Court File No.: 37209

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS

- and -

LAW SOCIETY OF UPPER CANADA

RESPONDENT

and

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PART I OVERVIEW

1. In reply to the facta of the interveners, the Law Society makes these submissions with respect to the following issues:

(a) the Law Society's Decision does not result from an intolerance of the religious beliefs of Evangelical Christians and the TWU community;

(b) the Decision does not result in any limitation on access to the Ontario bar for Evangelical Christians;

(c) the Decision properly recognizes that *Charter* rights are inherently limited by the rights and freedoms of others; and

(d) the *Doré/Loyola* approach represents an appropriate analytical framework for the judicial review of the Decision.

PART II STATEMENT OF ARGUMENT

A. The Law Society's Decision does not result from an intolerance of the religious beliefs of Evangelical Christians and the TWU community

i. The Law Society respects the beliefs of the TWU community

2. Certain interveners have asserted or implied that the Law Society's Decision was premised on, or reflects, an intolerance of Evangelical Christians and their beliefs.[1] It was further asserted that the Law Society has "punished" Evangelical Christians for their religious beliefs.[2]

3. The Law Society replies that:

(a) It does not challenge the legitimacy of the religious views held by the TWU community;

(b) It does not doubt the sincerity of the religious beliefs of the Appellants as reflected in the Community Covenant;

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[1] See e.g. Factum of the Intervener, International Coalition of Professors of Law at paras 1-2.
[2] Factum of the Intervener, Christian Legal Fellowship at para 3.

(c) It does not and has never challenged the integrity, competence or good character of TWU graduates. The Law Society accepts that they will be competent to practice law. Indeed, many lawyers practicing law in Ontario are Evangelical Christians;

(d) It does not suggest that lawyers trained at TWU would be more likely to discriminate than any other lawyer, in contrast to the position of the B.C. College of Teachers in *Trinity Western University v. British Columbia College of Teachers*;[3] and,

(e) It has never taken issue with the fact that many TWU students voluntarily wish to sign the Community Covenant and structure their lives in accordance with the religious beliefs it embodies (as aptly stated by the Attorney General of Ontario). Rather, the Law Society's concern is the mandatory nature of the Community Covenant and its adverse impact on equality of access to requisite legal education for those unwilling or unable to sign the Community Covenant.[4]

4. Indeed, the Law Society is constitutionally and statutorily bound to respect equally each individual's *Charter*-protected rights and freedoms. It is from this obligation of equal respect - and to ensure equality of access based on merit - that its Decision not to accredit TWU stems.

ii. The Law Society did not prefer one group over another

5. Certain interveners suggest that the Law Society made a "choice" in favour of the LGBTQ community over Evangelical Christians.[5] In reply, the Law Society makes three points.

6. First, in fostering a regime where access to accredited legal education is determined based on merit and not on any exclusionary ground, the Law Society is ensuring equality of access for <u>all</u> prospective law school students. The Law Society is manifestly not "choosing" any one group or "favouring" any one right.

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[3] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772.
[4] Factum of the Attorney General of Ontario at paras 11-12.
[5] See the factum of the Interveners, Evangelical Fellowship of Canada and Christian Higher Education at para 21 and factum of the Intervener, Association for Reformed Political Action Canada at para 4.

7. Second, the Law Society reiterates that the admissions policy of TWU excludes not only members of the LGBTQ community, but also individuals who do not share the same thoroughly Evangelical Christian worldview as members of the TWU Community. These include individuals from other faiths, including the Jewish, Muslim or Buddhists faith, as well as Atheists and Agnostics. In addition, TWU's admission policy can have the effect of excluding unmarried individuals and women.[6] Consequently, in denying to accredit TWU's proposed law school, the Law Society was concerned with ensuring that accredited legal education continue to be accessible to any individual regardless of religion, gender, marital status - and not only sexual orientation.

8. Third, the International Coalition of Professors of Law claims that because the Law Society emphasises in its factum the distinctly Christian content within the Community Covenant, the Decision impugns the Christian nature of the TWU community.[7] This misinterprets the Law Society's purpose which is only to highlight the fact that the requirement to sign the Community Covenant has the effect of excluding individuals who do not share TWU's religious beliefs - as found by the Divisional Court.[8] The Law Society does not single out any language of the Covenant to impugn or disparage the religious beliefs that are the basis for the content of the Covenant.

B. Denial of accreditation is not denial of access to the bar

9. Certain interveners base their submissions on the premise that denial of accreditation is tantamount to the denial of access to the Ontario bar.

