Court No. 27168

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

THE BRITISH COLUMBIA COLLEGE OF TEACHERS

Appellant

- and -

TRINITY WESTERN UNIVERSITY
and DONNA GAIL LINDQUIST

Respondents

- and -

THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA
THE CHRISTIAN FELLOWSHIP LEAGUE
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

INTERVENER'S FACTUM OF THE SEVENTH-DAY ADVENTIST CHURCH IN CANADA

Fraser Milner Casgrain
Barristers & Solicitors
2900, 237 – 4th Avenue S.W.
Calgary, Alberta T2P 4X7

Tel: (403) 268-6861 Fax: (403) 268-3100
Gerald D. Chipeur
Barbara B. Johnston
Solicitors for the Intervener
The Seventh-day Adventist Church in Canada

Fraser Milner Casgrain
Barristers & Solicitors
1420, 99 Bank Street
Ottawa, Ontario K1P 1H4

Tel: (613) 783-9600 Fax: (613) 783-9690
Ottawa office of the Solicitors for the Intervener

Nelson & Vanderkruyk
Barristers & Solicitors
13th Floor, 335 Burrard St.
Vancouver, British Columbia V6C 2G8

Tel: (604) 684-1311 Fax: (604) 684-6402
Thomas R. Berger, Q.C.
Solicitors for the Appellant

Gowling Strathy & Hunderson
Barristers & Solicitors
2600 – 160 Elgin St.
Ottawa, Ontario K2P 2C4

Tel: (613) 233-1781 Fax: (613) 563-9869

Ottawa Agents for the Appellant

Kuhn & Company
Barristers & Solicitors
300, 31935 South Fraser Way
Abbotsford, British Columbia V2T 5N7

Tel: (604) 864-8877 Fax: (604) 864-8867
Robert G. Kuhn
Solicitors for the Respondents

McCarthy Tetrault
Barristers & Solicitors
1400, 40 Elgin Street
Ottawa, Ontario K1P 5K6

Tel: (613) 238-2000 Fax: (613) 563-9386

Ottawa Agents for the Respondents

Nelligan Power
Barristers & Solicitors
1900 - 66 Slater Street
Ottawa, Ontario K1P 5H1

Tel: (613) 231-8276 Fax: (613) 238-2098
Pam MacEachern
Solicitor for the Intervener,
EGALE Canada Inc.

Green & Chercover
Barristers & Solicitors
10th Floor, 30 St. Clair Ave. W.
Toronto, Ontario M4V 3A1

Tel: (416) 968-3333 Fax: (416) 968-0325
Maurice Green and Susan Ursel
Solicitors for the Intervener,
Ontario Secondary School Teachers' Federation

Nelligan Power
Barristers & Solicitors
1900 - 66 Slater Street
Ottawa, Ontario K1P 5H1

Tel: (613) 238-8080 Fax: (613) 238-2098
Ottawa agents for the Intervener,
Ontario Secondary School Teachers' Federation

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,
The Canadian Conference of Catholic Bishops

Stikeman, Elliott
Barristers & Solicitors
Commerce Court West
Suite 5300, P.O. Box 85
Toronto, Ontario M5L 1B9

Tel: (416) 869-5602 Fax: (416) 947-0866
David M. Brown and Adrian C. Lang
Solicitors for the Intervener,
The Evangelical Fellowship of Canada

Stikeman, Elliott
Barristers & Solicitors
91 - 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

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

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

Lindsay Kenney
Barristers & Solicitors
1700 - 700 West Pender Street
Vancouver, B.C. V6C 1G8

Tel: (604) 687-1323 Fax: (604) 687-2347
F.G. Potts and Timothy J. Delaney
Solicitors for the Intervener,
The British Columbia Civil Liberties Association

Gowling, Strathy & Henderson
Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario K2P 3C3

Tel: (613) 232-1781 Fax: (613) 563-9869
Eduard Van Bemmel
Ottawa Agents for the Intervener,
The British Columbia Civil Liberties Association

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I. STATEMENT OF FACTS

1. The Seventh-day Adventist Church in Canada ("Intervener") adopts the statement of facts in the Respondent's Factum, but desires to add the following.

2. The Seventh-day Adventist Church is a Christian denomination which, as its name would suggest, rests and worships on the Seventh-day of the week and looks forward to the second coming of Jesus Christ. There are members of the Seventh-day Adventist Church in all Canadian provinces and territories.

