

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

BETWEEN:

THE BRITISH COLUMBIA COLLEGE OF TEACHERS

APPELLANT
(Respondent)

- and -

TRINITY WESTERN UNIVERSITY and
DONNA GAIL LINDQUIST

RESPONDENTS
(Petitioners)

- and -

THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA
THE CHRISTIAN LEGAL FELLOWSHIP
EGALE CANADA INC.
ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION
THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS
THE EVANGELICAL FELLOWSHIP OF CANADA
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER
THE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

GREEN & CHERCOVER

Barristers & Solicitors
30 St. Clair Avenue West,
10th Floor,
Toronto, Ontario M4V 3A1
Tel: 416-968-3333
Fax: 416-968-0325
MAURICE A. GREEN &
SUSAN URSEL
Solicitors for the Intervener,
The Ontario Secondary School
Teachers' Federation

NELLIGAN POWER

Barristers & Solicitors
66 Slater Street
Suite 1900
Ottawa, Ontario K1P 5H1
Tel: 613-238-8080
Fax: 613-238-2098
DOUGALD E. BROWN

Ottawa Agents for the Intervener,
The Ontario Secondary School
Teachers' Federation

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Tel: 613-238-8080
Fax: 613-238-2098
DOUGALD E. BROWN
Ottawa Agents for the Intervener,
The Ontario Secondary School
Teachers' Federation

NELSON & VANDERKRUYK

Barristers & Solicitors,
13th Floor, 335 Burrard Street
Vancouver, B.C. V6C 2G8
Tel: 604-684-1311
Fax: 604-684-6402

THOMAS R. BERGER, Q.C. &
GARY A. NELSON
Solicitors for the Appellant

KUHN & COMPANY

Barristers & Solicitors
300 - 31935 South Fraser Way
Abbotsford, B.C. V2T 5N7
Tel: 604-864-8877
Fax: 604-864-8867

ROBERT G. KUHN,
KEVIN G. SAWATSKY &
KEVIN L. BOONSTRA
Solicitors for the Respondents

STIKEMAN, ELLIOTT

Barristers & Solicitors
5300 Commerce Court West
Toronto, Ontario M5L 1B9
Tel: 416-869-5602
Fax: 416-947-0866

DAVID M. BROWN &
ADRIAN C. LANG
Solicitors for the Intervener,
The Evangelical Fellowship of
Canada

BARNES, SAMMON

Barristers & Solicitors
400 - 200 Elgin Street,
Ottawa, Ontario K2P 1L5
Tel: 613-594-8000
Fax: 613-235-7578

W. J. SAMMON
Solicitors for the Intervener,
Canadian Conference of Catholic
Bishops (CCCB)

GOWLING, STRATHY & HENDERSON

Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K2P 3C3
Tel: 613-233-1781
Fax: 613-563-9869

HENRY S. BROWN, Q.C.
Ottawa Agents for the Appellant

McCARTHY TETRAULT

Barristers & Solicitors,
1400 - 40 Elgin Street
Ottawa, Ontario K1P 5K6
Tel: 613-238-2000
Fax: 613-563-9386

COLIN S. BAXTER
Ottawa Agents for the Respondents

STIKEMAN, ELLIOTT

Barristers & Solicitors
914 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2
Tel: 613-234-4555
Fax: 613-230-8877

MIRKO BIBIC

Ottawa Agents for the Intervener,
The Evangelical Fellowship of Canada

LINDSAY KEMEY

Barristers & Solicitors
17th Floor - 700 West Pender St.
Vancouver, British Columbia V6C 1G8
Tel: 604-687-1323
Fax: 604-687-2347

**F. G. POTTS &
TIMOTHY J. DELANEY**
Solicitors for the Intervener,
British Columbia Civil Liberties
Association (BCCLA)

FRASER MILNER

Barristers & Solicitors
237 - 4th Avenue S.W.
Calgary, Alberta T2P 4X7
Tel: 403-268-6861
Fax: 403-268-3100

GERALD CHIPEUR
Solicitors for the Interveners,
The Christian Legal Fellowship and
the Seventh-Day Adventist Church
in Canada

**GOWLING, STRATHY &
HENDERSON**

Barristers & Solicitors
Suite 4900, Commerce Court West,
Toronto, Ontario M5L 1J3

Tel: 416-862-7525
Fax: 416-862-7661

**ANDREW K. LOKAN &
HEATHER BOWIE**
Solicitors for the Intervener,
The Canadian Civil Liberties
Association

FRASER MILNER

Barristers & Solicitors
1200 - 180 Elgin Street,
Ottawa, Ontario K2P 2K7
Tel: 613-783-9600
Fax: 613-783-9690

CAMERON P. TIESMA
Ottawa Agents for the Interveners,
The Christian Legal Fellowship and
the Seventh-Day Adventist Church
in Canada

**GOWLING, STRATHY &
HENDERSON**

Barristers & Solicitors
2600 - 160 Elgin Street,
Ottawa, Ontario K1P 1C3

Tel: 613-232-1781
Fax: 613-563-9869

EDUARD VAN BEMMEL
Ottawa Agents for the Intervener,
The Canadian Civil Liberties
Association

NELLIGAN POWER

Barristers & Solicitors

1900 - 66 Slater Street

Ottawa, Ontario K1P 5H1

Tel: 613-231-8276

Fax: 613-238-2098

PAM MACEACHERN,

Ottawa Agents for the Intervener,

Egale Canada Inc.

