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, SEVENTH DAY ADVENTIST CHURCH IN CANADA

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

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SCC File No. 37209 & 37318

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
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BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

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AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
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PART I-OVERVIEW AND STATEMENT OF FACTS

1. The Seventh-day Adventist Church in Canada ("**Church**"), is incorporated by special act of the Parliament of Canada. The Church operates a post-secondary institution in Lacombe, Alberta, incorporated by special act of the Legislative Assembly of Alberta, known as Burman University ("**University**"). The University is now in its 110th year.

2. The Law Society of British Columbia ("**LSBC'**) and the Law Society of Upper Canada ("**LSUC"**) (collectively, "**Law Societies**") may not refuse a license to practice law in their respective jurisdictions solely because of the conduct policy ("**Policy**")[1] of Trinity Western University ("**TWU**").

3. The decisions of the Law Societies regarding TWU ("**Decisions**") discriminate against TWU and are beyond the authority of the Law Societies because:

(a) There are no facts to support the Decisions;
(b) There is no public interest in regulating the Policy;
(c) The Decisions are inconsistent with human rights law;
(d) The Decisions are based on an impoverished conception of religious liberty; and
(e) The Decisions are intolerant of religious belief and expression.

PART II-QUESTION IN ISSUE

4. One issue will determine these appeals. Is the decision of the Supreme Court of Canada in *TWU v British Columbia College of Teachers*[2] correct in its interpretation and application of the Charter of Rights and Freedoms ("***Charter***")? The decision is correct.

PART III – STATEMENT OF ARGUMENT

(a) No Facts to Support the Decisions

5. In *TWU v BCCT*, the Supreme Court of Canada determined that there was no factual basis for the decision of the British Columbia College of Teachers to refuse to accredit TWU. This Court decided that TWU was entitled to be accredited by the BC College of Teachers, notwithstanding the TWU "Community Standards." This Court found that TWU is not for

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1 See Affidavit of Dr. Greenman, Appeal Book in SCC File Number 37209, Vol IV, Tab 15 at p 671, in Appeal Book in SCC File Number 37318, Vol II, Tab 11 for discussion of the Policy.

2 2001 SCC 31, [2001] 1 SCR 772 [***TWU v BCCT***].

everybody and that the adoption of counter-cultural ethical beliefs did not necessarily mean that their graduates would pose a risk of harm to the public educational system. It turns out this Court was right. The fears raised by the BCCT have not materialized and TWU continues to graduate high quality teachers to this day. For this reason, the factual case against TWU is much weaker today than it was in 2001. In any event, the Law Societies have not introduced evidence of discrimination or intolerance on the part of TWU graduates.

(b) No Public Interest in Regulating the Religious Policies of TWU

6. No one should be punished for their thoughts. Nor should the State punish the expression of those thoughts through religious practice. There is no public interest in regulating the religious policies of TWU. By way of section 2(d) of the Charter, Parliament created a wall to defend religious freedom and this Court has always defended that wall.[3]

7. Tolerance for religious opinions is not just for teachers.[4] The Charter requires the state to refrain from proscribing or prohibiting ideologies and worldviews for any person or profession. A religious test for those entering a publicly regulated profession is not permitted by the Charter. Lawyers in Canada were subject to a religious test in 1763, when Lord Egremont directed that Quebec adopt the anti-Catholic test of office imposed in England under a statute known as the "Test Act" (the Royal Proclamation of October 7, 1763).[5] The British North America (Quebec) Act 1774 [6] changed this state of affairs and allowed Catholics to hold government office. The Court should say no to a new "Test Act" that would impose a religious test on universities that grant degrees which open doors to the highest offices of this great country.

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[3] See *TWU v BCCT* and *Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11* at para 97 ("Freedom of religious speech and the freedom to teach or share religious beliefs are unlimited, except by the discrete and narrow requirement that this not be conveyed through hate speech.").