3. The Seventh-day Adventist Church operates Canadian University College ("CUC") in College Heights, Alberta. The Alberta Private Colleges Accreditation Board has granted to CUC the power to bestow bachelors degrees to worthy candidates. CUC operates an accredited education degree program on its campus. Students at CUC undertake to follow a personal code of conduct similar to that in issue in this appeal.

4. Among members of the Seventh-day Adventist Church are individuals who have an interest in receiving an education degree from a Christian university college such as CUC.

5. The Seventh-day Adventist Church in Canada operates an education system across Canada which relies on graduates of CUC for its very survival. The Adventist education system cannot thrive unless it has access to government-certified teachers educated in Christian post-secondary institutions. This concern is unique to this Intervener. The Seventh-day Adventist Church operates the broadest unified church-supported educational system in the world with schools, colleges and universities in more than 100 countries, including (as of January 1, 2000):

	Schools	**Teachers**	**Students**
Elementary	4,598	32,816	747,237
Secondary	1,115	15,703	241,441
Worker Training	38	421	4,163
Colleges & Universities	95	5,049	62,348
Totals	**5,846**	**53,989**	**1,055,189**

II. ISSUES

6. The Seventh-day Adventist Church in Canada will advance arguments with respect to the interpretation of the preamble and sections 2(a), 7 and 15(1) of the Canadian Charter of Rights and Freedoms ("Charter"). In particular, counsel for the Intervener will address the question of whether the religious beliefs and practices of education students and others in a pluralistic society should affect the determination of where such individuals may attend classes or where they may pursue a livelihood and will argue that:

(a) any governmental inquiry into religious beliefs, as distinct from conduct, is contrary to the preamble and sections 2(a) and 15(1) of the Charter and a century of jurisprudential practice in Canada;

(b) the preamble and sections 2(a), 7 and 15(1) of the Charter prevent government or a governmental delegate from restricting the liberty of an individual to attend a qualified religious university and to receive professional licensure absent a compelling governmental interest and due process;

(c) the preamble and sections 2(a) and 15(1) of the Charter prevent government or a governmental delegate from denying educational opportunities, licensure or employment to individuals because of publicly expressed or privately held religious beliefs concerning positive moral behaviour (assuming such beliefs or behaviors are in themselves lawful);

(d) the preamble and sections 2(a) and 15(1) of the Charter prevent government or a governmental delegate from denying accreditation to a qualified university or other educational institution solely on the basis of the religious beliefs, expressions of religious belief or religious practices of the faculty and students of that institution.

7. Counsel for the Intervener will also argue that the Appellant's infringement of rights and freedoms guaranteed by the Charter cannot be justified in a free and democratic society under section 1 of the Charter. Restrictions on individual liberty based solely upon the religious beliefs of an individual can never be justified in Canadian society.

III. ARGUMENT

QUESTION PRESENTED

8. May a government agency withhold a government service, benefit or approval solely based upon the expressed religious beliefs of an individual Canadian or group of Canadians?

BRIEF ANSWER

9. Government agencies must refrain from inquiring into the religious beliefs of Canadians in the course of exercising delegated authority. An inquiry into the religious beliefs of Canadian citizens is never justified in our free and democratic society. None of the questions thoroughly argued in this appeal would need to be addressed if this primary constitutional principle were respected by the British Columbia College of Teachers ("BCCT").

10. Acknowledging that an inquiry has been made in this case, the evidence before the BCCT and this court is conclusive that Trinity Western University's ("TWU") faculty and students teach and believe that all persons are worthy of equal respect, regardless of lifestyle choices. TWU is acting in the public interest and TWU policies and curriculum are consistent with public policy in Canada and British Columbia.

11. Furthermore, the decision under review in this appeal was not made in accordance with the principles of fundamental justice.

SUBMISSIONS

A. Religious Inquiry Unconstitutional

12. Under the common law, the courts avoided engaging in any analysis or judgement of purely religious questions. Ukrainian Greek Orthodox Church v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary, [1940] S.C.R. 586, 591. In the era of the Charter, the courts have expressed similar sentiments in the context of protection for freedom of conscience and religion. Justice Hall of the Nova Scotia Supreme Court addressed the question in this way in 1989 (in obiter):

> I agree generally that it is inappropriate to call into question a person's beliefs in a proceeding such as this [custody hearing] except for very strong reasons, and it indeed may be unconstitutional.

Smith v. Smith, 92 N.S.R. 2d 204, 208 (N.S.S.C. 1989).

