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
(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 FELLOWHIP OF CANADA
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

LINDSAY KENNEY
Barristers & Solicitors
1700 - 700 West Pender Street
Vancouver, B.C. V6C 1G8
Ph. 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
Ph. 613-232-1781
Fax. 613-563-9869

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

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
(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 FELLOWHIP OF CANADA
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

LINDSAY KENNEY
Barristers & Solicitors
1700 - 700 West Pender Street
Vancouver, B.C. V6C 1G8
Ph. 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
Ph. 613-232-1781
Fax. 613-563-9869

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

To: **KUHN & COMPANY**
Barristers & Solicitors
300-31935 South Fraser Way
Abbotsford, BC V2T 5N7
Ph. 604-864-8877
Fax. 604-864-8867

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

MCCARTHY TETRAULT
Barristers & Solicitors
1400-40 Elgin Street
Ottawa, Ontario K1P 5K6
Ph. 613-238-2000
Fax. 613-563-9386

COLIN S. BAXTER
Ottawa Agents for the
Respondents

AND TO: **NELSON & VANDERKRUYK**
Barristers & Solicitors
13th Floor, 335 Burrard Street
Vancouver, BC V6C 2G8
Ph. 604-684-1311
Fax. 604-684-6402

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

GOWLING, STRATHY HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, Ontario K2P 3C3
Ph. 613-233-1781
Fax. 613-563-9869

Ottawa Agents for the Appellant

AND TO: **FRASER MILNER**
Barristers & Solicitors
237-4th Avenue S.W.
Calgary, Alberta T2P 4X7
Ph. 403-268-6861
Fax. 403-268-3100

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

FRASER MILNER
Barristers & Solicitors
1200-180 Elgin Street
Ottawa, Ontario K2P 2K7
Ph. 613-783-9600
Fax. 613-783-9690

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

AND TO: **NELLIGAN POWER**
Barristers & Solicitors
1900-66 Slater Street
Ottawa, Ontario K1P 5H1
Ph. 613-231-8276
Fax. 613-238-2098

PAM MACEACHERN
Solicitors for the Intervener,
EGALE Canada Inc.

AND TO: **GREEN & CHERCOVER**
Barristers & Solicitors
10th Floor, 30 St. Clair Avenue West
Toronto, Ontario M4V 3A1
Ph. 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
Ph. 613-238-8080
Fax. 613-238-2098

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

AND TO: **BARNES, SAMMON**
Barristers & Solicitors
400-200 Elgin Street
Ottawa, Ontario K2P 1L5
Ph. 613-594-8000
Fax. 613-235-7578

W.J. Sammon
Solicitor for the Intervener, The Canadian
Conference of Catholic Bishops

AND TO: **STIKEMAN, ELLIOTT**
Barristers & Solicitors
Commerce Court West
Suite 5300, P.O. Box 85
Toronto, Ontario M5L 1B9
Ph. 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
914-50 O'Connor Street
Ottawa, Ontario K1P 6L2
Ph. 613-234-4555
Fax. 613-230-8877

MIRKO BIBIC
Ottawa Agents for the Intervener,
The Evangelical Fellowship of Canada

AND TO: **GOWLING, STRATHY & HENERSON**
Barristers & Solicitors
Suite 4900, Commerce Court West
Toronto, Ontario M5L 1J3
Ph. 416-862-4324
Fax. 416-862-7661

ANDREW LOKAN and
HEATHER BOWIE
Solicitors for the Intervener,
The Canadian Civil Liberties Association

GOWLING, STRATHY HENDERSON
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, Ontario K2P 3C3
Ph. 613-233-1781
Fax. 613-563-9869

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

FACTUM OF THE INTERVENER
THE B.C. CIVIL LIBERTIES ASSOCIATION

INTRODUCTION

1. The main issue in this case is whether the Appellant can demonstrably justify an infringement of the Respondents' fundamental freedoms.

2. The Appellant, the B.C. College of Teachers (the "BCCT") argues that it is not in the "public interest" to certify Trinity Western University's ("TWU") teacher education program because TWU's Code of Conduct discriminates on the basis of sexual orientation. The Respondents assert that denying certification of their program, infringes their right to be free from religious discrimination and their freedoms of conscience, religion, association and expression.