[4] Peter Lauwers, "Liberal Pluralism and the Challenge of Religious Diversity," (2008) 79 SCLR 2d 29 [***Lauwers***] at 62 ("Tolerance takes its place as robust virtue at those points at which the tolerating group thinks that the other is blasphemously, disastrously, obscenely wrong"). [BOA Tab 10]

[5] Donald Fyson, "The Royal Proclamation and the Canadiens," Canada Watch (Fall 2013) at 12.[BOA Tab 6]

[6] 14 Geo III c 83.

8. The Church is concerned that acceptance of a religious test does not logically stop at the scrutinizing of the beliefs and practices of institutions. It could just as easily be used to justify scrutiny of the beliefs of individual lawyers, since lawyers also end up playing important roles in access to the profession (through articling programs) and (much more so than universities) access to justice. Professor Ian T. Benson writes:

> Merely pointing out that "nobody is arguing that individuals should be quizzed on their views of marriage" is no comfort at all once one realizes that the logic of the associational inquisition suggests the inevitability of a personal or individual inquisition.[7]

If the Law Societies believe that members of a specific identifiable minority are underrepresented in the legal profession, there are other and much more effective remedies.

9. The Law Societies claim that state neutrality requires them to demand secular worldviews of all whom they accredit, lest the Law Societies be viewed as endorsing the religious views of TWU. This is absurd. The US Supreme Court recently pointed out this reality:

> If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.[8]

10. The LSUC argues it would not accredit a law school that catered to a specific faith group, stating in its factum that it would not accept a population of prospective licensees who were chosen based on "irrelevant personal characteristics."[9] Its Factum does not contemplate an accredited TWU law school, with or without the Policy. In embarking on what Justice Campbell of the Nova Scotia Court of Appeal referred to as a "secularizing mission,"[10] the Law Societies abandoned their obligation of religious neutrality.

11. Canada will benefit from the diversity represented by TWU. Differences of religious and moral opinion do not harm Canada. They are part of what makes this nation strong, tolerant and accepting. It is worth noting that diversity of opinion is essential to change within society. Professor Errol Mendes has identified human dignity as another basis for the protection of religious liberty in Canada:

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7 Iain Benson & Barry Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis Canada, 2017) at p xxxix. [BOA Tab 3] See also *TWU v BCCT* at para 33.

8 *Matal v Tam*, 137 S Ct 1744 at para 16 of opinion of Alito J.

9 Factum of LSUC at paras 6, 18, 19, 115, 132.

10 *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at para 19.

> The Canadian position is based on what is necessary to preserve the essential human dignity of individuals within religious minorities in a society that values multiculturalism and diversity as a constitutional principle which promotes not only the equal concern and respect … of religious minorities as a group, but also individuals within that group that hold sincere and genuine beliefs as to what practices and symbols their religions and beliefs dictate. [11]

12. The debate in Canada about religious diversity should have been settled by the adoption of section 27 of the *Charter*[12] and the *Canadian Multiculturalism Act*.[13] Professors Jukier and Woehrling refer to the Canadian Multiculturalism Act in support of their description of Canada as "a bilingual, multicultural federation operating within a pluralistic society."[14] Professor JK Donlevy got it right when he observed that "Canada is and should be a community of communities."[15] There is no expectation under the Charter of a "moral melting pot."[16]

13. The importance of pluralism is emphasized in statements from two of Canada's Prime Ministers. The first is from Prime Minister Sir Wilfrid Laurier's speech to the Imperial Conference held in London, U.K. in 1911: "I want the marble to remain marble; the granite to remain granite; the oak to remain oak; and out of these elements, I would build a nation great among the nations of the world."[17] The second is from Prime Minister Diefenbaker's declaration at the proclamation of the Canadian Bill of Rights on July 1, 1960:

> I am a Canadian, a free Canadian, free to speak without fear, free to worship in my own way, free to stand for what I think right, free to oppose what I believe wrong, or choose those who shall govern my country. This heritage of freedom pledge to uphold for myself and mankind.[18]

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11 Errol P. Mendes, "Being Reasonable About Reasonable Accommodation," in Christian Brunelle & Patrick A. Molinari, eds, *Reasonable Accommodation and the Role of the State: A Democratic Challenge* (Canadian Institute for the Administration of Justice, 2008) 205 at 220. [BOA Tab 11]

12 See *R v Big M Drug Mart*, [1985] 1 SCR 295, 337-38 [***Big M***].

13 *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp.).