13. Justice McDonald explained why a religious investigation should be avoided in Starland School Division v. Alberta, [1988] 91 A.R. 329, 337:

> "Such an exploration ... is inherently repugnant as a matter of judicial policy. ... Such a matter is in the realm of the non-justiciable, not because the court could not entertain and compel evidence, but because the court ought not to do so."

14. The Supreme Court of Canada has also given direction on how religious inquiries should be handled under the Charter. Chief Justice Dickson wrote, in The Queen v. Edwards Books, [1986] 2 S.C.R. 713, 779 ("Edwards Books"):

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

15. The inquiry conducted by the BCCT started off as a normal course review of the circumstances at TWU. Unfortunately, it turned into a critical analysis of the religious beliefs of the faculty and students of TWU. See Appellant's Record ("AR") 272-327. The reason for Chief Justice Dickson's caution in Edwards Books is graphically illustrated in this appeal. When religious inquiries are allowed, the likelihood of negative outcomes for members of non-majortarion faiths increases dramatically.

16. Had the BCCT respected the privacy of the religious beliefs of faculty and students of TWU, the entire administrative and now judicial inquiry into the religion of TWU faculty and students could have been avoided. Other than the substance of the religious beliefs of certain individuals associated with TWU, the BCCT had no reason, expressed or otherwise, to deny approval to TWU.

B. Preamble to the Charter

17. The preamble establishes the general principles of the Constitution and gives them life. In Re: Provincial Court Judges, [1997] 3 S.C.R. 3, 75, this Court highlighted the general principle known as the "rule of law" and explained the importance of the preamble to the Charter:

> The preamble identifies the organizing principles of the *Constitution Act, 1867*, and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text.

18. While the focus in Re: Provincial Court Judges was on the "rule of law", the approach is equally applicable to the interpretation of the "supremacy of God" principle in the preamble. Just as the preamble invites courts to apply the principle of the rule of law, the preamble invites the courts to give meaning and effect to the general principle of the supremacy of God. The rule of law and the supremacy of God are founding principles of the Constitution and therefore of Canadian society.

19. What does it mean to believe in the supremacy of God? (T.D.) The phrase is rich with constitutional meaning. See O'Sullivan v. Canada, [1992] 1 F.C. 522 (Canada cannot become an officially atheistic state). While it need not be defined fully in this case, it must at least mean this: government will respect the obligations citizens feel towards God, whatever they may conceive God to be.

20. When government respects the obligations of its citizens to their God, it will not take actions which interfere with the fulfillment of those obligations, absent a compelling governmental interest. But the preamble means more than this. It also means that government may never have an interest in marginalizing citizens because of their religious beliefs.

C. Employment Division v. Smith

21. If this Court were to determine that the actions of the BCCT were not taken for a religious or anti-religious purpose, then the question of the effect of such actions will arise. The Supreme Court of Canada has held in The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295, 334

("Big M") and Edwards Books that a law which has a neutral purpose but nevertheless burdens religion will be subject to the test set forth in section 1 of the Charter. The government will be required to justify the burden as reasonable in a free and democratic society.

22. This approach to the constitutionally protected rights of freedom of religion and equality among religions (including non-religion) stands in sharp contrast to that followed by the United States Supreme Court. The absence of a clause similar to section 1 of the Charter allowed the United States Supreme Court to determine that under their Constitution religion could be burdened by government without any requirement of a compelling state interest supporting the existence of the burden.

23. Employment Division v. Smith, 494 US 872 (1990) is the now famous case where the United States Supreme Court abandoned the "compelling interest" test for laws which were neutral on their face but nevertheless negatively impacted the free exercise of religion. The reasoning of Justice Scalia in that case is foreign in many ways from the approach to plurality in Canada:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," Braunfeld v. Brown, 366 US, at 606, 6 L Ed 2d 563, 81 S. Ct. 1144, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.... The First Amendments protection of religious liberty does not require this.

At 888-89.

24. Unlike the United States after Employment Division v. Smith, Canadian Charter analysis does place an onus on the government to justify any Charter infringement. RJR–MacDonald v. Canada, [1995] 3 S.C.R. 199, 268.

25. It appears that the decision of the United States Supreme Court in Employment Division v. Smith was just as foreign to Americans as it is to Canadians. Almost every major faith group and virtually every denomination in the United States of America condemned the Supreme Court decision as a devastating set back for the cause of religious liberty. The United States Congress reacted quickly and passed the Religious Freedom Restoration Act in 1993. 42 U.S.C. s. 2000 bb. That Act re-established the duty on government to show a compelling interest before burdening the free exercise of religion.

