File Number: 37209

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

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

- and -

LAW SOCIETY OF UPPER CANADA

Respondent

- and -

THE ATTORNEY GENERAL OF ONTARIO, ASSOCIATION FOR REFORMED POLITICAL ACTION, THE ADVOCATES' SOCIETY, THE CANADIAN BAR ASSOCIATION, THE CHRISTIAN LEGAL FELLOWSHIP, THE INTERNATIONAL COALITION OF PROFESSORS OF LAW, THE NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES, LAWYERS' RIGHT WATCH CANADA, THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), THE CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CANADIAN COUNCIL OF CHRISTIAN CHARITIES, THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, THE LAW STUDENTS' SOCIETY OF ONTARIO, THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA, THE EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN HIGHER EDUCATION CANADA, THE BRITISH COLUMBIA HUMANIST ASSOCIATION, THE CANADIAN SECULAR ALLIANCE, EGALE CANADA HUMAN RIGHTS TRUST, THE FAITH, FEALTY & CREED SOCIETY, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, and THE FAITH AND FREEDOM ALLIANCE, THE WORLD SIKH ORGANIZATION OF CANADA, LESBIANS GAYS BISEXUALS AND TRANS PEOPLE OF THE UNIVERSITY OF TORONTO (LGBTOUT), THE UNITED CHUCH OF CANADA, and START PROUD and OUTLAWS

Interveners

FACTUM OF THE INTERVENER THE UNITED CHURCH OF CANADA
Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

Counsel for the United Church of Canada

Sean Dewart/Tim Gleason/Jonathan Schachter
DEWART GLEASON LLP
102 - 366 Adelaide Street West
Toronto ON M5V 1R9
Tel.: (416) 971-8000
Fax: (416) 971-8001
Email: sdewart@dgllp.ca

Agent for the United Church of Canada

Moira Dillon
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa ON K1P 5H9
Tel.: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Robert Staley **BENNETT JONES LLP** Suite 3400, P.O. Box 130 One First Canadian Place Toronto ON M5X 1A4 Tel: (416) 777-4857 Fax: (416) 863-1716 staleyr@bennettjones.ca Counsel for the Appellants, Trinity Western University and Brayden Volkenant	Mark Jewett **BENNETT JONES LLP** 1900 – 45 O'Connor Street Ottawa ON K1P 1A4 **Attention: Sheridan Scott** Tel: (613) 683-2328 Fax: (613) 683-2323 jewettm@bennettjones.com Agent for the Appellants, Trinity Western University et al.
Guy Pratte **BORDEN LADNER GERVAIS LLP** Bay Adelaide Centre, East Tower 22 Adelaide Street West Toronto, Ontario M5H 4E3 Tel: (416) 350-2638 Fax: (416) 367-6749 gpratte@blg.com Counsel for the Respondent, the Law Society of Upper Canada	Nadia Effendi **BORDEN LADNER GERVAIS LLP** 100 Queen Street, Suite 1300 Ottawa ON K1P 1J9 Tel: (613) 237-5160 Fax: (613) 230-8842 neffendi@blg.com Agent for the Respondent, the Law Society of Upper Canada
S. Zachary Green **ATTORNEY GENERAL OF ONTARIO** 720 Bay Street, 4th Floor Toronto ON M7A 2S9 Tel: (416) 326-8517 Fax: (416) 326-4015 zachary.green@ontario.ca Counsel for the Intervener, Attorney General of Ontario	Robert E. Houston **BURKE-ROBERTSON** 441 MacLaren Street, Suite 200 Ottawa ON K2P 2H3 Tel: (613) 236-9665 Fax: (613) 235-4403 rhouston@burkerobertson.com Agent for the Intervener, Attorney General of Ontario

