

**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)

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**FACTUM OF THE INTERVENER,**  
**NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES' ASSOCIATIONS**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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BETWEEN:

**TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT**

APPELLANTS  
(Appellants)

-and-

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AND BETWEEN:

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APPELLANT  
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## PART I – OVERVIEW & STATEMENT OF FACTS

### Who the National Coalition is

1. The National Coalition of Catholic School Trustees' Associations (the "Coalition") is interested in the present appeals to the extent they could impact education delivered from a religious perspective in Canada.
2. The Coalition is a comprehensive alliance of representative associations from the provinces and territories, where separate schools have constitutional status, as well as a national association:
  - a. *Alberta Catholic School Trustees' Association* ("ACSTA") (membership includes Yellowknife Catholic Schools and the Catholic Education Association of Yukon);
  - b. *Ontario Catholic School Trustees' Association* ("OCSTA");
  - c. *Association franco-ontarienne des conseils scolaires catholiques* ("AFOCSC");
  - d. *Saskatchewan Catholic School Boards Association* ("SCSBA"); and
  - e. *Canadian Catholic School Trustees Association* ("CCSTA").
3. In total, the Coalition members represent approximately 61 school boards, 460 trustees, who in turn serve more than 750,000 students. Given the constitutional history of denominational schools in Canada – operating since the 1800s – Catholic schools provide an example of a religious entity which has stood the test of time and continues to successfully function with a distinct religious identity in a society becoming increasingly secular.
4. While operating in a different context (in terms of level of education and religious denomination), the Coalition shares a general interest with TWU to the extent they both have a commitment to religious education. For the Coalition, to maintain the Catholic education system and preserve Catholic identity, schools must have the ability to educate students in an environment that is consistent with their faith which includes the determination of policy and admission.
5. The Coalition agrees with the facts as stated by the parties.

## PART II – POSITION ON QUESTIONS IN ISSUE

6. The Coalition submits:
- a. There is a need for predictability when engaging in adjudicating fundamental freedoms.
  - b. As government actors, law societies must apply carefully defined “public interest” criteria, having regard to the following principles:
    - there is no hierarchy of fundamental rights;
    - there is a duty of state neutrality; and
    - there is a communal or associational aspect central to religious belief.
7. Troubling implications flow from allowing a public body to refuse accreditation simply because of the religious character of the individual or groups seeking approval. This is particularly so in the context of education, where individuals who choose or have chosen to attend religious schools run the risk of having their credentials stripped from them by operation of public law. A public body cannot directly use the *Charter* to regulate constitutionally protected activities within the private sphere. Neither can they do so indirectly by invoking amorphous “*Charter* values” in the “public interest”.

## PART III – STATEMENT OF ARGUMENT

### **Need for predictability when adjudicating fundamental freedoms**

8. Both the courts of appeal below found that the law societies’ decisions infringed TWU’s freedom of religion.<sup>1</sup> With freedom of religion engaged, the analysis turned to balancing *Charter* rights – freedom of religion and equality – and whether a decision against TWU was therefore reasonable.
9. The state regulation of religious schools, as explained in *Loyola*, “poses the question of how to balance robust protection for the values underlying religious freedom with the values

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<sup>1</sup> *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 (“*TWU BCCA*”) at para. 190; *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 (“*TWU ONCA*”) at para. 101.



of a secular state.”<sup>2</sup> These values are often framed as the public interest and include equality considerations.

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

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

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

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

### **Public interest**

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

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<sup>2</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 43.

<sup>3</sup> *Bruker v. Marcovitz*, 2007 SCC 54 at para. 2 [Emphasis added].

<sup>4</sup> *TWU BCCA* at para. 165.

<sup>5</sup> *TWU ONCA* at para. 112.

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

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

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

### **There is no hierarchy of rights**

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

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

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<sup>6</sup> *TWU BCCA* at para. 165.

<sup>7</sup> *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15 at para. 26.

<sup>8</sup> *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25 at para. 187.

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

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

### **State neutrality**

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

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

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

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

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

<sup>12</sup> *Ibid.* at para. 71.

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

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

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

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

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

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

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

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<sup>13</sup> See comments by LeBel J. dissenting in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 SCR 650, 2004 SCC 48 at paras. 66-67.

<sup>14</sup> *Mouvement laïque québécois v. Saguenay (City)*, *supra* at para. 75.

<sup>15</sup> Richard Moon, “The Requirement of Religious Neutrality: Civic Action and Institutional Autonomy”, *The Supreme Court Law Review* (2d) Volume 79, p. 156.

<sup>16</sup> *Ibid.* at p. 157 citing *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at para. 62.

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

### **Communal aspects of religious belief**

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

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

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

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

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<sup>17</sup> Mark A. Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" 79 Sask. L. Rev. 215 (2016) at 262.

<sup>18</sup> Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45(2) Osgoode Hall L.J. 10; *Loyola*, *supra* at paras. 60, 91-96.

<sup>19</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 65.

<sup>20</sup> *Ibid.* at para. 56.

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

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

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

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

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<sup>21</sup> *Ibid.* at para. 64.

<sup>22</sup> *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the “*Alberta Reference*”) at para. 85

<sup>23</sup> *Ibid.* at para. 86, quoted with approval in *Mounted Police Association of Ontario*, *supra* at para. 35 [Emphasis added].

<sup>24</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 59.

<sup>25</sup> *Ibid.* at para. 60.

<sup>26</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94-95 [Emphasis added].

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

### **Conclusion: Religious education context**

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

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

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

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<sup>27</sup> *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 121, 128

<sup>28</sup> *Loyola, supra* at para. 34 citing *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 71.

<sup>29</sup> *Trinity Western University v. College of Teachers*, 2001 SCC 31 at para. 33.

“the right to do collectively what one may do as an individual.”<sup>30</sup> The meaningful exercise of the constitutional guarantee of freedom of religion and association would allow for Evangelical Christian lawyers to be trained in an Evangelical Christian law school.

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

#### **PART V – ORDERS SOUGHT**

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

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



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<sup>30</sup> *Mounted Police Association of Ontario, supra* at para. 36, quoting Dickson J. in the *Alberta Reference* at para. 172.



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**PART VII – STATUTES, REGULATIONS, RULES, ETC.**

N/A