14 Rosalie Jukier & Jose Woehrling, "Religion and the Secular State in Canada," (18/06/2015): Madrid: servicio publicaciones facultad derecho Universidad Complutense Madrid at 183.[BOA Tab 9]

15 JK Donlevy, "Trinity Western Law School: "To Be or Not to Be – That is the Question," Constitutional Forum, Vol. 25, No. 2 (2016) at p 12.[BOA Tab 4]

16 *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at para 212.

17 Canada, Citizen and Immigration Canada, *Discover Canada: The Rights and Responsibilities of Citizenship* at p 66 [***Discover Canada***]. See also Randolph Bourne, "Trans-national America," The Atlantic (July 1, 1916) at p 96.[BOA Tab 1]

18 *Discover Canada* at p 66.

14. Professor Paul W.R. Bowlby addressed the issue of religious pluralism in the public sphere in a publication of the Global Centre for Pluralism in Ottawa in 2008. Professor Bowlby quoted the above noted statement of Prime Minister Laurier in making the point that "the bedrock fact of Canadian history is diversity among its citizens."[19] In his discussion of diversity, Professor Bowlby recognized an unfortunate reality that has also manifested itself in the Decisions: "there appears to be considerable resistance ... often times voiced in terms of a 'Canadianism' which admits diversity, but not religious diversity."[20]

15. Professor Janet Epp Buckingham challenged this narrow view of diversity in her book "Fighting Over God" where she asserted that "law must accept that diversity is a permanent feature of our pluralistic society. Religion is deeply important to many in Canada, providing identity, succour, community, and mutual aid. By substituting secular majoritarianism for Christian majoritarianism, all religions are undermined."[21]

16. This is not just a Canadian problem. On April 5, 2013, a conference at Harvard Law School focused on the same resistance to diversity in law schools south of the border.[22] The debate in the United States of America has been resolved in favour of religious diversity. The American Bar Association continues to accredit law schools operated by faith traditions that have "provisions for student expectations that are very similar to TWU's."[23] Professor Dwight Newman referred to this acceptance of diversity in law school accreditation in his article "On Trinity Western University Controversy: An Argument for a Christian Law School in Canada," where he concluded: "The American experience of religious schools reflects a profound respect for religious diversity, a living together in difference, from which Canadians can learn."[24]

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19 Paul W.R. Bowlby, "Religious Pluralism in the Public Sphere in Canada" (Paper delivered at the 2008 Expert Roundtable on Canada's Experience with Pluralism) online: Global Centre for Pluralism <http://www.pluralism.ca/images/PDF docs/pluralism_papers/bowlby_paper pp8.pdf> at pp 12-13.

20 *Ibid* at 13.

21 Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (Montreal: McGill-Queen's University Press, 2014) at 212.[BOA Tab 5]

22 Nicholas Quinn Rosenkranz et al., "Intellectual Diversity and the Legal Academy," (2013) 37:1 Harvard J. L. & Pub. Pol. 187 at 198.[BOA Tab 15]

23 Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada", (2013) 22:3 Constitutional Forum at p 7.[BOA 13]

24 *Ibid*.

(c) TWU Policy is Consistent With Canadian Human Rights Law

17. The Law Societies do not have the authority to regulate TWU or to judge internal TWU policies that do not demonstrably impact the educational qualifications of TWU graduates. However, even if the Law Societies did have such authority, TWU would meet any public policy demands that the Law Societies could legally place upon TWU.

18. The Law Societies are limited in the choice of public policy criteria that they may impose on law students and law schools. If the Law Societies desire to rely upon the *Charter* or the human rights codes of Ontario[25] or BC[26] to make a decision contrary to the interests of TWU or TWU graduates, they must identify a public policy that TWU or TWU students contravene. There is no *Charter*, statutory or common law principle that is violated by TWU.[27]

19. In addition, there is a privacy consideration that arises under the Charter. TWU has a reasonable expectation that government actors like the Law Societies will not conduct inquiries into private religious beliefs. Privacy is a fundamental principle of our Constitution:

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.[28]

20. This principle of privacy is central to the guarantee of religious freedom in section 2(a) of the *Charter*. Chief Justice Dickson wrote this in *R v Edwards Books and Art Ltd.*:

> In my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The inquiry is all the worse when it is demanded only of members of a non-majoritarian faith, who may have good reason for reluctance about so exposing or articulating their non-conformity.[29]

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25 *Human Rights Code*, RSO 1990, c H.19.