Barry Bussey **CANADIAN COUNCIL OF CHRISTIAN CHARITIES** 1-43 Howard Avenue Elmira ON N3B 2C9 Tel : (519) 669-5137 Fax : (519) 669-3291 barry.bussey@cccc.org Counsel for the Intervener, Canadian Council of Christian Charities	Eugene Meehan **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Agent for the Intervener, Canadian Council of Christian Charities
Avnish Nanda **NANDA & COMPANY** 3400 Manulife Place 10180 – 101 Street N.W. Edmonton AB T5J 4K1 Tel: 780-801-5324 Fax: 587-318-1391 avnish@nandalaw.ca Counsel for the Intervener, World Sikh Organization of Canada	Marie-France Major **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 102 Fax: (613) 695-8580 mfmajor@supremeadvocacy.ca Agent for the Intervener, World Sikh Organization of Canada
Andre Schutten **ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA** 130 Albert Street, Suite 1705 Ottawa ON K1P 5G4 Tel: (613) 297-5172 Fax: (613) 249-3238 andre@arpacanada.ca Counsel for the Intervener, Association for Reformed Political Action (ARPA) Canada	Marie-France Major **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 102 Fax: (613) 695-8580 mfmajor@supremeadvocacy.ca Agent for the Intervener, Association for Reformed Political Action (ARPA) Canada

W.J. Sammon **BARNES, SAMMON LLP** 200 Elgin Street, Suite 400 Ottawa ON K2P 1L5 Tel.: (613) 594-8000 Fax: (613) 235-7578 wjs@barnessammon.ca Counsel for the Intervener, Canadian Conference of Catholic Bishops	
Peter Barnacle **CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS** 2705 Queensview Drive Ottawa ON K2B 8K2 Tel.: (613) 820-2270, Ext: 192 Fax: (613) 820-7244 barnacle@caut.ca Counsel for the Intervener, Canadian Association of University Teachers	Colleen Bauman **GOLDBLATT PARTNERS LLP** 500 – 30 Metcalfe Street Ottawa ON K1P 5L4 Tel: 613-482-2455 Fax: 613-235-3041 cbauman@goldblattpartners.com Agent for the Intervener, Canadian Association of University Teachers
Chris G. Paliare **PALIARE, ROLAND ROSENBERG, ROTHSTEIN, LLP** 155 Wellington Street West, 35th Floor Toronto ON M5V 3H1 Tel.: (416) 646-4318 Fax: (416) 646-4301 chris.paliare@paliareroland.com Counsel for the Intervener, The Advocates' Society	Jeffrey Beedell **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel: 613-786-0171 Fax: 613-788-3587 jeff.beedell@gowlingwlg.com Agent for the Intervener, The Advocates' Society

Susan Ursel **URSEL PHILLIPS FELLOWS HOPKINSON LLP** 1200 - 555 Richmond Street West Toronto ON M5V 3B1 Tel.: (416) 969-3515 Fax: (416) 968-0325 sursel@upfhlaw.ca Counsel for the Intervener, Canadian Bar Association	Jeffrey Beedell **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel: 613-786-0171 Fax: 613-788-3587 jeff.beedell@gowlingwlg.com Agent for the Intervener, Canadian Bar Association
Derek B.M. Ross **CHRISTIAN LEGAL FELLOWSHIP** 285 King Street, Suite 202 London ON N6B 3M6 Telephone: (519) 601-4099 Fax: (519) 601-4098 execdir@christianlegalfellowship.org Counsel for the Intervener, Christian Legal Fellowship	Eugene Meehan **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Agent for the Intervener, Christian Legal Fellowship
Albertos Polizogopoulos / D. Geoffrey Cowper, Q.C. / Kristin Debs / Geoffrey Trotter **VINCENT DAGENAIS GIBSON LLP/S.R.L.** 260 Dalhousie Street, Suite 400 Ottawa ON K1N 7E4 Tel : 613-241-2701 Fax: 613241-2599 albertos@vdg.ca Counsel for the Interveners, the Evangelical Fellowship of Canada and Christian Higher Education Canada	