TABLE OF CONTENTS

Part I	-	Statement of Facts	1
Part II	-	Issues	2
Part III	-	Argument	2
		A. Overview of the Intervener's Position	2
		B. The Standard of Review	2
		(i) General	2
		(ii) The Expertise of the Council	3
		(iii) The Purpose of the Act as a Whole	4
		(iv) The Purpose of the Provision in Particular	4
		(v) The Nature of the Problem: A Question of Law or Fact?	4
		(vi) The Presence or Absence of a Privative Clause	5
		C. The Decision of the Council was Neither Patently Unreasonable nor Incorrect	5
		(i) The Nature of a Public School System	6
		(ii) The Influence of Teachers and Teacher Education Programs On the Classroom Experiences of Gay, Lesbian and Bisexual Students	7
		(iii) The Council was Obligated to Consider the Public Interest	8
		(iv) It was Proper and Necessary for the Council to Consider Both the Impact of TWU's Program and Learning Environment on Student Teachers and the Public School System	9
		D. There Has Been No Violation of the <i>Charter</i> Rights of the Respondents	12
		(i) General	12
		(ii) Freedom of Religion: Section 2(a)	13
		(iii) Freedom of Expression: Section 2(b)	14
		(iv) Freedom of Association: Section 2(d)	14
		(v) Equality Without Discrimination: Section 15	14
		E. Any Violation of the Respondents' Charter Rights is Justified Pursuant to Section One	17
Part IV	-	Nature of Order Sought	20
Part V	-	Table of Authorities	21

PART I - STATEMENT OF FACTS

1. The intervener O.S.S.T.F. adopts the statement of facts as set out by the appellant, and emphasizes the following facts contained in the record for the purposes of its submissions.

2. Trinity Western University (“TWU”) requires its students to adopt the values of the TWU community as their own. The university’s community standards, which must be signed by all students, state that “homosexual behaviour” is “biblically condemned”. The community standards document “provides concrete examples of a commitment to the mission of Trinity Western University, and a commitment to fellow members of this academic community”.

10

Appellant’s Record, pp. 55-57

3. TWU’s perspective informs its teacher education program. According to TWU, a distinctive aspect of its program is its aim that its graduate teachers thoroughly incorporate TWU’s values into their professional lives as teachers. TWU’s application for certification of its program emphasized that “one of its aims is that its graduates possess a Christian understanding of educational philosophy, issues and practices”. (emphasis added)

Appellant’s Record, pp. 133-34

4. In its report to the Council (“the Council”) of the B.C. Teachers College (“BCCT”), the Program Approval Team (the “PAT”) raised the issue of whether the public interest is served by a teacher education faculty with the mission statement of TWU. The PAT noted that, while there is no question of the right of teachers to their personal religious beliefs, the Council must assure itself that graduates of a program such as that of TWU can take their places in a public school system and maintain a non-sectarian position in their daily work with children. TWU, in its response to the report, made no objection to the Council considering these factors.

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Appellant’s Record, p. 237 and p. 260

5. The ultimate effect of the decision of the Council, of which TWU sought judicial review, was to continue the system of teacher education at TWU which had existed for a number of years: students could study at the school of their choice, TWU, but were required to take certain course requirements from a secular university, Simon Fraser University (“SFU”).

30

PART II - ISSUES

6. The O.S.S.T.F. adopts the statement of issues as set out in the factum of the appellant, and shares the position of the appellant on each issue.

PART III - ARGUMENT

A. Overview of the Intervener's Position

7. The Council is a specialized body with considerable expertise and should be accorded a high
10 degree of judicial deference. The O.S.S.T.F. submits that its decision-making was neither patently unreasonable nor incorrect.

8. The Council properly took into account public policy considerations including the prevention of discrimination in all phases of a public education system. It appropriately considered the risks and effects of accrediting TWU as a provider of services to that system, having regard to the nature of TWU's educational philosophy, the requirements TWU makes of its students, and the impact of these on TWU's graduate teachers.

9. The Council has no responsibility or mandate to advance the goals of a religiously-based
20 education system. Further, there is no right, constitutionally protected or otherwise, for TWU to advance its religiously-based practices and beliefs through any component of the public education system.

B. The Standard of Review

(i) General

10. The appropriate standard of review with regard to administrative decision-making is determined using the "pragmatic and functional" approach previously adopted by this Court.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at paras. 26-38;
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at paras. 58-62;
30 *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, at para. 29

11. The appropriate standard of review in the instant case is patent unreasonableness on both of the basic questions implicated in the administrative law aspects of this appeal: (1) whether the Council was entitled to take into account the discriminatory practices and religious nature of TWU, and (2) whether, in rejecting TWU's application, the Council appropriately considered the facts and balanced the respective values and interests involved. In the alternative, the standard should be reasonableness. In the further alternative, the Council was correct in its decision.

12. The Council is a specialized tribunal with considerable expertise in the field of education, legislatively charged with the public duty of approving teacher education programs. It is expressly granted wide discretion in deciding what factors to take into account when approving such programs. Determining the criteria as to whether a teacher education program is appropriate for the public school system is a polycentric policy decision, involving the balancing of multiple factors and competing and complex interests. As such, and according to the factors set out in *Pushpanathan*, the Council should be entitled to significant deference in fulfilling this duty.