3. It is respectfully submitted that the Appellant erred when it determined that the TWU was guilty of discrimination, because the Appellant failed to consider the Respondents' fundamental freedoms of conscience, religion and association. With respect, the error in the argument of the Appellant was the assumption that equality on the basis of sexual orientation was the only value which is engaged by TWU's application for certification of its teacher education program. It was not. The values inherent in the Respondents' fundamental freedoms of conscience, religion and association were also engaged. If these competing values cannot be reconciled then the Court must determine on the facts and law, in each particular case, which rights and freedoms will take precedence. Where the State seeks to justify an infringement of a

1 fundamental freedom, it must meet the test under s. 1 of the *Charter*. On the facts in this
2 case, it is respectfully submitted that the Appellant's infringement of the Respondents'
3 freedoms cannot be demonstrably justified.
4
5 4. This Intervener, the British Columbia Civil Liberties Association (the "BCCLA")
6 will make submissions on the following issues: (a) whether TWU's Code of Conduct
7 unjustifiably discriminates on the basis of sexual orientation, contrary to law; (b) whether
8 there is any evidence that TWU should be denied certification because its graduates may
9 poison the classroom environment; and, (c) whether the Appellant's refusal to certify
10 TWU's program was an unjustified infringement upon the Respondents' freedoms of
11 religion and association.
12

13 **THE TWU CODE OF CONDUCT DOES NOT VIOLATE HUMAN RIGHTS**
14 **<u>LEGISLATION AND THE CHARTER</u>**
15

16 5. It is important to keep in mind that there are basically two reasons why the
17 Appellant says the TWU program should not be certified, due to the TWU Code of
18 Conduct. The Appellant has blended these two reasons together in its argument, but they
19 are really separate. First, the Appellant refused to certify TWU's program because, it
20 says, the TWU Code of Conduct discriminates on the basis of sexual orientation and
21 therefore it was not in the public interest to certify the program: A.B. p. 323. Second, the
22 Appellant said that it refused to certify the program because of the concern that graduates
23 of TWU, who had been adherents to the Code of Conduct and the TWU "world view",
24 may have a detrimental effect on the learning environment in the classroom, once they
25 graduate: A.B. p. 326.

1 6. This Intervener will first deal with the Appellant's concern that TWU was
2 following discriminatory practices.
3
4 7. This Intervener concedes that, in its effect, the Code of Conduct is discriminatory,
5 but that does not end the matter.
6
7 8. Both the Appellant and the Respondents have agreed that TWU is not subject to
8 British Columbia human rights legislation. The BCCLA respectfully disagrees with both
9 of the parties. It is the position of the BCCLA that the British Columbia *Human Rights*
10 *Code* clearly does apply to TWU.
11
12 9. The Appellant argues that it may refuse to certify the TWU program because
13 discrimination is wrong and "there is evidence of discriminatory practices" by TWU:
14 Appellant's factum, pp. 12 – 13, 22. With respect, the Appellant is arguing that once
15 TWU has been found guilty of discrimination, that is the end of the matter. This is
16 simply not the case. The British Columbia *Human Rights Code* provides certain
17 "defences" to a charge of discrimination. Not all discrimination is unlawful. For
18 example, only discrimination which is without "bona fide and reasonable justification"
19 violates s. 8 of the British Columbia *Human Rights Code*. Further, non-profit religious
20 and educational institutions may grant a preference to members of an identifiable group
21 without contravening the *Code*: s. 41 (formerly s. 19).
22
23 10. In addition, while the *Charter* does not apply to TWU, the Appellant argues that
24 the law prohibiting discrimination is, in effect, codified in s. 15 of the *Charter*:

1 Appellant's factum, para. 51. While this is true, the Appellant is ignoring the fact that
2 under the *Charter*, discrimination which may be demonstrably justified in a free and
3 democratic society, is permitted under s. 1.
4
5 11. What the Appellants are really saying is that, in their view, to the extent that the
6 law provides TWU with "defences" to a charge of discrimination, the law is wrong. The
7 Council did not issue detailed reasons for its decision but the reasons it did issue
8 demonstrate that it applied a very simple analysis to the problem before it. The Council
9 said it was contrary to the public interest to approve the TWU program because TWU
10 "...appears to follow discriminatory practices that public institutions are, by law, not
11 allowed to follow": A.B. pp. 291, 323. In other words, the Council realized that TWU
12 was, unlike a public institution, entitled to raise religious freedom and other rights and
13 freedoms as defences to a charge of discrimination. The Council evidently did not like
14 this state of the law so it chose to ignore those defences. It is not open to the Appellant,
15 however, to apply part of the law and ignore the rest.
16
17 12. Section 41 of the British Columbia *Human Rights Code* is a recognition by the
18 legislature that some discrimination by religious institutions should be tolerated in British
19 Columbia, in order to protect their freedom to associate: *Caldwell v. Stuart* [1985] 1
20 W.W.R. 620, at. 641. Obviously, the very nature of a religious educational institution is
21 to provide services to an identifiable group. This may either expressly or impliedly
22 exclude others who do not belong to that group. This sort of discrimination is
23 permissible under the *Code*.
24

1 13. Had the Council referred to the jurisprudence under the British Columbia *Human*
2 *Rights Code*, it would have undoubtedly reviewed this Court's decision in *Caldwell v.*
3 *Stuart*, supra, where it was found that it was permissible that a Catholic school dismissed
4 a teacher from her employment for failing to follow Catholic dogma. (see also, *R. v.*
5 *Black and Metropolitan Separate School Board* (1988), 52 D.L.R. (4th) 736 (Ont. C.A.)
6 and *Newfoundland Teachers Association and Walsh v. The Queen* (1988), 39 C.R.R. 188
7 (Nfld. C.A.)). In doing so, this Court considered s. 41 (then s. 22) of the British
8 Columbia *Human Rights Code* and stated, at p. 640:
9

> 10 "To begin with it must be recognized that we are here facing a situation where
> 11 there is a clear conflict between two sound legal positions. There is an assertion
> 12 by each party of a clear legal right and the two rights, if each is to be accepted
> 13 with no modification or limitation, are incompatible....
> 14 It seems evident to me that the legislature of British Columbia, recognizing the
> 15 historically acquired position of the denominational school and the desirability of
> 16 preserving it, in enacting a *Human Rights Code* which goes far to eliminate
> 17 differences and distinctions in society, included s. 22 [now s. 41] as a protection
> 18 for the denominational school or other institution in like case."

19

20 14. The Appellant concedes, and this Intervener agrees, that the Council was not
21 applying the *Human Rights Code* and the *Charter* when considering TWU's application:
22 Appellant's factum, para. 63. Indeed, there was no complaint of discrimination before
23 the Council. The Appellant argues, and again this Intervener agrees, that it may consider
24 the principles contained in the *Charter* and the *Human Rights Code* to guide it in its
25 assessment of TWU's application: Appellant's factum, para. 63.
26 15. The problem, however, is that assuming it was within the Council's jurisdiction to
27 consider whether TWU was contravening the principles enshrined in the B.C. *Human*
28 *Rights Code* or the *Charter*, in order to determine if it was in the public interest to certify
29 their program, the Council must, in doing so, consider those laws in their entirety. They

1 cannot pick and choose which sections of the *Code* and the *Charter* they wish to
2 consider. They cannot purport to consider the *Code* and *Charter* and ignore the
3 jurisprudence under both. Had they considered the *Code* and the *Charter* in their entirety
4 and the jurisprudence under each, they would have concluded that TWU's Code of
5 Conduct does not contravene the *Code* and *Charter* principles.
6
7 16. With the greatest of respect, the Council of the BCCT has, in effect, either
8 concluded that the value of equality on the basis of sexual orientation was the only value
9 that was at issue before them, or that the value of equality should somehow "trump" the
10 Respondents' freedoms of conscience, religion and association. The British Columbia
11 Legislature, however, has determined through s. 41 of the *Human Rights Code* that the
12 Respondents' freedoms of religion and association are deserving of protection and it is
13 not open to the Appellant to disregard or overrule this protection.
14
15 17. The Appellant is a statutory tribunal which is a branch of the State. It was not
16 open to the Appellant to re-write human rights law. The decision of the Council was
17 wrong. The TWU Code of Conduct does not violate the B.C. *Human Rights Code* and is
18 not contrary to the principles set out in the *Charter*. Even if one accepts that the Code of
19 Conduct is discriminatory, it is discrimination which is permitted or justified by the law,
20 by reason of the protections and freedoms accorded to the Respondents.
21
22 18. Thus, there is no justification for concluding that certifying TWU's teacher
23 education program is not in the public interest.
24