26 *Human Rights Code*, RSBC 1996, c 210 [***BC Code***].

27 It is important at this point to underline the fact that TWU is not subject to the Charter. See *McKinney v University of Guelph*, [1990] 3 SCR 229 ("To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, 'diminish the area of freedom within which individuals can act'.").

28 *R v Dyment*, [1988] 2 SCR 417 at 427-28.

29 *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 779.

21. Section 8 of the *BC Code* accommodates religion by permitting "bona fide and reasonable" discrimination on religious grounds.[30] The LSBC cannot act inconsistent with the *BC* Code This is because Section 4 of the *BC Code*[31] grants statutory primacy to the protections set forth therein.

22. It is important to recognize that the bona fide religious belief exception in the *BC Code*[32] is not simply the result of legislative policy choices that favour *TWU*. The *Charter* requires human rights codes to include bona fide religious belief exceptions. This is clear from the decision of the Supreme Court of Canada in *Reference re Same-Sex Marriage*.[33] In *Reference*, the Supreme Court of Canada indicated that both religious officials and religious institutions could not be "compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs."[34] This same principle was re-stated in the *Civil Marriage Act*,[35] which extends the principle to the "expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others."

23. The Policy is without a doubt an expression of TWU's "belief in respect of marriage."

24. The conclusions of the Supreme Court of Canada in *Reference* would be entirely frustrated, if the religious organization that operates TWU was entitled to refrain from conducting same-sex marriages but was prohibited from teaching and promoting behavior consistent with such a religious belief to students in its law school.

(d) Impoverished View of Religious Liberty

25. The Law Societies suggest that no *bona fide* religious beliefs are at stake. The argument is that because TWU does not assert a sincere religious belief that its religious adherents must be

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30 This appeal is largely the consequence of an academic movement to oppose pluralism and to prevent the accommodation of religion by government. This phenomenon is well analyzed in an article by Paul Horowitz, "Against Martyrdom: A Liberal Argument for Accommodation of Religion," 91:4 Notre Dame L. Rev. 101 (2016).[BOA Tab 8]

31 *BC Code* at s 4.

32 *Ibid* at s 8.

33 2004 SCC 79, [2004] 3 SCR 698, 722-23 [***Reference***]. See also Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto, Calgary, Vancouver, Carswell, 1990) at 137. [BOA Tab 7]

34 *Reference* at 722.

35 SC 2005, c 33, s 3.1.

isolated from those who believe or act differently than they do, the Policy does not represent a vital religious interest of TWU. There is significant danger in governmental evaluations of which religious practices are mandatory and which are not. It is important to note that the idea a religious practice must be "mandatory" in order to be *Charter* protected was rejected by the Supreme Court of Canada in *Syndicat Northcrest v Amselem*:

> To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in Edwards Books, supra, at p 759 ... In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, obligation, precept, commandment, custom or ritual. [36]

26. It is evident that TWU sees itself as having a religious duty to train lawyers in a space where the principles of Exodus 20:14, which forms an important part of its religious tradition, is respected by all. This conviction is not at all contradicted by the fact that TWU admits people of other faiths and viewpoints, because the *sine qua non* condition for admission is that they sign the Policy, thus evidencing their respect for TWU's ethical principles.

27. The no *bona fide* religious beliefs argument of the Law Societies misconceives the Policy. The purpose of the Policy is religious. This is not a case like *Hutterian Brethren* where the interest at stake was the ability to drive on public highways.[37] Here, the interest at stake is the ability of TWU to train students within its faith tradition, which is at the core of the religious interests the *Charter* protects.[38] The Supreme Court of Canada recognized the relevance of the *bona fide* religious beliefs exception in *TWU v BCCT*.[39] In *Caldwell v Stuart*, the Supreme Court of Canada explained why *bona fide* religious belief exceptions are essential for faith-based schools,[40] finding that a requirement that the students and staff of a particular religious school

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[36] [2004] 2 SCR 551, 580-81.