Pushpanathan, *supra*, at para. 36; *Baker*, *supra*, at paras. 56 and 61

(ii) The Expertise of the Council

13. A tribunal's expertise may derive from specialized knowledge, special procedure, or a "non-judicial means" of implementing the legislation. It is the tribunal's expertise relative to that of the Court that must be considered, in relation to the specific issue before the tribunal.

Pushpanathan, *supra*, at para. 33

14. It has been recognized that the BCCT has "relative expertise in the area of setting standards for admission into the teaching profession". It is a self-governing body of teaching professionals.

Casson v. British Columbia College of Teachers, [2000] B.C.J. No. 1038 (S.C.), at para. 29 and at paras. 22-25; *Teaching Profession Act*, R.S.B.C. 1996, c. 449, ss. 5-6, 12

15. Legislatures have made professions self-governing, and accorded them considerable discretion, because of their particular expertise and sensitivity to the conditions of practice.

The Ministry of the Attorney General of Ontario, *The Report of the Professional Organizations Committee* (1980) at p. 25, cited in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at pp. 886-87

16. Determining what will be considered in the approval of teacher education programs is an essential aspect of educational policy. The policy-based nature of the Council's decision militates in favour of deference.

R. v. Jones, [1986] 2 S.C.R. 984, at pp. 303-04; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 596; *Pushpanathan, supra*, at para. 36

17. This Court has recognized the relatively low expertise of the courts on such issues. In *Jones*, La Forest J. noted that the courts of the United States have applied the policy that:

The courtroom is simply not the best arena for the debate of issues of educational policy and the measurement of educational quality.

State v. Shaver, 294 N.W. 2d 883, at p. 900 (N.D. S.C. 1980), cited in *Jones, supra*, at p. 304

(iii) The Purpose of the Act as a Whole

18. The broad nature of the object of the College set out in the *Teaching Profession Act*, and the reference to the public interest in general terms suggest that decisions made by the Council in determining the criteria considered in approving teacher education programs are “conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies”.

Teaching Profession Act, s. 21; *Pushpanathan, supra*, at para. 36; *Pezim, supra*, at p. 595

19. The Council's “protective role” in relation to the public also signals that deference should be accorded its decisions.

Pushpanathan, supra, at para. 36; *Casson, supra*, at para. 21

(iv) The Purpose of the Provision in Particular

20. The Council's decision on the certification of TWU was made pursuant to s. 21(i), permitting it “to approve, for certification purposes, the program of any established faculty of teacher education or school of teacher education”. This provision involves “vague, open-textured principles”, suggesting greater deference, as well as “the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many parties”.

Pushpanathan, supra, at para. 36; *Baker, supra*, at para. 60

(v) The Nature of the Problem: A Question of Law or Fact?

21. The Council's assessment of TWU's teacher education program involves questions of mixed law and fact. It is a question of law whether the legislation permits the Council to take into account an institution's discriminatory practices. However, determining how such practices may affect the ability of prospective teachers to work in the public schools is factual in nature, and the consideration of this factor lies at the heart of the specialized expertise of its members.

Pushpanathan, supra, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 45

10 *(vi) The Presence or Absence of a Privative Clause*

22. Although there is no privative clause in the *Teaching Profession Act*, the absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard. For the reasons set out above, all other factors signal a deferential level of scrutiny.

Pushpanathan, supra, at para. 30

C. The Decision of the Council was Neither Patently Unreasonable nor Incorrect

23. The Council was entitled to find that TWU's teacher education program did not meet the criteria for certification "because it is contrary to the public interest to approve a teacher education program offered by a private institution which appears to follow discriminatory practices that public
20 institutions are, by law, not allowed to follow". Specifically, the Council was entitled to consider and make the conclusions it did on "the suitability and preparedness of graduates to teach in the diverse and complex social environments found in the public system".

Appellant's Record, p. 286 and p. 292

24. Such considerations relate to the duty of the Council, like the school board in *Ross*, "to ensure that the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence".

Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, at para. 84

30 25. The Council's exercise of its statutory discretion should be reviewed in the context of the principles of public education, the role of teachers, and the function of teacher education programs.

(i) *The Nature of a Public School System*

26. Education is the principal instrument in awakening children to our society's values and aspirations. Schools are "communication centres", a means by which such values and aspirations are transmitted. A foundational principle of modern education is that the state's role in educating the young is to develop civic virtue and the capacity for full and responsible citizenship.

Ross, supra, at paras. 42-45 and 80-82; *Jones, supra*, at pp. 296-97; F.H. Johnson, *A Brief History of Canadian Education* (1968), at pp. 3-6 and 31-43; H. Entwistle, "Political Education" in D. Cochrane & M. Schiralli, eds., *Philosophy of Education: Canadian Perspectives* (1982) 133, at pp. 133-44; G. Tomkins, "Tradition and Change in Canadian Education" in H.A. Stevenson & J. Wilson, eds., *Precepts, Policy and Process: Perspectives on Contemporary Canadian Education* (1977) 1, at pp. 1-19

10

27. Central to this purpose is the recognition that public education must be conducted on a secular and non-sectarian basis. Since 1876 the British Columbia legislature has expressly maintained that public schools in the province are to be conducted on "strictly secular and non-sectarian principles" and that "the highest morality must be inculcated, but no religious dogma or creed is to be taught".