10. As a preliminary matter, it should be borne in mind that there is an incongruity between the interveners' submissions regarding the importance of access to the Ontario bar for prospective TWU law graduates and the original submission of TWU for accreditation. In its application to the Federation of Law Societies, TWU explained that the intended purpose of the

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[6] See the factum of the Respondent, the Law Society of Upper Canada at paras 22-25 for the Law Society's submissions on the discriminatory exclusion resulting from TWU's admission policy. Court of Appeal Decision at paras 117, 119, AB, Vol III, Tab 6; Divisional Court Decision at paras 117, 119, AB, Vol III, Tab 4; Report of Pamela Klassen, AB, Vol VIII, Tab 24B, Exhibit "B" to the Affidavit of Pamela Klassen sworn 23 October 2014, AB, Vol VIII, Tab 24; Affidavit of Helen Kennedy sworn 24 October 2014 at paras 18–21, AB, Vol V, Tab 21.

[7] Factum of the Intervener, International Coalition of Professors of Law at paras 1-2.

[8] Divisional Court Decision at paras 64-65, 67, Appeal Book ("AB"), Vol III, Tab 4.

law school would be to train students interested in practicing in small to medium sized firms, and outside the major urban areas in British Columbia.[9] TWU did not claim that Evangelical Christians required an accredited law school in order to become lawyers in Ontario.

11. In any event, those interveners' premise is flawed.

i. Evangelical Christians have equal access to legal education and the Ontario Bar

12. It is important to put this case in perspective – particularly as it relates to the impact of the Decision on access to the Ontario bar. The Law Society's Decision preserves equality of access based upon merit alone at every accredited law school. None of the currently accredited law schools discriminates against Evangelical Christians on the basis of their religious beliefs or any personal characteristic. Therefore, this case is <u>not</u> about denial of access of Evangelical Christians to the profession by the Law Society.

13. There is no evidence that Evangelical Christians have had to compromise their religious beliefs in order to attend accredited law schools or that the practice of their religion has in any way been threatened by the current policy of accrediting schools that provide equal access. No intervener is claiming that the Law Society's policy of insisting on non-discriminatory, equal access to accredited law schools forces Evangelical Christians to forsake or compromise their beliefs in a way that threatens their religion. Indeed the Appellant, Mr. Volkenant, is attending an accredited law school at the University of Alberta.

14. Further, the Appellants relied on an affiant who is practising law in Ontario and who has had positive experiences at an accredited law school at the University of Ottawa. TWU itself stated that accredited law schools have students and graduates who have religious beliefs similar to those on which TWU is founded.[10]

15. It is, therefore, evident that Evangelical Christians have been afforded exactly the same opportunity to become lawyers, without deleterious impact upon their beliefs, as any member of

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[9] TWU School of Law Proposal, AB, Vol VIII, Tab 27A at 1437, 1442.

[10] Letter from Kevin G. Sawatsky, Vice-Provost and University Legal Counsel, Trinity Western University, to John J.L. Hunter, Chair of the Federation of Law Societies of Canada Special Advisory Committee on Trinity Western University's Proposed School of Law (17 May 2013), AB, Vol IX, Tab 27A.

any other religion. Evangelical Christians have benefitted from the Law Society's policy of equal access to the same extent as everyone else.

ii. Speculation about prospective individual TWU graduates is not warranted

16. In pursuing judicial review of the Decision, the Appellants bear the burden of establishing that the Decision is discriminatory. Some of the interveners, adopting the same flawed premise as the Appellants, assert the Decision is discriminatory because the denial of accreditation will prevent future individual graduates of a yet-to-be-established law school from the practice of law in Ontario.[11] For the following reasons, this is a speculative and unwarranted assumption.

17. First, in order to obtain a licence to practice law in Ontario, an applicant must have one of the following: (1) a bachelor of laws from an accredited law school or (2) a certificate of qualification issued by the National Committee on Accreditation. In addition, an applicant must complete the applicable licensing examinations and experiential training as determined by the Law Society.[12]

18. TWU has never asked the Law Society what its position would be if an individual graduate from a TWU law school made his/her own application for admission to the Ontario bar. TWU has only asked the Law Society for its prospective law school to be accredited as an institution.[13]

19. Second, it is premature to speculate about whether an individual graduate from a future unaccredited law school at TWU would face an obstacle in being admitted to the Ontario bar.[14] This is an issue which, in the first instance, should properly be directed to Convocation of the Law Society, as the regulator of the legal profession in Ontario, for it to consider and determine if and when a request is made. In this regard, the Law Society agrees with the submission of the Attorney General of Ontario that (as held by this Court) the legislature has clearly intended to leave the governance of the profession to lawyers and, unless judicial intervention is clearly