26. No sooner was the Religious Freedom Restoration Act passed than it was struck down by United States Supreme Court as unconstitutional. City of Boerne v. Flores, 521 U.S. 507 (1997) (See also L. Boothby, "Without Shelter, Life in Post RFRA America", Liberty, November/December 1998, at p. 6). The hearing in the United States Supreme Court on that appeal united virtually the entire religious community in the United States. A brief filed in the U.S. Supreme Court on behalf of the Coalition for the Free Exercise of Religion ("Coalition Brief") described the consensus which developed in the Unites States on this issue:

> The Coalition for the Free Exercise of Religion ("Coalition") is a coalition of over sixty religions and civil liberties organizations. These organizations represent almost every major faith group in America, spanning the spectrum of religious diversity in America – Christians, Jews, Moslems, Native Americans and Sikhs. The Coalition includes religious liberals and conservatives, and groups with world views as disparate as People for the American Way and Concerned Women for America. They are united by the conviction that the protection of religious liberty is an essential element of a democratic society. (Its members are listed in Appendix A.) The Coalition was called into being in response to the decision of this Court in Employment Division v. Smith. It drafted, lobbied for, and ultimately secured the passage of, the Religious Freedom Restoration Act.

Coalition Brief at 11.

27. The response to the decision of the U.S. Supreme Court in City of Boerne v. Flores has been just as strong as it was to the decision in Employment Division v. Smith. The academic criticism is well represented in an article by Greg Walston in the Thomas Jefferson Law Review: "Re-examining the Implications of Expanding Constitutional Liberty: How the Supreme Court Misconstrued the Religious Freedom Restoration Act in City of Boerne v. Flores," 21 Thomas Jefferson L. Rev. 23 (1999) (the Supreme Court decision effectively limited Congress' ability to add to constitutionally guaranteed liberties through statutory process, notwithstanding prior precedents such as the Civil Rights Act of 1964). Organizations concerned about religious liberty regrouped and went back to Congress seeking reestablishment of the "compelling interest" test through a "Religious Liberty Protection Act". See M. McConnell, "Protecting Free Exercise, A Compelling Case for "Compelling State Interest"," Liberty, November/December 1998, at p. 15.

D. Section 2(a) of the Charter

28. Freedom of religion was best defined by Chief Justice Dickson in Big M at 336:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.... The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [emphasis added]
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled to by the state, or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot said to be truly free...Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from action on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. [emphasis added]

29. In refusing to accredit the Bachelor of Education program of TWU because of certain religious beliefs of faculty and students at TWU, the BCCT violated the guarantee of freedom of religion enshrined in section 2(a) of the Charter. The Community Standards Code subscribed to by students and faculty of TWU is an open declaration of religious belief. The BCCT refusal to

accredit TWU because of this declaration of belief is an infringement of freedom of religion, as Chief Justice Dickson conceived it.

30. Furthermore, in insisting that Donna Lindquist, and all other students of the TWU program take courses at Simon Fraser University in order to graduate, the BCCT engaged in coercion of the nature condemned by Chief Justice Dickson. This attempt to directly control where students obtain their education degree was actuated exclusively by the BCCT disagreement with the religious beliefs of the Christian faculty and staff of TWU.

31. The Intervener is concerned that government be limited from engaging in this form of coercion. CUC and other institutions of the Intervener will be at risk if the BCCT is successful in this appeal. The purpose of the action taken by the BCCT was to discriminate on the basis of religion. Regardless of the severity of the effects of the discrimination, the purposeful actions of the BCCT cannot be justified in a free and democratic society. Chief Justice Dickson explained why in Big M:

> Even if such effect were found inoffensive...this could not save legislation whose purpose has been found to violate the Charter's guarantee.
>
> If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid.

At 333-34.

32. In Canadian Civil Liberties Association v. Ontario, 46 C.R.R. 316, 340-42 (Ont. C.A. 1990), the Ontario Court of Appeal said that "State-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities" and violates section 2(a) of the Charter. The clear message from the BCCT decision under review in this appeal was change your religious beliefs and you will be accredited, a message even more coercive than that in issue before the Ontario Court of Appeal. As noted above, when a governmental action has a purpose which infringes section 2(a) of the Charter, section 1 has no application and the governmental action must be declared unconstitutional. See Canadian Civil Liberties Association v. Ontario, 46 C.R.R. at 358.