School Act, R.S.B.C. 1996, c. 412, s. 76; *Russow v. British Columbia (Attorney-General)* (1989), 62 D.L.R. (4th) 98 (B.C. S.C.), at pp. 102-04; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.), at p. 367; *Manitoba Assn. for Rights and Liberties, Inc. v. Manitoba* (1992), 94 D.L.R. (4th) 678 (Man. Q.B.), at p. 686; *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (C.A.), at p. 663

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28. The right of every individual to be educated in a school system free from bias, prejudice and intolerance and any manifestation of discrimination has been recognized as a laudable and essential goal of our educational system.

Ross, supra, at para. 80; Mr. Justice M. Bastarache, "An Overview of the Unique Impact of the *Charter* on Our Schools" (Paper delivered April 30, 2000, Charlottetown)

29. Teachers are essential to the task of inculcating social values because of their status as "medium" and must be perceived by the community at large to uphold the values, beliefs, and knowledge sought to be transmitted by the school system. Teachers are expected not only to impart to students the knowledge and skills they will require for productive and fulfilling careers, but to imbue in their students a range of values and aspirations that will enable them to fully participate in our social and political communities.

30

Ross, supra, at paras. 43-45; G.V. La Forest, "Off-Duty Conduct and the Fiduciary Obligations of Teachers" in W. F. Foster and W.J. Smith, eds., *Navigating Change in Education: The Law as a Beacon* (1998) 207, at p. 207

30. Teachers must also teach by example, particularly when it comes to demonstrating respect for and inculcating the importance of the constitutional rights of all members of society.

Ross, supra; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 54; *La Forest, supra*, at p. 207; *Bastarache, supra*, at p. 1

31. The vulnerability of students to the influence of teachers and the harm caused by teachers who do not by their conduct inside and outside the classroom demonstrate the appropriate values and models of behaviour have been widely recognized. In this respect, teachers “occupy positions of trust and confidence, and exert considerable influence over their students...” Their actions bear directly upon the community’s confidence in the public school system as a whole.

Toronto Board of Education, supra, at paras. 54 and 57; *Ross, supra*, at para. 82; *R v. Audet*, [1996] 2 S.C.R. 171, at paras. 41-43; *Shewan v. Abbotsford School District No. 34* (1987), 47 D.L.R. (4th) 106 (B.C.C.A.), at pp. 110-11; *Cowichan Sch. Dist. No. 65 v. Peterson* (1988), 22 B.C.L.R. (2d) 98 (C.A.), *per* McLachlin J.A. (as she then was), dissenting, at pp.114-16; *La Forest, supra*

(ii) The Influence of Teachers and Teacher Education Programs On the Classroom Experiences of Gay, Lesbian, and Bisexual Students

32. The manner in which teacher education programs address issues of sexual orientation is thought to influence how future teachers teach and address these issues in the classroom.

C. Mathison, “The Invisible Minority: Preparing Teachers to Meet the Needs of Gay and Lesbian Youth” (1998) 49(2) *Journal of Teacher Education* 151, at p. 154; H.M. Miller, “Swimming with the Sharks” (1999) 52(6) *The Reading Teacher* 632, at p. 634

33. The learning environment offered by schools, and specifically the failure to take into account their needs, harms gay, lesbian, and bisexual students. Moreover, the attitudes of teachers toward homosexuality are believed to influence their treatment of students. As one educational scholar has stated:

Schools that do not actively provide for the protection of minority group members lend implicit support to the continued harassment of their marginal status.

J.H. Fontaine, “The Sound of Silence: Public School Response to the Needs of Gay and Lesbian Youth” in M.B. Harris, ed., *School Experiences of Gay and Lesbian Youth: The Invisible Minority* (1997) 101, at pp. 107-09; S.L. Nichols, “Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools” (1999) 99(5) *Elementary School Journal* 505, at pp. 514-15; J.T. Sears, “Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?” in K.M. Harbeck, ed., *Coming Out of the Classroom Closet: Gay and Lesbian Students, Teachers, and Curricula* (1992) 29, at pp. 31, 66-70, and 74

34. The role of teachers in changing the experiences of gay, lesbian, and bisexual students is significant, and it is important to incorporate an understanding of this role into teacher education:

Too often, gay and lesbian students are left with no one who sees them, no one who reaches out to them. It is painful to be devalued, but devastating to be invisible... Teacher educators profess to believe that all students are precious, all students deserve care. If this is the belief, if these are truly teacher educators' values, they must help future teachers reach out to their gay and lesbian students without hesitation and without apology.

Mathison, *supra*, at pp. 154-55

10 35. Teachers' attitudes towards homosexuality may be experienced and perceived by students in various ways. As noted by one theorist:

Students perceive teacher attitudes and feelings through the teacher's verbal and nonverbal behaviour. Teacher attitudes can provide the validation for a gay student's self-acceptance or self-rejection. While educators are thus uniquely poised to play a primary role in the lives of adolescents because of their availability and daily contact, evidence indicates that their use of this role has been less than positive for sexual minority students.

Fontaine, *supra*, at p. 105

20 36. Teachers' approaches to gay, lesbian, and bisexual students are therefore critically important for students' experiences, and educators have a responsibility to address their needs.

J.T. Sears, "Peering into the Well of Loneliness: The Responsibility of Educators to Gay and Lesbian Youth" in A. Molnar, ed., *Social Issues and Education: Challenge and Responsibility* (1987) 79, at p. 81

(iii) The Council was Obligated to Consider the Public Interest

37. The BCCT's governing statute specifically requires the College to exercise its powers in accordance with the "public interest". Indeed, the protection of the public interest is "at the heart of the College's mandate".