Rahool P. Agarwal **NORTON ROSE FULBRIGHT CANADA LLP** Royal Bank Plaza, South Tower 200 Bay Street, Suite 3800 Toronto ON M5J 2Z4 Tel.: (416) 216-3943 Fax: (416) 216-3930 rahool.agarwal@nortonrose.com Counsel for the Intervener, Law Students' Society of Ontario	Matthew J. Halpin **NORTON ROSE FULBRIGHT CANADA LLP** 45 O'Connor Street, Suite 1500 Ottawa ON K1P 1A4 Tel.: (613) 780-8654 Fax: (613) 230-5459 matthew.halpin@nortonrosefulbright.com Agent for the Intervener, Law Students' Society of Ontario
Gerald D. Chipeur **MILLER THOMSON LLP** 3000, 700- 9th Avenue SW Calgary AB T2P 3V4 Tel: (403) 298-2425 Fax: (403) 262-0007 gchipeur@millerthomson.com Counsel for the Intervener, Seventh-day Adventist Church in Canada	Eugene Meehan **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Agent for the Intervener, Seventh-day Adventist Church in Canada
Albertos Polizogopoulos **VINCENT DAGENAIS GIBSON LLP/S.R.L.** 260 Dalhousie Street, Suite 400 Ottawa ON K1N 7E2 Tel: (613) 241-2701 Fax: (613) 241-2599 albertos@vdg.ca Counsel for the Interveners, Evangelical Fellowship of Canada and Christian Higher Education Canada	

Gwendoline Allison **FOY ALLISON LAW** 210 – 2438 Marine Drive Vancouver, British Columbia V7V 1L2 Tel: (604) 922-9282 Fax: (604) 922-9283 gwendoline.allison@foyallison.com Counsel for the Interveners, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and The Faith and Freedom Alliance	Albertos Polizogopoulos **VINCENT DAGENAIS GIBSON LLP/S.R.L.** 260 Dalhousie Street, Suite 400 Ottawa ON K1N 7E2 Tel: (613) 241-2701 Fax: (613) 241-2599 albertos@vdg.ca Agent for the Interveners, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and The Faith and Freedom Alliance
Eugene Meehan **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Counsel for the Intervener, International Coalition of Professors of Law	Marie-France Major **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 102 Fax: (613) 695-8580 mfmajor@supremeadvocacy.ca Agent for the Intervener, International Coalition of Professors of Law
Wesley J. McMillan **HAKEMI & RIDGEDALE LLP** 1500-888 Dunsmuir Street Vancouver, British Columbia V6C 3K4 Tel.: (604) 259-2269 Fax: (604) 648-9170 wmcmillan@hakemiridgedale.com Counsel for the Intervener, British Columbia Humanist Association	Guy Régimbald **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel.: (613) 786-0197 Fax: (613) 563-9869 guy.regimbald@gowlingwlg.com Agent for the Intervener, British Columbia Humanist Association

Steven Barrett **GOLDBLATT PARTNERS LLP** 20 Dundas Street West, Suite 1100 Toronto ON M5G 2G8 Tel.: (416) 979-6422 Fax: (416) 591-7333 sbarrett@goldblattpartners.com Counsel for the Intervener, EGALE Canada Human Rights Trust	Colleen Bauman **GOLDBLATT PARTNERS LLP** 500 – 30 Metcalfe Street Ottawa ON K1P 5L4 Tel: 613-482-2455 Fax: 613-235-3041 cbauman@goldblattpartners.com Agent for the Intervener, EGALE Canada Human Rights Trust
Blake Bromley **BENEFIC LAW CORPORATION** 1250 - 1500 West Georgia Street P.O. Box 62 Vancouver, British Columbia V6G 2Z6 Tel: (604) 683-7006 Fax: (604) 683-5676 blake@beneficgroup.com Solicitor for the Intervener, Faith, Fealty and Creed Society	Michael J. Sobkin 331 Somerset Street West Ottawa ON K2P 0J8 Tel.: (613) 282-1712 Fax: (613) 288-2896 msobkin@sympatico.ca Agent for the Intervener, Faith, Fealty and Creed Society
Tim Dickson **JFK LAW CORPORATION** 640-1122 Mainland Street Vancouver, British Columbia V6B 5L1 Telephone: (604) 687-0549 Fax: (604) 687-2696 tdickson@jfklaw.ca Counsel for the Intervener, Canadian Secular Alliance	Guy Régimbald **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel.: (613) 786-0197 Fax: (613) 563-9869 guy.regimbald@gowlingwlg.com Agent for the Intervener, Canadian Secular Alliance
Eugene Meehan **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855, Ext: 101 Fax: (613) 695-8580 emeehan@supremeadvocacy.ca Counsel for the Intervener, National Coalition of Catholic School Trustees'	Thomas Slade **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa ON K2P 0R3 Tel: (613) 695-8855 Fax: (613) 695-8580 tslade@supremeadvocacy.ca Agent for the Intervener, National Coalition of Catholic School Trustees'