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[11] See e.g. Factum of the Intervener, Christian Legal Fellowship at para 3.
[12] Law Society By-Laws, By-Law 4, s. 9(1)1.
[13] Reasons for Decision – LSUC Convocation Transcript, 10 April 2014, AB, Vol I, Tab 1 at 23.
[14] Court of Appeal Decision at para 96, AB, Vol III, Tab 6.

warranted after the governing body has decided an issue, this expression of legislative intent ought to be respected.[15] Moreover, as The Advocates' Society points out, issues before the Law Society related to legal education are polycentric and require consideration of overarching legal obligations as well as case-specific factors.[16] Accordingly, such issues cannot be determined based upon speculative assumptions, in the absence of an evidentiary record and before the governing body itself has been asked to consider them.

20. Third, the Law Society disagrees that the absence of an alternative licensing process for prospective graduates of a yet-to-be-established TWU law school is a necessary consideration to determine the issues on appeal.[17] In this regard, the Law Society concurs with the submission of the Attorney General of Ontario that there is no evidence in the record to suggest that graduates of a future TWU law school would be unable to gain admission to the practice of law in Ontario even if the Decision is upheld.[18] On the other hand, the evidence is clear that all of the law schools accredited by the Law Society ensure equality of access and do not discriminate against any prospective applicant based upon religious beliefs.

21. Therefore, arguments founded on speculative assumptions about how the Law Society may address prospective applications from individual graduates from a yet-to-be established TWU law school should not be entertained.

C. *Charter* rights are inherently limited by the rights and freedoms of others

i. The *Charter* grants individual rights *equally* to each person

22. The Evangelical Fellowship of Canada and Christian Higher Education Canada take the position that, as a result of the Decision, "a religious individual or organization surrenders its *Charter* rights when it enters the public sphere."[19] In a similar vein, the Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and the Faith and Freedom Alliance assert that the Decision "prioritizes" rights and allows religious rights to be "trumped"

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[15] Factum of the Attorney General of Ontario at para 4, quoting *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 888.
[16] Factum of the Intervener, The Advocates' Society at para 18.
[17] See factum of the intervener, Law Students' Society of Ontario at paras 15-19.
[18] Factum of the Intervener, Attorney General of Ontario at para 19.
[19] Factum of the Intervener, The Evangelical Fellowship of Canada and Christian Higher Education Canada at para 23.

by other rights.[20] These submissions misconceive the nature of *Charter* rights generally, and the scope of freedom of religion specifically.

23. No *Charter* right is absolute. In the public sphere, ones' rights and freedoms are inherently limited by the rights and freedoms equally granted by the *Charter* to others.[21] *Equal* respect of the rights of others thus entails *inherent limitations* on the free exercise of one's protected freedoms. Those limitations are necessary to ensure that "everyone" has *equal* enjoyment of protected rights and freedoms enshrined in the *Charter* and do not depend on section 15.[22]

24. It follows that while rights like freedom of religion should be given the widest possible scope, the *Charter*'s grant of such individual rights to "everyone" equally must be interpreted in the relevant context so as to ensure that no one person's rights are exercised to the detriment of another's. In the public context, the requirement of equal respect of the rights of each individual may necessitate that no one can be allowed to exercise his/her rights absolutely (as they might in the private sphere) if so doing would trench upon the rights of others.

25. Accordingly, the Law Society joins the Canadian Secular Alliance in its submission that section 2(a) of the *Charter* does not protect practices that seek to coerce or constrain the behaviour of others outside the religious community. As stated by Justice Dickson:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*.
>
> 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… Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.[23]

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[20] Factum of the Interveners, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and the Faith and Freedom Alliance at para 26, 37.
[21] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 61, [2004] 2 SCR 551.
[22] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321 [*Big M*].
[23] *Big M, supra* at 336, 346-347.

26. Given that the Law Society's jurisdiction to regulate admission to legal education and the Ontario bar must be exercised in conformity with its obligations under the *Charter* and in the public interest, it is bound to ensure that its decisions respects the appropriate equilibrium among all rights claimants.

27. It is, therefore, incorrect and unhelpful to suggest that entering the public sphere requires individuals to "abandon their faith". That is simply not so. Indeed there is no evidence whatsoever that any Evangelical Christian that has attended or is attending any accredited law school has had to "abandon his/her faith". But all – whether they be Evangelical Christians or adherents of other religions or of none at all – must accept that their right to religious liberty does not extend to justifying actions that harm the liberties of others.