Teaching Profession Act, s. 4; *Casson, supra*, at para. 20; *Stolen v. B.C. College of Teachers* (1995), 128 D.L.R. (4th) 453 (B.C.C.A.), at para. 28, *per* Prowse J.A.

30 38. TWU sought to be certified to provide an appropriate teacher education program for the public education system. In essence, this expressly religious institution, with a mission to advance its particular, exclusive and in some elements discriminatory world view, has asked to be recognized by a public agency as an approved service provider for the purposes of public, secular education.

39. Decisions about the types of institutions that will be certified to provide training for the public schools affect the interests of students, teachers, parents, administrators, prospective teachers, and the general public. They involve the question of the nature of a public educational system in a modern democratic society. The Council has a responsibility not just to TWU and its graduates, but to a multiplicity of stakeholders whose interests are neither always the same as, nor even compatible with, those of TWU and its students. The goal for the Council must always be the development and continuation of a public, secular education system which upholds the civic values necessary for co-existence in a pluralistic and diverse society.

10 40. The Council did not purport to apply the *Charter* or the *Human Rights Code*, R.S.B.C. 1996, c. 210. It did take into consideration the values underlying those enactments. This Court has often emphasized the role of *Charter* and equality values as sources or interpretative aids in construing statutes and revising common law rules. Administrative agencies should be permitted, and expected, to use the same sources in exercising delegated powers.

Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 558; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, at p. 181; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, at paras. 21-23, 30; *R. v. Lucas*, [1998] 1 S.C.R. 439, at paras. 65-66; *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 49

20 41. Moreover, the Court has held that administrative discretion must generally be exercised in accordance with the fundamental values of Canadian society. The values of equality, tolerance and diversity, as well as equal concern and respect for all certainly fall within that category of fundamental values amounting to public policy.

Baker, supra, at para. 56; *Re Drummond Wren*, [1945] 4 D.L.R. 674 (Ont. H.C.J.); *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 O.R. (2d) 481 (C.A.), at pp. 494-96, *per* Robins J.A., and at pp. 509-15, *per* Tarnopolsky J.A.; *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 (C.A.), at pp. 501-02, *per* Galligan J.A.

30 ***(iv) It was Proper and Necessary for the Council to Consider Both the Impact of TWU's Program and Learning Environment on Student Teachers and the Public School System***

42. A school board has a duty to maintain a positive school environment free from discrimination and may be required to take proactive measures to ensure a non-discriminatory learning environment.

Ross, supra, at paras. 42, 50, and 54

43. No less than a board of education, a college of teachers has a duty to contribute to the maintenance of a positive environment, by limiting certification of education programs to those that develop teachers with the abilities, skills, and attitudes to advance the principles and goals of the public school system. Teacher training is the bedrock upon which the entire system is built.

44. Professionals working in the public school system must be capable of inculcating secular skills and values, and proficient in imbuing a civic philosophy consistent with the goals of public education. The question for the Council was: would the TWU program fulfil these goals? The Council was not only entitled to raise concerns and make a judgment about the program based on these matters, it was obligated to. Were the Council to have remained silent, the reasons of La Forest J. in *Ross* would be applicable: "...its passivity signalled a silent condonation of, and support for the respondent's views."

Ross, *supra*, at para. 50; La Forest, *supra*, at p. 223

45. Certification as a teacher training institution for the public schools associates an institution with the BCCT and with the public school system as a whole. It constitutes the Council's, and thus the state's, "seal of approval" of that institution and its educational practices. Given the importance that this Court has placed on upholding and implementing the values of public school education, it was reasonable and correct for the Council to take into account the values being taught, demonstrated, and represented by TWU.

46. Moreover, it was not patently unreasonable, let alone incorrect for the Council to take into account TWU's admission practices, mission, and philosophy, as well as the attitudes and behaviour demanded of TWU students. The Council was entitled to act on its concern that these requirements manifested intolerance for and disrespect of the rights of gay, lesbian, and bisexual students to be treated with equal concern, respect, and consideration, that they were improper for an institution training public school teachers, and that they would detrimentally impact upon the teaching practices of TWU graduates.

47. TWU cannot escape the discriminatory aspects of its policies by insisting that it does not

denigrate homosexuality, but rather merely prohibits homosexual “behaviour”. Its approach to homosexual “conduct” and relationships cannot be separated from its views of gay, lesbian, and bisexual individuals. In *Egan v. Canada*, Cory J. found that:

Sexual orientation is more than simply a “status” that an individual possesses. It is something that is demonstrated in an individual’s conduct by the choice of a partner. The *Charter* protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of “status” and “conduct” and that both should receive protection.

Egan v. Canada, [1995] 2 S.C.R. 513, at para. 175; Respondents’ Factum, paras. 58-60

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48. Where an institution trains teachers, its own internal practices are particularly important. Such an institution both instructs its students in the skills of the profession, and models, through its own approach to education, the manner in which its students will carry themselves as teaching professionals. The Council is entitled to consider whether such modelling conforms to the values of the public system.

Policies of the British Columbia College of Teachers, P5.C.01 (b) (4.3.1), Appellant’s Record, p. 86; Mathison, *supra*, at p. 154

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49. In assessing TWU’s program, the Council was entitled to be concerned about the impact of TWU’s practices and academic approach on the suitability of its graduates for public school teaching. In raising such a concern before approving teacher education programs, the Council was not engaging in speculation about the graduates’ behaviour. It was expressing its professional judgment as to the impact of a particular program upon those educated within it, and the effect its certification could have upon the public school system as a whole.