THERE IS NO EVIDENCE THAT TWU GRADUATES ARE UNFIT TO TEACH

17. The Council's other stated reason for refusing to certify TWU's teacher education program was because of a concern that graduates of TWU may have a detrimental effect on the classroom environment.

18. As a "cure" to prevent this alleged effect from occurring, the Council of the BCCT argues that it is important that the students in TWU's teacher education program attend Simon Fraser University for one year in order to gain exposure to secular or *Charter* values.

19. Students have been graduating from TWU, taking 4 of their 5 year program there, for many years. No evidence was placed before the Council of the BCCT nor the Court below, to suggest that any graduates of TWU have discriminated against homosexual persons in the public school classroom environment, or failed to provide a welcoming or supportive environment to homosexual persons in the school system. The Appellant argues that this proves the present system is working. The final "de-programming" year at Simon Fraser University, however, has actually been as spent as a student practicum, in the classroom environment. The same would be done at TWU if certification was granted: A.B. p. 33, 467, 499 – 500.

20. This Intervener takes the position that, while the Appellant had the authority and jurisdiction to consider whether graduates of TWU may not be fit to teach in a school classroom environment, there was simply no evidence in this case to support the view that they are unfit. It is noteworthy that the Council ignored the recommendations of its

1 own accreditation committee, who had also considered the TWU Code of Conduct and
2 world view: A.B. pp. 197, 211-216, 263-264, 484-5.
3
4 21. This Court in *Ross v. New Brunswick School District No. 15* [1996] 25 C.H.R.R.
5 175, dealt with the case of a dismissal of a teacher on the basis of his racist comments
6 and expressions made outside of the classroom. At p. 193 the Court stated:
7
8 "I do not wish to be understood as advocating an approach that subjects the entire
9 lives of teachers to inordinate scrutiny on the basis of more onerous moral
10 standards of behaviour. This could lead to a substantial invasion of the privacy
11 rights and fundamental freedoms of teachers. However, where a "poisoned"
12 environment within the school system is traceable to the off-duty conduct of a
13 teacher that is likely to produce a corresponding loss of confidence in the teacher
14 and the system as a whole, then the off-duty conduct of the teacher is relevant."
15
16
17 22. On this issue, this Intervener adopts and repeats the Reasons for Judgment of Mr.
18 Justice Goldie of the British Columbia Court of Appeal, at paragraphs 109 – 112 (A.B.
19 pp. 499 – 500). Indeed, the only evidence before the Council on this issue was from the
20 Respondent, TWU, rebutting the assertion that their teachers would poison the classroom
21 environment: A.B. pp. 301, 302, 305, and 308. On the other hand, the Appellant's refusal
22 to certify TWU on the basis of the Code of Conduct is, it is respectfully submitted, a
23 substantial and unnecessary infringement of the fundamental freedoms of the
24 Respondent, TWU and the students in its teacher education program.
25

THE DECISION OF THE COUNCIL INFRINGES THE RESPONDENTS' FREEDOM OF RELIGION AND ASSOCIATION

24. This Court, in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 336-7 described freedom of religion as follows:

> "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 a 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 fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint...Coercion includes not only blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

25. In *R. v. Public Service Employee Relations Act* [1987] 1 S.C.R. 313, at 395, this Court had occasion to describe freedom of association as follows:

> "While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associated with his fellows both to satisfy his desire for social intercourse and to realize common purposes."