28. As it relates to religious liberty, the impact of the mandatory nature of the Community Covenant is clear: if the Law Society were to accredit TWU, it would force prospective law school students, who are not Evangelical Christians, to forsake their *Charter*-protected religious rights in order to have equal access to accredited prerequisite legal education. The mandatory nature of the Community Covenant would compel these students to adhere to a code of conduct that is contrary and may be offensive to their identity and religious beliefs. Freedom of religion does not extend to requiring others to adopt religious beliefs or practices. It is premised on the principle "that no one can be forced to adhere to or restrain from a particular set of religious beliefs."[24]

ii. The duty of neutrality requires the Law Society to respect religious beliefs and practices equally

29. The duty of state neutrality is borne out of the constitutional imperative of equal respect for the oft conflicting religious views among citizens: it thus requires that the state express no preference of any specific religious view.

30. The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and the Faith and Freedom Alliance assert that the state's duty to be neutral does not "eliminate religious beliefs, expressions and manifestations from the public sphere."[25] The Law Society

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[24] *Loyola High School v Quebec (Attorney General)* 2015 SCC 12 at para 59, [2015] 1 SCR 613.
[25] Factum of the Interveners, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League and the Faith and Freedom Alliance at para 18.

concurs, but submits that the Decision does not suppress or constrain the expression or manifestation of religious beliefs in the public sphere:

(a) The Decision respects the expression and manifestation of each individual's religious beliefs, but avoids the state expressing and implementing a preference for Evangelical Christian views which accrediting the proposed TWU law school and its discriminatory admission policy would entail;

(b) The Law Society has only accredited law schools that do not – and could not lawfully - discriminate in their admissions based upon religion, including Evangelical Christians;

(c) Attending any of the law schools accredited by the Law Society does not threaten actual religious beliefs or conduct;

(d) The Law Society fosters and celebrates diversity in the profession[26], including religious diversity.[27] It is fallacious to imply that in denying to accredit TWU the Law Society sought to eliminate expressions of religious belief from the public sphere.

31. The Decision therefore accords with the Law Society's obligation of neutrality by respecting religious beliefs and practices in a manner that does not injure or deleteriously impact the religious freedoms of others.

iii. The Decision is consistent with the inherent limitation of *Charter*-protected rights and the Law Society's duty of state neutrality

32. TWU's claim to accreditation is inconsistent with the constitutionally implicit equality principle which imposes a necessary limitation on all *Charter* rights exercised in the public sphere, namely, that all individual applicants are entitled to *equal* respect and recognition of *their Charte*r rights (both in respect of freedom of religion and under section 15 gender equality).

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[26] See, for example, Court of Appeal Decision at paras 108–109, AB, Vol III, Tab 6 at 474-475; Divisional Court Decision at para 26, AB, Vol III, Tab 4 at 402.

[27] See, for example, the Law Society report "Dialogue with Lawyers: Religious and Spiritual Beliefs and the Practice of Law", Affidavit of Josée Bouchard sworn 23 October 2014, Exhibit "G", AB, Vol VII, Tab 23 at 1240-1272. See also the 1997 Bicentennial Report and Recommendations on Equity Issues in the Legal Profession; Bouchard Affidavit at paras 9–13, AB, Vol V, Tab 23.

33. In effect, TWU's discriminatory admissions policy amounts to a total denial of the religious and gender-based rights of all who cannot sign the covenant. As a result, it is inconsistent with the promotion of an optimally competent, diverse legal profession and with the Law Society's legal obligation to respect all applicants' rights equally.

34. For these reasons, refusing to accredit TWU is essential to preserve equal access to prerequisite legal education. Accrediting TWU would give preferential access to prerequisite legal education to those willing to sign the Community Covenant, which would instantly undermine and tarnish the Law Society's long-time commitment of guaranteeing equal access to prerequisite legal education based on merit and not on personal characteristics that are irrelevant to competence.

35. The Decision reflects the inherent limitation of *Charter*-protected religious rights. However broadly construed, those rights do not extend to or require the state sanctioning of practices that seek to coerce or constrain the behaviour of individuals outside the religious community.