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50. It is a misapprehension of the duties of the Council to assert that it could only make a negative decision if it had actual evidence before it of harm due to TWU’s policies and practices. The Council is charged with the prospective protection of the public and the maintenance of the public school system, relying upon the professional expertise of its members. If administrative bodies charged with policy-making functions are required to have substantive evidence that harm has already been caused before making requirements, their ability to act in the public interest to prevent harm will be undermined and their statutory role thwarted.

51. The Council appropriately guarded against the potential risk of harm to all stakeholders. It has been recognized that the sensitivity of the educational setting, the special vulnerability of students, and the need for public confidence in the education system demand caution and vigilance. This vigilance is particularly important in relation to the rights of gay and lesbian students, an especially vulnerable minority.

Toronto Board of Education, supra, at para. 57

52. The Council correctly identified and balanced the public's interests with those of TWU and its students.

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D. There Has Been No Violation of the *Charter* Rights of the Respondents

(i) General

53. The O.S.S.T.F. emphasizes that this case is not about whether the guarantees of freedom of religion, expression, or association permit teachers or TWU students to hold religious beliefs about homosexuality, express those views, or be members of a religious association that holds them. Rather, the question is whether these freedoms were infringed by the requirement that those who choose to attend TWU and also wish to teach in the public schools be exposed to a period of secular education that approaches such questions from a different perspective.

20

54. In this regard, the caution of Bastarache J. in *Delisle v. Canada* should be borne in mind:

The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them [w]hile the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard.

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, at para. 25

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55. The Council's decision has not interfered with TWU's or Lindquist's freedoms. Sections 2(a), (b), or (d) cannot impose upon the government a positive obligation to accredit a particular institution as a suitable mode of training for those who will fulfil the state function of being teachers in public schools.

Delisle, supra, at paras. 25-33

(ii) Freedom of Religion: Section 2(a)

56. TWU and Lindquist have not contended that attending SFU classes for one year before teaching in public schools violates any of their religious precepts. Moreover, TWU graduates retain the ability to exercise their chosen profession in independent schools.

57. Freedom of religion does not entitle one to state support for one's religion. The Council's decision could be said to involve the denial of a state benefit, namely, certification of TWU's program on terms it finds acceptable. However, members of this Court have held that freedom of religion does not require the state to provide benefits to religious institutions equivalent to those given to secular ones. Thus, the government need not fund religious schools simply because it funds public ones. Similarly, s. 2(a) cannot require the state to confer on religious universities the unconditional privilege of accreditation for public school teaching. This is especially so when even secular universities do not enjoy this benefit.

Adler v. Ontario, [1996] 3 S.C.R. 609, at paras. 170-76, *per* Sopinka J., and at paras. 198-201, *per* McLachlin J. (as she then was)

58. The right to freedom of religion cannot require the state to accept purely religious training and religious standards as sufficient for employees carrying out government functions. It would be strange indeed if, just because TWU and the individual respondent have a religious approach to education, they were free from review by those whose responsibility it is to ensure that the standards of secular education are being met.

Jones, supra, at pp. 312-13

59. Additionally, finding a violation of s. 2(a) in this case would conflict with the purpose of the constitutional guarantee of freedom of religion and conscience for other stakeholders in the public school system. Public schools are non-denominational so that students' freedoms of religion and conscience are not abridged. The Council was permitted, and perhaps even constitutionally required, to reinforce the non-denominational character of the public school system by mandating a period of secular training for future employees of that system.

Zylberberg, supra, at pp. 654-63; *Canadian Civil Liberties Association, supra*, at pp. 358-66

(iii) Freedom of Expression: Section 2(b)

60. The essence of the respondents' submission is that the Council's decision not to accord certification to those who have expressed certain religious views constitutes a violation of their freedom of expression.

61. This Court has held that the government is entitled to distribute public benefits without according them to all forms of expression equally, subject to s. 15 of the *Charter*.

Delisle, supra, at para. 29

10 62. The suggestion that Parliament should promote all forms of expression and all associations equally or else it will repress some of them and, therefore, violate s. 2 of the *Charter* has never been accepted as a valid interpretation of s. 2(b).

Delisle, supra, at para. 29

(iv) Freedom of Association: Section 2(d)

63. Similarly, it is submitted that the respondents' freedom of association has not been violated. The respondents' submission amounts to the argument that the activity of training teachers certified to instruct students in the public schools is protected by s. 2(d) as some form of "association". This Court has found that foundational activities of an organization are not protected by s. 2(d). All that
20 is included are the establishment and maintenance of an association, the exercise in common of the associational rights of individuals, and the exercise in common of the lawful rights of individuals. Nothing in the Council's decision implicates these rights.

Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367, at pp. 401-03; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at paras. 110-13; *Delisle, supra*

(v) Equality Without Discrimination: Section 15

64. Finding a violation of s. 15 (1) requires a three stage analysis. Does the governmental action or law draw a distinction between the claimant and others in purpose or effect? Are one or more
30 enumerated or analogous grounds the basis for the differential treatment? Does the governmental action or law have a purpose or effect that is discriminatory within the meaning of s. 15?

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at para. 39

65. The governmental action complained of here does not draw a distinction between the claimant and others. The Council has treated the respondent TWU as it would any other institution seeking to be accredited to provide a teacher education program. It has reviewed the program, noted deficiencies, and has made a decision. The consequences to the individual respondent flow naturally from her choice of educational institution and not from any discrimination by the Council. Simply because the deficiencies arose out of the respondent's religious beliefs does not require the Council to ignore their existence, nor could it legally ignore deficiencies given its statutory mandate.