33. The TWU faculty and student communities are respectful of groups that do not share their world view or Christian beliefs. To suggest otherwise is not supported by the evidence. The BCCT is engaged in nothing less than fear mongering to suggest that graduates of TWU are intolerant and that there is a threat or risk that these graduates will be intolerant of their students or their students' beliefs. The BCCT's fears are unfounded. There is no evidence that graduates of Christian-based universities have been or will be intolerant to any greater degree than graduates of public universities.

34. Furthermore, as will be addressed later, the beliefs under attack in this appeal are not abhorrent or contrary to public policy.

35. But even if the beliefs in question were contrary to public policy, the mere existence of such beliefs in the faculty and students of TWU could not justify governmental action by the BCCT which limited the Charter rights of Donna Linquist and TWU.

36. This approach to the application of the Charter guarantee of freedom of conscience and religion is supported by the decision of this Court in B. (R) v. Children's Aid Society, [1995] 1 S.C.R. 315, 383 where Justice La Forest (Justices Gonthier and McLachlin concurring) supported the view that while conduct may be restricted by government, religious belief should never be:

> While it is difficult to conceive of any limitations on religious beliefs, the same can not be said of religious practices, notably when they impact on the fundamental rights and freedoms of others.

37. In any event, the BCCT takes issue with TWU because of beliefs held, not because of actions taken, by graduates. This is clearly beyond the constitutional or legislative jurisdiction of the BCCT.

38. Here are the specific reasons given by the BCCT for its condemnation of the TWU education program and its refusal to approve TWU's application for accreditation:

> Labelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. AR 325-26.

> Councillors also expressed concern that the particular world view held by Trinity Western University with reference to homosexual behaviour may have a detrimental effect in the learning environment of public schools. AR 326.

Both of these reasons are rooted exclusively in the condemnation of the religious beliefs of TWU by the BCCT. Neither reason focuses on the TWU graduates and others towards individuals who may be "gay or lesbian".

39. The BCCT cites Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825 ("Ross") as authority for the premise that the beliefs of teachers are relevant to how they will be perceived by the public and thus how they will perform their role in the public school system. The BCCT has misstated the thesis of Ross. The decision in Ross impacted the conduct of teachers in the public school system and not the beliefs of students or faculty.

40. That the conduct of the teacher was the relevant factor in Ross is made clear throughout the decision. The teacher's belief system was never questioned nor made the subject of sanction. Examples of the emphasis on conduct include:

> By their conduct, teachers, as "medium" of the educational message (the values, beliefs and knowledge sought to be transmitted by the school system must be perceived as upholding that message. At 831.
>
> The finding of discrimination, he continues, was made in light of the respondent's conduct, which poisoned the educational environment at the school. At 852.
>
> However, where a "poisoned" environment within the school system if traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teachers and the system as a whole, then the off-duty conduct of the teacher is relevant. At 858.
>
> The School Board itself characterized the effect produced by the respondents conduct in this manner...It (Board of Inquiry) found the School Board had been reluctant to take disciplinary action against the respondent, notwithstanding the publicity his conduct received. At 860.

[emphasis added]

41. The decision in Ross was concerned with a teacher and his conduct. It would be a misapplication of Ross to extend it to the facts in this appeal, where only beliefs are in issue. Particularly where the beliefs, if acted upon, would not be illegal, immoral or contrary to public policy. The moral code of conduct signed by each student and faculty member only requires that they personally act in a particular manner. The nature of their personal conduct is not disrespectful or discriminatory towards any group protected by human rights laws or the Charter.

42. Furthermore, the fact that the views of the faculty and students at TWU are not the same as the members of the BCCT or society generally is no reason to intervene. Justice Twaddle highlighted the appropriate stance in Mackey v. Manitoba, 24 D.L.R. 4th 587, 596:

> The support given by the government to political causes hostile to the general, or a minority viewpoint cannot induce in anyone a pang of conscience for the moral quality of their own conduct or lack of it.

E. Public Policy

1. The Constitution Establishes Public Policy

43. In certifying public school teachers the BCCT must have regard to the public interest. Teaching Professions Act. S.B.C. 1987, c. 19, s. 4 ("It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members").

44. There is no more reliable statement of the public interest in Canada than that found in the Constitution Act, 1867 and the Charter.

45. The right to the free exercise and enjoyment of religious profession and worship without discrimination or preference is a constitutional right of all the people of Canada given to them by the pre-Confederation Statute of 1852 (14-15 Vict. c. 175) and implicit in the language of the preamble of the Constitution Act. Saumur v. Quebec (City), [1953] 2 S.C.R. 299, (by-law forbidding street distribution of literature by Jehovah Witnesses was ultra vires the provincial legislature because it purported to restrain the right of freedom of worship).

46. Protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation. Therefore, the Constitution Act, 1867 was crafted so as to preserve the rights and privileges already acquired by law at the time of Confederation, including the constitutional guarantee of the rights of separate schools. In Re: An Act to Amend the Education Act, [1987] 1 S.C.R. 1148, 173-74 ("Bill 30 Reference"), Justice Wilson noted that Roman Catholic schools received constitutional protection because Roman Catholics "regarded it as essential that the education of their children should be in accordance with the teachings of their church and...could only be secured in schools conducted under the influence and guidance of the authorities of their Church."

10 47. Section 52 of the Charter recognizes that the Charter is the supreme law of the land. This supreme law enshrines the protection of religion in our society and ensures that members of religious organizations will not be marginalized. The importance of protecting religion in Canadian society as a matter of public policy can be gleaned from the numerous references to religion in the Charter:

Preamble	Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.
Section 2(a)	Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.
Section 15	Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... religion ...
Section 27	This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
Section 29	Nothing in this Charter abrogates or derogates from any rights or principles guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentent schools.

[emphasis added]

48. The effect of denying government certification to organizations by virtue of their religious teachings, adversely discriminates against members of such organizations on the basis of religion and is inconsistent with Canadian public policy as evidenced in the Charter.

49. Justice Cory explained it this way in Vriend v. Alberta, [1998] 1 S.C.R. 493, 536 ("Vriend"):

> It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual. [emphasis added]

50. To deny religious organizations the protection of section 15 of the Charter based on stereotypical and biased perceptions of their religion would render Justice Cory's words in Vriend meaningless.

2. Human Rights Codes are Reflective of Public Policy

51. Human rights legislation is quasi-constitutional legislation which embodies many Charter values and is reflective of public policy.

52. Because of their status as "fundamental law" human rights statutes must be interpreted liberally, so that they may better fulfill their objectives. British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3, 27 ("Meiorin").

53. The Human Rights Code, R.S.B.C. 1996, c. 210 ("Code") statutorily entrenches the concept of a bona fide occupational requirement ("BFOR").

54. The decision of this Court in Meiorin is the latest word on the BFOR test in human rights jurisprudence. B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights), [1999] 3 S.C.R. 868 ("Grismer") confirmed the Meiorin test applies to all claims for discrimination under the Code. For a full discussion of the BFOR defense in the context of religious institutions see Tarnopolsky, W. and Pentney, W., Discrimination and The Law (Carswell, looseleaf) (Section 6.3, pp. 6-41 to 6-71).

55. Under the Meiorin test, once the plaintiff establishes that the standard is prima facie discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a bona fide and reasonable justification. In order to establish this justification, the defendant must prove that:

> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Grismer at 881.

(a)

56. This is consistent with the Supreme Court of Canada's approach in Vriend where Justice Cory wrote:

> To begin, I cannot accede to the suggestion that the Alberta Legislature has been cast in the role of mediator between competing groups. To the extent that there may be a conflict between religious freedom and the protection of gay men and lesbians, the *IRPA* contains internal mechanisms for balancing these rival concerns. In addition, ss. 7(3) and 8(2) excuse discrimination which can be linked to a *bona fide* occupational requirement. The balancing provisions ensure that no conferral of

> rights is absolute. Rather, rights are recognized in tandem, with no one right being automatically paramount to another.
>
> Given the presence of the internal balancing mechanisms, the argument that the Government's choices regarding the conferral of rights are constrained by its role as mediator between competing concerns cannot be sustained. The Alberta Legislature is not being asked to abandon the role of mediator. Rather, by virtue of the provisions of the *IRPA*, this is a task which is carried out as the Act is applied on a case-by-case basis in specific factual contexts. Thus, in the present case it is no answer to say that rights cannot be conferred upon one group because of a conflict with the rights of others. A complete solution to any such conflict already exists within the legislation.

At 560. See also Caldwell v. Stuart, [1984] 2 S.C.R. 603, 625 (requirement of religious conformance, including the acceptance and observance of the Church's rules regarding marriage, constitutes a bona fide qualification in respect of the occupation of a Catholic teacher employed in a Catholic school).

57. Section 3 of the Code reinforces the public policy element of human rights legislation. Section 3 details some of the purpose of the Code in these terms:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code.