[37] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, see Factum of LSBC at para 145 and Factum of LSUC at para 124.

[38] *Big M* at 336-37.

[39] *TWU v BCCT* at 813-14. See also Victor M. Muniz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context," Osgoode Hall Law Journal (forthcoming) online (November 26, 2015).[BOA Tab 12]

[40] *Caldwell v Stuart*, [1984] 2 SCR 603 at 624-25.

subscribe to the religious beliefs of that school is protected by the *Charter* and not contrary to Canadian law or public policy.

(e) Accommodation of Differences is the Essence of True Equality

28. In a 2008 Canadian Institute for the Administration of Justice Conference on Reasonable Accommodation and the Role of the State: A Democratic Challenge, Justice Lynne Smith (as she then was) wrote on the subject of the "Development of Charter Equality Rights" and included this important observation: "*Andrews* made clear that the definition of "discrimination" to be applied under s. 15 encompasses the unintended effects of legislation or government activities, and that the accommodation of differences is the essence of true equality."[41]

29. In that same Conference, Justice David Brown got to the heart of the matter:[42]

> Where government policy touches upon matters of interest to religions, what stance should it take? … In *Big M Drug Mart*, for example, Dickson C.J. hinted at a notion of equality amongst religions as a necessary principle informing government policy.[43] Martha Nussbaum recently fleshed out this point of view, arguing that the basic principle informing the American tradition of religious freedom is that of equality:
>
> > Insofar as it is a good, defensible value, the separation of church and state is, fundamentally, about equality, about the idea that no religion will be set up as the religion of our nation, an act that immediately makes outsiders unequal. Hence separation is also about protecting religion—minority religion, whose liberties and equalities are always under pressure from the zeal of majorities.
>
> … Of course, if the objective of equal treatment is to ensure that government policy does not render certain groups of people "outsiders" by treating them as unequal, then the equality principle would have to regulate not only the relations between government and religions, but also the relations between the government and any philosophical point of view, religious or non-religious. … The problem was put well by Professor Steven Smith in his review of Nussbaum's book:
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> > The modern political problem—the problem of *e pluribus unum*—is to devise ways of maintaining community in a pluralistic society in which citizens have an equal right to adhere to and express their beliefs but in which, inevitably, not all

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41 Lynn Smith, "Development of *Charter* Equality Rights: The Contribution of the Right Honourable Antonio Lamer" in Christian Brunelle & Patrick A. Molinari, eds, *Reasonable Accommodation and the Role of the State: A Democratic Challenge* (Canadian Institute for the Administration of Justice, 2008) 71 at 79.[BOA Tab 14]

42 David M. Brown, The Courts' Spectacles: Some Reflections on the Relationship Between Law and Religion in *Charter* Analysis," in Christian Brunelle & Patrick A. Molinari, eds, *Reasonable Accommodation and the Role of the State: A Democratic Challenge* (Canadian Institute for the Administration of Justice, 2008) 183[BOA Tab 2] at 198-200.[BOA Tab 2]

> deeply held beliefs will be consistent with those expressed by government. It is, to be sure, a daunting problem.

30. The problem is resolved when the Court places upon the government actors (the Law Societies) the duty to accommodate all *Charter* interests. Section 1 of the *Charter* imposes obligations upon the state, not the private sector. In accommodating TWU, the state harms no *Charter* interest of a third party.[44] All remain free to fully enjoy the rights to which they are entitled under the *Charter*.

PARTS IV & V

31. The Church seeks no costs and requests that no costs be ordered against it.

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

Gerald Chipeur, Q.C.
Jonathan Martin
Miller Thomson LLP

Lawyers for the Intervener,
Seventh-day Adventist Church in Canada

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[44] *Lauwers, supra* note 4 at 45 ("In a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence").[BOA Tab 10]

PART-VI LIST OF AUTHORITIES

Cases **Paragraph**

Statutes

Other Authorities