26. It is recognized in British Columbia and Canadian society generally, through the *Human Rights Code* and the *Charter of Rights and Freedoms* that the freedoms of religion, conscience and association are important.. Indeed, it is the British Columbia legislature who decided to provide the special protection to the freedom of association of religious institutions as set out in s. 41 of the British Columbia *Human Rights Code*. This

1 Court, in *Caldwell v. Stuart*, supra, adopted the following statement by Seaton J.A.,

2 regarding s. 41 (then s. 22):

3

4 "This is the only section of the Act that specifically preserves the right to
5 associate. Without it the denominational schools that have always been accepted
6 as a right of each denomination in a free society, would be eliminated. In a
7 negative sense s. 22 [now s. 41] is a limitation on the rights referred to in other
8 parts of the Code. But in another sense it is a protection of the right to associate.
9 Other sections ban religious discrimination; this section permits the promotion of
10 the religion."
11

12 27. The Appellant evidently takes issue with freedom of religion and association and

13 believes that the right to be free from discrimination on the basis of sexual orientation

14 ought to supersede these freedoms.

15

16 28. The Appellant, however, is an instrument of the State. It cannot unjustifiably

17 infringe freedom of religion and association when imposing certification requirements on

18 TWU. This Court, in *Jones v. The Queen* [1986] 2 S.C.R. 284, considered a very similar

19 problem. At 298, the majority of the Court stated:

20 "How far the province could go in imposing conditions on the way the appellant
21 provides instruction, if he had applied for registration of his academy as a private
22 school or for certification of the efficiency of his instruction, I need not enter into.
23 Certainly a reasonable accommodation would have to be made in dealing with
24 this issue to ensure that provincial interests in the quality of education were met in
25 a way that did not unduly encroach on the religious convictions of the appellant.
26 In determining whether pupils are under "efficient instruction", it would be
27 necessary to delicately and sensitively weigh the competing interests so as to
28 respect, as much as possible, the religious convictions of the appellant as
29 guaranteed by the *Charter*. Those who administer the province's educational
30 requirements may not do so in a manner that unreasonably infringes on the right
31 of parents to teach their children in accordance with their religious convictions.
32 The interference must be demonstrably justified."
33

29. Moreover, if the Appellant wishes to infringe upon the Respondents' freedoms, as they have done, the Appellant must demonstrate that this infringement is a justifiable infringement, which is "prescribed by law".

30. It is submitted that the infringement in the case at Bar is a decision of the Council of the British Columbia College of Teachers, and as such it is not "prescribed by law". A decision by a statutory tribunal is not entitled to s. 1 protection: *Ontario Film & Video Appreciation Soc. v. Ontario Board of Censors* (1983), 147 D.L.R. (3d) 58, at 67, aff'd (1984), 5 D.L.R (4th) 766; *Eldridge v. British Columbia (A.G.)* [1997] 3 S.C.R. 624 at para. 84; *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1998), 54 B.C.L.R. (3d) 306, at 323.

31. Even if the decision of the Council is entitled to s. 1 protection, it is submitted that the Appellant cannot meet the *Oakes* test under s. 1 of the *Charter*. Contrary to the submission of the Appellant, this is not a matter for which the Court should give judicial deference.

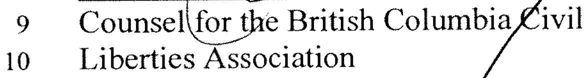
32. The conditions that the Appellant imposes on certification of TWU must not unreasonably interfere with the Respondents' freedoms, and the interference must be demonstrably justified. It is submitted that the Appellant's refusal to certify the TWU program does not satisfy this test. It is submitted that the Appellant's decision to not certify the TWU program, because of the religious beliefs contained in the Code of Conduct, is an unreasonable infringement upon the Respondents' freedoms of conscience and religion, and association.

1 33. This is not to say that one may act with impunity in the name of religious
2 freedom. But where freedom of religion and association conflicts with equality rights,
3 the Court should endeavour to balance the competing values under the s. 1 analysis.
4 Internal limits should not be placed on freedom of religion and association: *B. (R.) v.*
5 *C.A.S. (Metro Toronto)* (1995), 122 D.L.R. (4th)1 at 50 - 51; *M. (A.) v. Ryan* (1997), 29
6 B.C.L.R. (3d) 133, at 157 – 8. Since the Appellant is the State, this Court should not take
7 a flexible approach to balancing rights. Rather, the Appellant must demonstrate that
8 limits upon the Respondents' freedoms are justified: *M. (A.) v. Ryan*, supra, at 158.
9
10 34. It is submitted that it is not necessary to review all of the elements of the *Oakes*
11 test, because the Appellant cannot meet the "minimal impairment" and "proportionality"
12 requirements. In this respect this Intervener adopts and agrees with the submissions of
13 the Respondents as set out at Pages 34 and 35 of their factum.
14