58. It would be abhorrent from a public policy perspective to denigrate the BFOR protection for religion because of a perceived fear that individuals' educated in a Christian setting would discriminate against others on prohibited grounds of discrimination. This is anathema to a pluralistic society whose goal is to eradicate discrimination.

59. There is no evidence that merely because an individual exercises their right to freedom of religion that they will inculcate or teach discriminatory views towards others or act in an illegal discriminating manner.

60. A further source of stated public policy in British Columbia is the Civil Rights Protection Act, R.S.B.C. 1996, c. 49. Sections 1 and 2 of that Act make "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting...the superiority or inferiority of a person or class of persons in comparison with another or others, on the basis of...religion...is a tort actionable without proof of damage." The legislature of British Columbia has made it clear through this Act and other acts of the legislature that the religion of individuals must never be the basis for adverse distinction. It appears that if any action is contrary to public policy it is the action of the BCCT to suggest that the education at Simon Fraser University is superior to the education of TWU because of the religion of the faculty and students of TWU.

3. The Enabling Statute Creating TWU Is An Expression of Public Policy

61. The statute which created TWU includes an express statement of public policy regarding the objects of TWU. Trinity Western University Act, S.B.C. 1969, c. 44. Section 3(2) of that Act provides that: "The objects of the College shall be to provide for young people of any race, colour, or creed the first two years of university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian and to assist students to transfer to senior colleges and universities." [emphasis added]

4. Historically, Public and Religious Schools Have Coexisted in Canada

62. Canada has a history of public and religious schools coexisting as a matter of public policy, this approach to education should continue to be respected. See Bill 30 Reference at 1168-96.

63. The 1985 Commission on Private Schools in Ontario received many submissions on the value of religious-based schools in Canadian society. The submission of the Citizens for Public Justice opined on the value of these schools:

> Pluralism is threatened when government activity promotes one view and way of life and strongly discourages the others. Forcing all people to think the same way, by officially sanctioning certain values to the exclusion of others, violates their God-given humanity and creativity. To make pluralism a living reality in our society, government must provide equitable structural opportunities and financial incentives for groups to express their beliefs collectively and institutionally. It should do so within a framework of legislation that protects all and discriminates against none. [emphasis added]

Commission on Private Schools in Ontario, 1985 at 30.

5. International Covenants

64. Public policy may also be found within international declarations and covenants to which Canada is a signatory. Two international treaties which address the question of education within a religious institution are the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Article 5) and Convention on the Rights of the Child (Articles 28, 29 and 30).

F. Section 7 of the Charter

65. The due process clause of the Charter requires government decision makers to at least provide a fair hearing before making decisions which may limit the liberty of a citizen. Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 510 (18 C.R.R. 30, 50-52) (the decision maker "must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity to state his case'). Fundamental justice can require no less when individual liberty is at stake.

66. In Wilson v. Medical Services Commission of British Columbia, 41 C.R.R. 276, 304 (B.C.C.A. 1988) (leave to appeal to S.C.C. denied) the British Columbia Court of Appeal determined that geographic restrictions imposed by government on the right to practice medicine in British Columbia constituted a violation of the right to liberty protected by section 7 of the Charter. The decision by the BCCT directly restricts where students of TWU may attend university classes. The geographic restrictions are no less punitive than those in Wilson. Unless the BCCT acted to limit the liberty of TWU students in a manner which was consistent with the

principles of fundamental justice, the BCCT decision cannot measure up to the section 7 standard.

67. The United States Supreme Court commented on the fundamental liberty interests at stake in matters of education in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924):

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

68. The relevant procedural steps leading up to the decision of the BCCT are set forth at pages 198 to 376 of the Appellant's Record. A review of the letters and minutes in the Appellant's Record discloses the following breaches of the principles of fairness required of administrative tribunals such as the BCCT (See Baker v. Canada, [1999] 2 S.C.R. 817, 841 ("The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.")) and the principles of fundamental justice in section 7 of the Charter:

(a) TWU was not provided with full notice of the BCCT concerns regarding its Community Standards Code until June 28, 1996, long after the BCCT made its formal decision on May 16, 1996. AR at 316.

(b) TWU was not given an opportunity to address the Community Standards Code concern until after the BCCT Council decision was made on May 16, 1996. AR at 277 and 289.

(c) TWU was never provided with a copy of the legal advice or other information upon which the BCCT Council based its decision of May 16, 1996. AR at 314.

(d) The matter was not referred back to the Program Approval Team for review with TWU when Council members first raised concerns. AR at 277.