10 66. Assuming, however, that a distinction of some kind was made by the Council, the question remains whether it was on the basis of the respondent Lindquist's religion, or on the basis of TWU's otherwise discriminatory policies and practices regarding homosexual behaviour. But for the protection that may be afforded the respondents under the B.C. *Human Rights Code*, these policies and practices would *prima facie* be considered discrimination on the basis of sexual orientation.

Egan, supra; Vriend v. Alberta, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Veysey v. Canada (Correctional Service)*, [1990] F.C.J. No. 468 (C.A.)

20 67. The O.S.S.T.F. submits that the distinction drawn by the Council was not on the basis of religion, but on the basis of the respondent TWU's discrimination. Even if *Charter* guarantees under s. 2 and the human rights exceptions for religious organizations afford protection for this discriminatory form of religious belief, they cannot be the basis for the finding of an analogous ground. Equal benefit and protection of the law under s. 15 is not guaranteed in order to facilitate further discrimination.

68. Finally, it is submitted that the Council's decision did not have a purpose or effect that is discriminatory. In addressing this third factor, regard must be had to not only the situation of the claimants, but that of others affected by the governmental action. Particularly where the action impacts on other disadvantaged groups, this factor will take into account the particular needs and experiences of these groups. Section 15(1) provides for the "unremitting protection" of equality rights, whether those of the respondents or of gay and lesbian students, parents, and teachers.

30 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 65-67, *per* L'Heureux-Dubé J.; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877; *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 61-62

69. This Court has identified four contextual factors to be examined in determining whether governmental actions discriminate in a substantive or purposive sense. The individual respondent's claim of discrimination fails on all these factors.

Law, supra at paras. 63-75; *M. v. H., supra*, at paras. 67-74; *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, at paras. 59-70

70. Those in the position of the claimant, in their religious beliefs, are part of a broader Christian religious majority in Canadian society which has enjoyed a dominant status throughout most of our history. They are not disadvantaged within the meaning of s. 15.

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71. The Council's decision is concerned not with the religious status of the claimant but with the discriminatory policies and practices as regards gay and lesbian citizens, and in this sense corresponds closely to the claimants' actual capacity and circumstances.

72. The Council's decision and its effect are designed to forestall the possibility of the further disadvantage of gay and lesbian students, parents, and teachers in a public education system. It has an ameliorative purpose and effect upon these groups in society. The decision protects the interests of these others in the public system who have been recognized as suffering from a significant pre-existing disadvantage and vulnerability. This Court has recognized the need for redress of these circumstances.

20

Egan, supra, at para. 173; *Vriend, supra*, at para. 102

73. The nature of the affected interest is relatively minor. TWU students are not being requested to change their beliefs. The institution they choose to attend is being requested to include within the course of teacher training a number of hours of study at a public university. This does not have major constitutional and societal significance, nor constitute a complete non-recognition of the respondents' Christian perspective. Rather, TWU has the right to exist, to offer a teacher training program, and to have that program recognized as training for public schools subject (as are all other institutions offering teacher training) to the requirements of the BCCT.

30

Law, supra, at para. 74

74. None of these factors demonstrates a convincing human rights or *Charter* dimension to Lindquist's complaint. There is therefore no violation of s. 15(1).

E. Any Violation of the Respondents' Charter Rights is Justified Pursuant to Section One

75. In the alternative, if either TWU's or Lindquist's *Charter* rights are violated by this order, the decision is demonstrably justified pursuant to s. 1.

76. The Council's decision involved three pressing and substantial objectives: first, maintaining the standards, values, and integrity of the public school system; second, protecting the public school system and students, homosexual students among them, from the harm of doctrinally-based attitudes denigrating the value and worth of persons on the basis of their sexual orientation; and third, ensuring that discrimination or prejudice did not occur within the school system.

77. The higher standard of conduct and expectations for teachers allows greater restriction of individual rights. Teaching in the public schools is a voluntary act, but once the public responsibility of teaching is embarked upon, a teacher cannot expect the same degree of non-interference.

Shewan, supra at p. 111; *Ross, supra*, at paras. 84-85

78. Any restriction on the Respondents' *Charter* rights must be viewed in the context of the harms from which the Council sought to protect schoolchildren and the public education system. This Court has stated that:

In relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) - a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience.

This statement is equally applicable to any institution that denigrates the value, dignity, or worth of any individual or group on the basis of criteria prohibited by the *Charter*.

Ross, supra, at para. 94

79. Particularly important in this case is that the Council was acting in the interests of children. This Court has emphasized the importance of considering children's best interests, and has stressed

the special importance of the education of the young. As stated by La Forest J. in *Ross*, “education awakens children to the values a society hopes to foster and to nurture”.

Ross, supra, at para. 82; *Baker, supra*, at para. 67

80. Members of this Court have held, in various contexts, that the best interests of children and the avoidance of harm to them must take precedence even over the religious interests of parents. The Council was justified in making the same choice in relation to prospective teachers, particularly when the institution seeking accreditation should be viewed as attempting to play a secular role of training teachers for the public school system.

10 *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 120-22, *per* McLachlin J. (as she then was); *P.(D.)*, *supra*, at pp. 181-82, *per* L’Heureux-Dubé J.; *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at paras. 112-13, *per* La Forest J., and at paras. 223-32, *per* Iacobucci and Major JJ.