Julius H. Grey **GREY, CASGRAIN** 1155 René-Lévesque Ouest, Suite 1715 Montréal, Quebec H3B 2K8 Tel.: (514) 288-6180, Ext: 229 Fax: (514) 288-8908 jhgrey@greycasgrain.net Counsel for the Intervener, Lawyer's Right Watch	Guy Régimbald **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel.: (613) 786-0197 Fax: (613) 563-9869 guy.regimbald@gowlingwlg.com Agent for the Intervener, Lawyer's Right Watch
Marlys A. Edwardh **GOLDBLATT PARTNERS LLP** 1039-20 Dundas Street West, Box 180 Toronto ON M5G 2G8 Tel.: (416) 979-4380 Fax: (416) 979-4430 medwardh@goldblattpartners.com Counsel for the Interveners, Start Proud and OUTlaws	Colleen Bauman **GOLDBLATT PARTNERS LLP** 500 – 30 Metcalfe Street Ottawa ON K1P 5L4 Tel: 613-482-2455 Fax: 613-235-3041 cbauman@goldblattpartners.com Agent for the Interveners, Start Proud and OUTlaws
Angela Chaisson and Marcus McCann 197 Spadina Avenue, Suite 402 Toronto ON M5T 2C8 Tel : (647) 567-3536 Fax : (647) 977-9074 law@chaisson.ca Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto	Yael Wexler **FASKEN MARTINEAU DUMOULIN LLP** 55 Metcalfe Street, Suite 1300 Ottawa ON K1P 6L5 Tel: (613) 696-6860 Fax: (613) 230-6423 ywexler@fasken.com Ottawa Agent for the Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto
John Norris and Breese Davies 100 – 116 Simcoe Street Toronto ON M5H 4E2 Tel: (416) 596-2960 Fax: (416) 596-2598 john.norris@simcoechambers.com Counsel for the Intervener, Criminal Lawyers' Association	Matthew Estabrooks **GOWLING WLG (CANADA) LLP** 2600 – 160 Elgin Street Ottawa ON K1P 1C8 Tel: (613) 786-0211 Fax: (613) 788-3573 matthew.estabrooks@gowlingwlg.com Ottawa Agent for the Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

TABLE OF CONTENTS

PAGE

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. An individual's freedom of conscience and religion is critical to a pluralistic, democratic society. This right and the myriad religious beliefs in Canada are best protected when the governance of public institutions is entirely secular and neutral.

2. Although this appeal involves issues of religious freedom and the dignity of gay and lesbian Canadians, it primarily concerns the Law Society of Upper Canada's legitimate role in determining which law schools' graduates are eligible for admission to the legal profession, and the exercise of its statutory discretion in maintaining the rule of law, advancing the cause of justice and protecting the public interest.

3. It is entirely reasonable for the Law Society of Upper Canada to determine that it will not legitimize in any manner, far less accredit, a law school that engages in discriminatory practices. Law students who hold discriminatory beliefs are free to associate with like-minded individuals and, within limits, to express their discriminatory views at secular law schools where the diversity and respect that underlie all *Charter* values are promoted. These students' s. 2 rights do not extend to a requirement that the Law Society accredit a law school that enforces compulsory ideological conformity to discriminatory beliefs as a condition of enrolment.