(e) BCCT refused to provide further clarification on June 3, 1996 in response to the letter of May 28, 1996 from TWU to BCCT. AR at 295.

69. All of these actions deprived TWU of the opportunity to state its case to an unbiased decision maker. By the time TWU had all of the information necessary to properly respond to the issue raised at the last hour by the BCCT Council, the Council had already voted to deny accreditation. That vote created a reasonable apprehension of bias and prevented the BCCT from addressing the issue with an even hand.

70. As this Court considers the relevance of section 7 to the TWU application, it will have to address the issue of whether a corporate entity such as TWU may raise section 7 rights on behalf of its students. The sole purpose for the existence of TWU is its students. While the university is made up of faculty members, the beneficiaries of this collection of scholars are the students. Furthermore, one of the TWU students is a party to this appeal. Therefore, the interests of individual students are in fact before this Court and such interests will support a section 7 claim. In any event, the Federal Court of Appeal has held that a section 7 argument may be advanced by a corporation if that is the only effective means of judicial review. Canadian Council of Churches v. Canada, 46 C.R.R. 290, 299-301 (Fed. C.A. 1990). In Canadian Council of Churches v. Canada, the rights of refugees were in question. In this appeal it is the rights of students. The section 7 question is properly before this Court. Donna Lindquist and the other students at TWU have a section 7 protected right to attend university in the location of their choice unless this right to liberty has been limited in accordance with the principles of fundamental justice. It has not.

IV. NATURE OF ORDER SOUGHT

71. The Intervener requests leave to make oral submissions not exceeding 20 minutes and requests that the within appeal be dismissed.

All of which is respectfully submitted this 13th day of July, 2000.

Gerald D. Chipeur
Barbara B. Johnston

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***Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11**

Preamble
Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:
a) freedom of conscience and religion;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Affirmative action programs (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(93)

52(1). The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52(2). The Constitution of Canada includes
(a) the Canada Act 1982, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

52(3). Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Civil Rights Protection Act, R.S.B.C. 1996, c. 49

1. In this Act, "prohibited act" means any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting

(a) hatred or contempt of a person or class of persons, or

(b) the superiority or inferiority of a person or class of persons in comparison with another or others,

on the basis of colour, race, religion, ethnic origin or place of origin.

2(1). A prohibited act is a tort actionable without proof of damage,

(a) by any person against whom the prohibited act was directed, or

(b) if the prohibited act was directed against a class of persons, by any member of that class.

2(2). If a corporation or society engages in a prohibited act, every director or officer of the corporation or society who authorized, permitted or acquiesced in the commission of the prohibited act may be sued by the persons referred to in subsection (1) and is liable in the same manner as the corporation or society.

2(3). In an action brought under this section, the commission of a prohibited act by any director or officer of a corporation or society must be presumed, unless the contrary is shown, to be done, authorized or concurred in by the corporation or society.

2(4). An action under this section must be commenced in the Supreme Court.

The Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3

Preamble

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared: And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Convention on the Rights of the Child

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Made educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human right and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, or the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individual and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30
In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exists, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

Article 5
1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brother hood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interest of the child being the guiding principle.

5. The practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

***Human Rights Code*, R.S.B.C. 1996, c. 210**

3. The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code;

(f) to monitor progress in achieving equality in British Columbia;

(g) to create mechanisms for providing the information, education and advice necessary to achieve the purposes set out in paragraphs (a) to (f).

***Teaching Professions Act*, S.B.C. 1987, c. 19**

4. It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.

***Trinity Junior College Act*, S.B.C. 1969, c. 44**

3(2). The objects of the College shall be to provide for young people of any race, coulour, or creed the first two years of university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian and to assist students to transfer to senior colleges and universities.

No. 27168

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal
for British Columbia)

BETWEEN:

The British Columbia College of Teachers
Appellant

- and –

Trinity Western University and
Donna Gail Lindquist
Respondent

- and –

The Seventh Day Adventist Church in Canada et al.
Interveners

INTERVENER FACTUM OF THE SEVENTH DAY ADVENTIST CHURCH IN CANADA

FRASER MILNER CASGRAIN
Barristers & Solicitors
Fifth Avenue Place
237-4th Avenue S.W.
Calgary, Alberta
T2P 4X7

Gerald Chipeur
Corina Dario

Tel: (613) 783-9600 (Ottawa agent)
Fax: (613) 783-9690 (Ottawa agent)

Solicitors for the Intervener,
The Seventh Day Adventist
Church in Canada