000 (4) SA 757 (CC) at para 36, (emphasis added) per Albie Sachs J.

The principled reason for this is that the accommodation accorded to persons makes little sense if it is not also accorded to groups. Failing to protect the group, in addition to depriving groups of any recognition when it is clear that their associational dimension is important to society, also robs the person of the collective and associational dimension of the right. With respect to religion, this collective dimension of "communion" (the root concept within our term "community") is a core aspect of the religion chosen by the individual. A religious believer without other religious believers and their chosen religious *group* is like a citizen without a country. The two are symbiotic. It is not an exaggeration to say that failure to protect religious associations is tantamount to eviscerating religious freedom itself.

ii. Domestic and International Law Support Corporate Religious Protection

Canadian Law

28. European history and English common law understood that religious freedom consisted of two aspects – the individual and the collective. This was echoed by this Honourable Court in *Saumur v. City of Quebec*.[23]

29. The dual nature of freedom of religion, which has "both collective and individual aspects", was also recognized by this Honourable Court in *Edwards Books*,[24] in *Alberta v. Hutterian Brethren of Wilson County,*[25] and in *Loyola High School v. Quebec.*[26]

International Law

30. The group right of religious freedom is recognized not only in Canada's domestic laws, but also in international law. The UN Article 18 of the *International Covenant on Civil and Political Rights 1996* (ICCPR) guarantees everyone freedom of thought, conscience, and religion "either individually or in community with others".[27] The UN commentary states:

> the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their

[23] *Saumur v City of Quebec,* [1953] 2 SCR 299 at 329.
[24] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 145, per Dickson CJC; per Wilson J, at paras 206-207.
[25] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 31 & 130.
[26] *Loyola,supra,* at para 91.
[27] *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

> religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[28]

31. Professor Julian Rivers observes, "[T]he fact that individuals normally require like-minded communities to be able to exercise their religious rights effectively is sufficient justification for accepting that religious association as juridical persons are also beneficiaries of subjective rights under article 18."[29]

Europe

32. Article 9 of *The European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) states: "Everyone has the right to freedom of … religion…either alone or in community with others."[30] There is ample European case law affirming that religious associations are beneficiaries of the rights derived from Article 9.[31]

iii. Content of the Group Right to Religious Freedom

33. These Appeals provide this Honourable Court the opportunity to outline the constitutional foundation for religious freedom of the religious group and to recognize the importance that religions can play culturally and in promoting genuine diversity.

i) It is not the aggregate of individual members' rights but a right of the religious group as such.

34. If the religious freedom of groups were simply an aggregate of members' rights, then it would mean that a greater latitude would be given to "state intervention into the internal affairs of such groups since the focus would be vindicating individuals and their interests, not the group and its interests."[32] It is a religious freedom right of a religious group as Julian Rivers notes,

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[28] UN Office of the High Commissioner for Human Rights, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art 18) : . 30/07/1993.* <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument> . See also: UN General Assembly Res. 36/55 (25 Nov. 1981) art. 1(1). Online: <http://www.un.org/documents/ga/res/36/a36r055.htm>.

[29] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) at 39[BA Tab 9].

[30] Council of Europe, *Convention of the Protection of Human Rights and Fundamental Freedoms*, online: <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

[31] *Supra*, note 25.

[32] Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State second edition* (Oxford: Oxford University Press, 2013), at 375-376.[BA Tab 1]

"Collective religious liberty in this sense is the liberty of a community of people sharing a common religious faith to organize themselves and structure their corporate life according to their own ethical and religious precepts.[33]

ii) Right to determine and administer their own internal religious affairs without state interference.

35. Canadian courts are reluctant to interfere with decisions made by religious groups, unless they violate basic procedural requirements.[34]

iii) Exercises moral authority over its members.

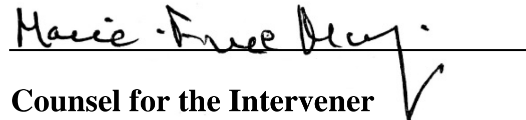
36. Section 27 of the *Charter* preserves the multicultural heritage of Canada defined as "various ways of life [...] rooted in the authentic life of a people seen as a community bound together by pervasive traditions and moral ties."[35] David Novak aptly describes this concept of moral authority being part of religious freedom of the group:

> [F]reedom of religion is my right to be a member or not to be a member or a religious community, and thus freely submit myself to its moral authority. However, freedom of religion becomes what could be called an "empty right" if the religious community I freely choose to join does not have the liberty to morally govern me and my fellow community members. Therefore, my right of religious freedom presupposes the communal right of a religious community to exercise its moral authority. That moral authority is its liberty.[36]

PARTS IV and V – SUBMISSIONS CONCERNING COSTS

37. CCCC requests that no costs be awarded for or against it. CCC takes no position on the disposition of the Appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September 2017.



Counsel for the Intervener

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[33] Rivers, "Religious Liberty as a Collective Right," in O'Dair and Lewis, *Law and Religion Current Legal Issues 2001 Volume 4*, (Oxford: Oxford University Press, 2001) at 231 [BA Tab 8].

[34] See M.H. Ogilvie's seven principles by which courts have been guided in deciding to intervene in church matters. M.H. Ogilvie, *Religious Institutions and the Law in Canada* (Toronto: Irwin Law, 2010) at 219-220 [BA Tab 6].

[35] Howard Brotz, "Multiculturalism in Canada: A Muddle" (1980) 6 Can. Pub. Pol. 41 at 41-42 [BA Tab 3].

[36] Novak, *In Defense of Religious Liberty* (Wilmington, DE: ISI Books, 2009) at 88 [BA Tab 7].

PART VI - LIST OF AUTHORITIES

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