4. Unlike natural persons, corporations and institutions are unable to hold beliefs and do not have consciences. The United Church is concerned about efforts to expand s. 2(a) in a manner that would give such organizations license to discriminate against those who disagree with the precepts of the organization's principals.

5. The fundamental purpose of s. 2(a) of the *Charter* is to protect individuals' rights to entertain and manifest their religious beliefs without fear of reprisal. Broadening its scope to protect organizations would enable those organizations to defend their own opaque and discriminatory decisions in the name of faith. This would create considerable mischief in the interests of protecting the collective dimension of religious belief, a dimension that is already protected by individuals' freedom of association.

PART II – ISSUES

6. The issue on this appeal is whether, in the exercise of its statutory mandate to regulate the legal profession, the Law Society of Upper Canada acted reasonably in refusing to accredit the appellants' proposed law school.

PART III – ARGUMENT

Lawyers play a crucial role in the defence of fundamental rights

7. The legal profession plays a central role in maintaining the rule of law, advancing the cause of justice, and protecting the public interest. Law schools are therefore a unique environment, in which future lawyers are trained to understand Canada's legal traditions and to apply constitutional principles, which, as lawyers, they will be charged with protecting.

8. There is a fundamental public interest in ensuring that these students are trained in an environment that respects *Charter* values and democratic ideals, fosters pluralism and free expression, and in particular rejects discrimination and compelled ideological conformity to a particular faith.

Law Societies are entitled to deference in their governance of the legal profession

9. The legal profession's central role in advancing the cause of justice and protecting the public interest is codified in s. 4.2 of the *Law Society Act*. It is well within the Law Society's area of expertise and mandate to preserve the profession's integrity.

10. This Court has repeatedly, and recently, affirmed the independence of law societies in regulating the legal profession. In particular, the Court has held that the legal profession is "self-governing in virtually every aspect", and that law societies are intended to be the primary bodies that articulate and enforce professional standards among lawyers. Law societies ensure "the good governance of the profession", and are best suited to determine the meaning of the 'purpose' clause in their home statutes.

> *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 886; *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at ¶40; *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39 at ¶15; and *Green v Law Society of Manitoba*, 2017 SCC 20 at ¶¶29-31.

11. Administrative decision-makers are entitled to deference in their consideration and balancing of *Charter* values. In *Doré v Barreau du Québec*, the Court explained that "An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values." The proper approach is as follows:

> [A]n administrative decision-maker … balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. … Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives
>
> *Doré v Barreau du Québec*, 2012 SCC 12 at ¶¶47 & 55-56.

All beliefs are best protected when public institutions are governed secularly and neutrally

12. The Court should not interpret s. 2(a) rights in a manner that intrudes on the Law Society's independence, neutrality and secularism. The United Church and its members, like all religious institutions and their members, benefit from an independent, impartial and secular state, and equally from an independent Law Society that decides matters impartially based on secular ideals. The rights of religious minorities are best protected when public institutions show no preference or favouritism. As Justice Abella explained in *Loyola High School v Québec*:

> Religious freedom must … be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights…
>
> *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 at ¶47 [*Loyola*].

13. The appellants "affirm that the Bible is the authoritative and divinely-inspired word of God". The TWU's interpretation of the Bible includes an absolute proscription against certain conduct which is characteristic of groups of individuals such as gays and lesbians. TWU's community is governed by a Community Covenant that, in keeping with TWU's governors' ideology, prohibits community members from certain conduct including "sexual intimacy that violates the sacredness of marriage between a man and a woman". This compulsory ideological conformity effectively excludes students on the basis of their sexual orientation or marital status.

It is also demeaning and degrading of these individuals, explicitly characterizing them as immoral outcasts, who are worthy of being shunned, or excluded by being pitied.

14. As noted by the Divisional Court "all law schools, that are currently accredited by [the Law Society], provide equal access to all applicants. No currently accredited law school has any policy that discriminates in terms of who may apply for entry to that law school. TWU seeks to be the sole exception": 2015 ONSC 4250 at ¶99.