36. By contrast, the non-discriminatory admission policies of accredited law schools promote an optimally competent profession and respect *equally and as much as possible* all applicants' guaranteed *Charter* rights. It follows that the Decision recognizes and implements the implicit limit on the scope of each person's *Charter* rights (including freedom of religion or association) when sought to be exercised in conjunction with other rights holders: equal respect of each person's rights in the public sphere necessitates that all rights be correspondingly limited, albeit to the minimal extent that is consistent with the claim of all to being able to exercise their own rights in the public sphere as fully as possible.

D. This Court's approach in *Doré/Loyola* represents an appropriate analytical framework for the judicial review of the Decision

37. Certain interveners suggest that the analytical framework set out by this Court in *Doré* is flawed on the basis that when decision-makers face *Charter* rights the reasonableness standard of review is inappropriate.[28] In reply, the Law Society submits that the *Doré* framework set out in a

[28] Factum of the Intervener, World Sikh Organization of Canada at paras 22-25; Factum of the Interveners, Evangelical Fellowship of Canada and Christian Higher Education Canada at para 14.

recent and unanimous decision of this Court and even more recently affirmed in *Loyola*, is an effective framework for the judicial review of administrative decisions that engage *Charter* rights and values.

38. In this regard, the Law Society notes that the intervener submissions that are critical of the *Doré/Loyola* framework do not adequately consider the prolonged debate in the legal community and in the decisions of this Court, prior to *Doré*, in which the incompatibility of applying a section 1 *Oakes* test to a decision or order of an administrative body was considered.[29]

39. Indeed, the suggestion that a less deferential standard of review may be required because of the implication of the *Charter* disregards the evolution of these matters from *Slaight Communications Inc.* v. *Davidson*[30] (in which both Chief Justice Dickson and Justice Lamer expressed reservations about the suitability of applying the *Oakes* test to administrative decisions) to *Dunsmuir* v. *New Brunswick*[31], in which this Court determined that judicial review should be guided by a policy of deference to administrative decision-makers. As this Court recognized in *Doré*, when the *Charter* is applied to an individual administrative decision, it is being applied to a particular set of facts. The resulting exercise of discretion by the administrative decision maker is, as this Court held unanimously, deserving of deference.[32]

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[29] See, for example, *Doré v Barreau du Québec*, 2012 SCC 12 at paras 24-45, [2012] 1 SCR 395; see also *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 101-125, [2006] 1 SCR 256. See also Stéphane Bernatchez, "Les rapports entre le droit administrative et les droits et libertés : la révision judiciaire ou le contrôle constitutionnel?" (2010), 55 McGill L.J. 641 (Reply LSUC Book of Authorities, Tab 1); Geneviève Cartier, "The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law – The Case of Discretion in David Dyzenhaus & Evan Fox-Decent, ed., *The Unity of Public Law*. Portland, Oregon: Hart, 2004, 61 (Reply LSUC Book of Authorities, Tab 2); D. Dyzenhaus and E. Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker* v. *Canada*" (2001), 51 UTLJ 193 (Reply LSUC Book of Authorities, Tab 3); Susan L. Gratton & Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law under the McLachlin Court", in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade*. Toronto: Irwin Law, 2011, 145 (Reply LSUC Book of Authorities, Tab 4); D. Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani"* (2006), 21 *NJCL* 127 (Reply LSUC Book of Authorities, Tab 5).

[30] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

[31] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[32] *Doré, supra* at para 36.

40. The *Doré/Loyola* framework was established after extensive and comprehensive consideration of the different and varying approaches to the judicial review of administrative decisions. The Law Society submits that, having canvassed these approaches and determined that deference is owed to administrative decision makers, this Court should maintain and reaffirm that reasoning.

41. In any event, if this Court is inclined to depart from the *Doré/Loyola* framework, the Law Society submits that whatever framework is applied, the Decision is not only justified and reasonable, but also correct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of September, 2017.

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PART III TABLE OF AUTHORITIES

Source		Para. in Factum
Cases		
1.	*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395	35, 36
2.	*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190	36
3.	*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 59, [2015] 1 SCR 613	25
4.	*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256	35
5.	*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 DLR (4th) 321	21, 23
6.	*Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416	36
7.	*Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551	21
8.	*Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772	3
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9.	S. Bernatchez, "Les rapports entre le droit administrative et les droits et libertés : la révision judiciaire ou le contrôle constitutionnel ?" (2010), 55 McGill LJ 641	35
10.	G. Cartier, "The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law – The Case of Discretion in David Dyzenhaus, ed., *The Unity of Public Law*. Portland, Oregon: Hart, 2004, 61	35
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13.	D. Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*" (2006), 21 NJCL 127	35
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