81. The group that the Council sought to protect – gay and lesbian students, parents, and teachers – is a vulnerable one. That group’s own subjective fears and perceptions of harm from discrimination are strong. It is very difficult to measure scientifically the harm that may occur by certification of teachers who have been trained in an institution with TWU’s attitudes toward homosexuality. These factors all “go to the question of whether there has been a demonstrable justification”.

20 *Thomson Newspapers v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 90

82. This Court has recognized the important role of Parliament in responding to the needs and voices of vulnerable groups. Administrative agencies appointed by Parliament or a legislature to act in the public interest and make policy also have a special role in hearing and being sensitive to the needs of such groups.

Mills, supra, at para. 58

83. The Council’s order was rationally connected to the above objectives. It ensured that the Council’s approval would not be given to an institution that carried out discrimination, and that TWU teachers would have a period of exposure to teacher training in a secular university. It avoided exposing public school students to teachers trained solely in an institution that had diametrically opposed views to the public, secular approach to the rights of gays and lesbians.

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84. The Council's decision also minimally impaired any rights of the respondents that were infringed. It appropriately balanced respect for their religious beliefs with the equality and public policy concerns enumerated above. The decision did not impose any standards on TWU itself, nor require it to change the nature of its program of instruction. Nor did it prevent TWU from being responsible for the majority of the classroom hours spent in teacher training by those of its students who wish to teach in the public schools. Rather, it simply maintained the *status quo* whereby TWU students who wish to teach in public schools spend a portion of their teacher training in a non-sectarian university.

10 85. Furthermore, the Council's decision had no effect on the ability of TWU graduates to teach in independent and religious schools. Through the *Independent School Act*, the legislature has provided for a separate process of certification, with its own set of guidelines, for teachers in independent schools, including religiously based schools. This process was available to TWU and its graduates should they not wish to conform to the requirements of a public, secular education system.

Independent School Act, R.S.B.C. 1996, c. 216, s. 5

86. There is proportionality between the effects of the decision and the objective. The effects are simply that TWU students have to attend part of their education in a secular university in order to
20 teach in a public school.

87. The effect of the Council's decision represents a reasonable balance between the values of religious freedom and the values of equality, diversity, and secular education. Requiring that a role be recognized for the public university system in training public school teachers has a minimal or negligible impact on the religious interests of the appellant. As noted by Wilson J. in *Jones*:

There are many institutions in our society which have both a civil and a religious aspect, *e.g.* marriage. A person's belief in the religious aspect does not free him of his obligation to comply with the civil aspect.

Jones, supra, at p. 313

88. This is particularly true when the religious person wishes to play a secular role. As stated by La Forest J. in *Ross*: “a teacher’s freedoms must be balanced against the right of school boards to operate according to their own mandates”.

Ross, supra, at para. 85

89. In contrast, maintaining the integrity and values of the public school system and protecting the vulnerable group affected are weighty objectives that have been recognized by this Court on numerous occasions.

90. As one learned author has noted:

When a religious organization enters into a public arena, for example, education, it must apply the inclusive-accommodative norms of Canadian society, just as a gay business must not discriminate on the basis of race, sex, religion, and so on. This approach has certainly been used in cases where rights or values, other than freedom from discrimination on the basis of sexual orientation in competition with religious interests, have been adjudged.

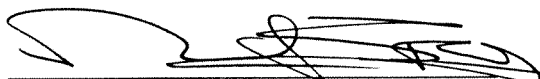
B. MacDougall, “Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology” (1998) Sask L. Rev. 41, at para. 58

PART IV - NATURE OF ORDER SOUGHT

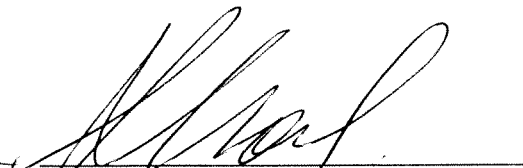
91. The O.S.S.T.F. requests that the appeal be allowed and the decision of the Council of the B.C.C.T. restored.

June 20, 2000

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Maurice A. Green



Susan Ursel

Counsel for the Intervener,
The Ontario Secondary School Teachers' Federation

PART V - TABLE OF AUTHORITIES

<u>Citation</u>	<u>Page References</u>
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<i>B. (R.) v. Children's Aid Society of Metropolitan Toronto</i> , [1995] 1 S.C.R. 315	18
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<i>Canada (Director of Investigation and Research) v. Southam Inc.</i> , [1997] 1 S.C.R. 748.	5
<i>Canada Trust Co. v. Ontario Human Rights Commission</i> (1990), 74 O.R. (2d) 481 (C.A.)	9
<i>Canadian Civil Liberties Assn. v. Ontario (Minister of Education)</i> (1990), 71 O.R. (2d) 341 (C.A.)	6, 13
<i>Canadian Egg Marketing Agency v. Richardson</i> , [1998] 3 S.C.R. 157	14
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<i>R. v. Audet</i> , [1996] 2 S.C.R. 171	7
<i>R. v. Jones</i> , [1986] 2 S.C.R. 984	4, 6, 13, 19
<i>R. v. Lucas</i> , [1998] 1 S.C.R. 439	9
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	15, 18
<i>R. v. Nova Scotia Pharmaceutical Society</i> , [1992] 2 S.C.R. 606	9
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<u>Citation</u>	<u>Page References</u>
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