15. Given that the number of positions in accredited Canadian law schools is finite, the accreditation of a law school governed by discriminatory policies would reduce access to the profession for non-conforming students. By doing so, the Law Society would be affording special access to the small minority of law students who would be genuinely welcome at TWU. It is no answer that these students may seek admission to non-discriminatory law schools. Accreditation would afford greater opportunities to students who conform to the discriminatory ideology that TWU seeks to impose.

The scope of freedom of religion

16. The United Church does not dispute the right of individual members of the Evangelical Free Church to hold faith-based beliefs. In the United Church's submission, this right is crucial in a pluralistic democracy. These individuals' rights do not, however, justify compelling other individuals to share these beliefs. Further, freedom of religion and conscience ought not to extend to non-natural persons, which are incapable of forming thought, far less holding beliefs. If s. 2(a) rights were to be extended to non-natural persons, the shareholders or others who control the institution in question would thereby acquire enhanced rights, commensurate with the reach and influence of the institution in question, at the expense of individuals who are subject to the institution’s influence or control.

17. More concretely, if Trinity Western University enjoys s. 2 rights, the small handful of people who decide what TWU "believes" from time to time will impose their own personal beliefs on the thousands of students who have any dealings with the university. Those students' right to believe what they want and associate with others who share their views should not be protected by amplifying the rights of the small number of individuals who govern TWU from time to time, and transforming those individuals' beliefs into the "beliefs" of a corporation.

18. Despite the collective fashion in which religious belief is sometimes expressed, faith and belief are deeply personal. This Court's early *Charter* jurisprudence cast freedom of religion as an individual right, noting that "the relationship between respect for individual conscience and the valuation of human dignity… [motivates its] unremitting protection." Although some organizations assume the fiction of legal personhood, consciousness and conscience are reserved for human beings.

> *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at ¶121, *per Dickson* J [*Big M*]; and *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 155.

19. It is this freedom of human conscience that the *Charter* protects, subject to the fundamental freedoms of others:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.
>
> *Big M*, *ibid* at ¶123, *per Dickson* J.

20. The expansive interpretation of the right to freedom of religion urged by the appellants undermines the freedom of thought of others, and threatens to eviscerate s. 2 rights from within. It would permit adherents, or organizations that purport to represent them, to rely on their beliefs as a shield to justify limiting the freedoms of others.

21. This Court has held that s. 2(a) rights cannot authorize individuals to make faith-based decisions for others. In *B(R) v Children's Aid Society of Metropolitan Toronto*, this Court considered the right of parents to refuse medical treatment for their infant on religious grounds. The Court explained that, "While it is difficult to conceive of any limitations on religious beliefs, the same cannot be said of religious practices, notably when they impact on the fundamental rights and freedoms of others. … As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others…"

> *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at *383* [*B(R)*].

22. The United Church endorses with respect the *dicta* of Justice Gascon in *Mouvement laïque québécois v Saguenay*, and submits that there are sound policy reasons for their application in the context of legal education and the governance of the legal profession:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. **Neutrality is required of institutions and the state, not individuals…** [A] neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 of the Canadian *Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the Canadian *Charter*, but also with a view to promoting and enhancing diversity…
>
> … **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.
>
> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at ¶¶74-*75*, *per* Gascon J [Citations omitted, emphasis added].

23. It is not the faith of TWU's governors that grounded the Law Society's decision, but the institution's approach of imposing selective rules on the community that necessarily discriminate against, and undermine the dignity of, gay and lesbian people. Contrary to the appellants' submissions, TWU graduates will not be denied admission to the legal profession because of their religious beliefs, but rather because of the discriminatory manner in which their school is governed.

24. For these reasons, the United Church submits that the right to freedom of conscience and religion belongs to individuals, and not to TWU as an institution. The *Charter* confers this right on "everyone", and not on every "person". This Court has interpreted "everyone" to include corporations only where corporations are capable of enjoying the right in issue. For example, corporations cannot enjoy life, liberty and security of the person, and so they are not protected by s. 7.

> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1002-1004, *per* Dickson CJ, and Lamer and Wilson JJ.