15 **CONCLUSION**

16
17 36. Even if one assumes that the Council of the B.C. College of Teachers had the
18 jurisdiction to consider human rights values when rejecting the Respondents' application
19 for certification, the fact is the Appellant was plainly wrong in the conclusions it came to.
20
21 37. The Appellant was wrong when it came to the conclusion that TWU had violated
22 the principles as set out in the *Charter of Rights and Freedoms* and in British Columbia
23 human rights legislation. On the facts, TWU has done no such thing. The Appellant fails
24 to recognize that the *Charter of Rights and Freedoms* and the British Columbia *Human*

1 *Rights Code* include protection for not only those discriminated against on the basis of
2 sexual orientation, but also for religious minorities. When rights and freedoms conflict,
3 some discrimination may be permissible in the name of freedom of religion and
4 association. Had the Council properly analyzed the issue, considering the *Code* and the
5 *Charter* in full, it would have come to the conclusion that TWU had not violated *Charter*
6 principles nor those expressed in the B.C. *Human Rights Code.*
7
8 38. Moreover, to the extent that TWU has discriminated on the basis of sexual
9 orientation, that discrimination must be weighed against, and balanced with the
10 Respondents' freedoms of religion and association. In the circumstance of the case of
11 Bar, it is respectfully submitted that these freedoms outweigh the intrusion upon equality
12 rights.
13
14 39. The concern that graduates of TWU will act in a detrimental fashion in the
15 classroom is not supported by any evidence.
16
17 40. Further, the Appellant's decision infringes the Respondents' freedoms in a
18 manner that is not prescribed by law and cannot be demonstrably justified in a free and
19 democratic society.
20
21 19. Thus, in the final analysis, the case at Bar is about balancing competing rights and
22 freedoms. In the circumstances of this case the Council of the B.C. College of Teachers
23 failed to conduct such an inquiry and erroneously concluded that equality of rights on the
24 basis of sexual orientation trump freedom of religion and association They do not. One

1 may not like or agree with the opinions or views contained in the Code of Conduct but
2 nevertheless, the Respondents are entitled to hold such opinions and views. Had the
3 Council properly considered the Respondents' freedoms and it is respectfully submitted
4 TWU would have received its accreditation.
5
6 ALL OF WHICH IS RESPECTFULLY SUBMITTED
7

8
9 Counsel for the British Columbia Civil
10 Liberties Association
11
12 Vancouver, British Columbia
13 June 19, 2000

1

TABLE OF AUTHORITIES

2

Citation	Page Cited
Caldwell v. Stuart [1985] 1 W.W.R. 620	4, 5, 10
R. v. Black and Metropolitan Separate School Board (1988), 52 D.L.R. (4th) 736 (Ont. C.A.)	5
Newfoundland Teachers Association and Walsh v. The Queen (1988), 39 C.R.R. 188 (Nfld. C.A.)	5
Ross v. New Brunswick School District No. 15 [1996] 25 C.H.R.R. 175	8
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295	9
R. v. Public Service Employee Relations Act [1987] 1 S.C.R. 313	9
Jones v. The Queen [1986] 2 S.C.R. 284	10
Ontario Film & Video Appreciation Soc. v. Ontario Board of Censors (1983), 147 D.L.R. (3d) 58, aff'd (1984), 5 D.L.R (4th) 766	11
Eldridge v. British Columbia (A.G.) [1997] 3 S.C.R. 624	11
Little Sisters Book & Art Emporium v. Canada (Minister of Justice) (1998), 54 B.C.L.R. (3d) 306	11
B. (R.) v. C.A.S. (Metro Toronto) (1995), 122 D.L.R. (4th)1	12
M. (A.) v. Ryan (1997), 29 B.C.L.R. (3d) 133	12

3