25. Following *Loyola*, it remains unclear whether corporations enjoy religious freedom under s. 2(a) of the *Charter*. The majority expressly declined to decide this issue. In joint reasons concurring in the result in *Loyola*, the Chief Justice and Justice Moldaver would have extended the constitutional protection of freedom of religion to religious organizations on the basis that the communal character of religion requires this.

> *Loyola* , *supra* at ¶33, *per* Abella J, and at ¶91, *per* McLachlin CJ and *Moldaver* J.

26. These concurring reasons quote an academic passage, cited by Justice Bastarache in his dissenting reasons in *Syndicat Northcrest v Amselem*, which suggests that "any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief."

> *Loyola*, *ibid* at ¶92, quoting *Syndicat Northcrest v Amselem*, 2004 SCC 47 at ¶*137*, Bastarache J quoting "Faith as a Secular Value" (2000), 45 *McGill LJ* 1 at 25.

27. The United Church agrees that the practice of religion necessarily involves both individual and collective dimensions, and that freedom of religion demands that adherents be permitted to develop and express their beliefs collectively. Thus, the United Church agrees with the sentiments expressed in the concurring reasons in *Loyola*, that "individual and collective aspects of freedom of religion are indissolubly intertwined". The rights of individuals to practice their beliefs, whether individually or collectively, are protected only insofar as their practices do not interfere with the fundamental rights of others.

28. As this Court observed in *B(R) v Children's Aid Society of Metropolitan Toronto*, the *Charter* protects freedom of beliefs, but harmful practices must yield to the fundamental rights of others. The right of adherents to associate can be adequately protected with reference to their individual rights, without adopting the fiction that corporations can think and believe.

> *B(R)*, *supra* at 383; and *Big M*, *supra* at ¶123, *per Dickson* J.

29. A constitutional right may protect collective endeavours while still belonging to the individual. This Court's analysis of freedom of association provides an analogue: an individual's exercise of rights "might prove impossible without the cooperation of others", but the right "belongs to the individual as a personal act. It does not become the property of the group formed through its exercise." Both of these rights are limited where their exercise comes into conflict with the freedoms of others.

R v Advance Cutting & Coring Ltd., 2001 SCC 70 at ¶176, *per* LeBel J [*Advance Cutting & Coring*].

30. If, as Justice Dickson explained in *Big M*, s. 2(a) protects the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly, and the right to manifest religious belief by worship, practice, teaching, and dissemination, there is no need to extend its protection to organizations. The communal character of religion is protected by virtue of the fact that individual adherents, who undoubtedly have rights under s. 2(a), are free to associate under s. 2(d).

31. The TWU's Community Covenant provides direct evidence of the ideological conformity that the appellants seek to impose. Freedom of religion, as originally conceptualized by this Court, is intended to provide a shield to protect individuals from ideological coercion, not to endow institutions with a sword to force the ideological conformity of individuals. Just as this Court has held that freedom of association includes a right to be free from compelled ideological conformity, so freedom of religion includes a right to be free from compelled ideological conformity to the Community Covenant.

Advance Cutting & Coring, *ibid* at ¶176, *per* LeBel J

32. In *Burwell v Hobby Lobby Stores, Inc*., a majority of the US Supreme Court extended religious protection (albeit statutory and not constitutional) to for-profit corporations on the basis of their owners' religious beliefs. In the result, the beliefs of a tiny group of shareholders dictated reproductive rights for thousands of employees. In a compelling dissent, Justice Ginsburg explained that one would not expect corporations to qualify for religious exemptions because "religion is characteristic of natural persons, not artificial legal entities."

Burwell v Hobby Lobby Stores, Inc., 573 US ____ at 73 (2014), *Ginsburg* J, dissenting.

33. Extending the right to freedom of belief to organizations, as the American experience demonstrates, can broadly affect other individuals, such as employees, consumers, students and patients. Ultimately, this hinders democracy, and invites organizations to discriminate against third parties, with near impunity, not just against LGBTQ persons, as in this case, but against adherents of other religions. Section 2(a) claims by organizations will, thus, undermine the true purpose of the right, namely to ensure that no individuals are forced to act in a manner contrary to their beliefs, seemingly for the sole purpose of enabling institutional conformity and coercion.

34. In his analysis of the *Hobby Lobby* decision in the US, Alex Luchenitser notes that "When one person uses a law to impose their religious beliefs on another, religious freedom suffers. … Religion should not become a trump card that allows one who professes it to hire or serve whomever they want." In the United Church's submission, the rights of adherents of all faiths are at risk if s. 2(a) is extended to protect organizations' discriminatory policies.

> A.J. Luchenitser, "New Era of Inequality? *Hobby Lobby* and Religious *Exemptions* from Anti-Discrimination Laws" (2015) 9 Harv L & Pol'y Rev 63 at 88.

35. Alternatively, this is not the proper case for the Court to determine this issue. The extension of s. 2(a) rights to organizations raises serious concerns that have not properly been canvassed in the courts below. On the limited record before this Court, it is clear that such an expansion of the right would create more mischief than it might cure.

36. As Professor Kathryn Chan notes in a forthcoming article, this appeal and the BC companion appeal raise difficult questions about the identity of the persons whose religious rights have been engaged. In particular, Professor Chan asks "if TWU's religious freedom *qua* institution was interfered with, what is the nature of that religious freedom and what characteristics of TWU are relevant to its exercise", and "if the Benchers' decision interfered with the religious freedom of persons associated with TWU, who are the members of that group?"

> K. Chan, "Identifying the Institutional Religious Freedom Claimant" (June 29, 2017), (2017) 95 Cdn Bar Rev at 7 (forthcoming in 2017) online: SSRN <https://ssrn.com/abstract=2994985> [Chan, "Identifying"]

37. Professor Chan highlights the difficulty of determining these important issues in the absence of a factual context:

> None of these questions about the identity of the religious freedom claimant(s) has been consistently or carefully answered in the decisions rendered so far. The courts have included both the institution and a range of people associated with the institution in their descriptions of those whose religious freedoms are engaged by the accreditation decisions, using terms such as "TWU", "the TWU community", "individual members, including teachers, students, and staff of TWU", "TWU graduates", "those involved with TWU", and "Evangelical Christians." **With regard to the identifying characteristics of TWU itself, these have not been put in issue at all. The law societies and the courts appear to have taken TWU's position on this point at face value, adopting TWU's descriptions of itself as a "private religious educational community" and as "an educational arm of the Evangelical Christian Church".** This lack of attention to TWU's corporate

> personality stands in striking contrast to the manner in which the courts have scrutinized the corporate identity of the law societies, carefully parsing their enabling statutes to determine their regulatory objects and the limits of their powers.
>
> Chan, "Identifying", *ibid* at 8 [Citations omitted, emphasis added]

38. In the case at bar, an organizational freedom of religion would permit TWU's decision makers to constrain the private behaviour of its law students and *de facto* to prevent certain groups from applying to study at its law school. This is in spite of the fact that there is no tenable argument by individual members of the TWU community that their s. 2(a) rights have been infringed by the Law Society. Nothing in the Law Society's decision not to accredit TWU's law school limits the freedom of individual TWU community members to believe what they wish or practice in accordance with their faith.

39. With respect to the individual appellant, Brayden Volkenant, s. 2(a) does not confer a right to impose his beliefs on others, or to have his law school of choice accredited if it has determined to discriminate against certain vulnerable groups.

40. In principle, the effects of the Community Covenant on the hypothetical gay or lesbian (or unmarried couple) who may attend TWU's law school are the same as the effects of the *Lord's Day Act* at issue in *Big M*: it works a sectarian form of coercion inimical to the dignity of adherents of other beliefs.

PART IV – COSTS

41. The United Church does not seek costs and asks that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____ _____

Tim Gleason / Sean Dewart / Jonathan Schachter
Counsel for The United Church of Canada

PART V – TABLE OF AUTHORITIES