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 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

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INDEX

V. TABLE OF AUTHORITIES

APPENDIX "A" STATUTORY AUTHORITIES

I. STATEMENT OF FACTS

1. The Christian Legal Fellowship ("Intervener" or "CLF"), adopts the statement of facts set out in the Respondent's factum, but desires to add the following.

2. The Intervener is a non-profit organization based in Vancouver, British Columbia. It was established in Canada in 1978 and has an active membership made up of law students, practising and retired lawyers, masters and judges.

3. One of CLF's purposes is to promote the professional interests of its membership. The provision of a forum for Christian fellowship amongst members of the legal profession is another object of CLF.

10 4. The members of CLF are required to sign a statement of faith that affirms Christian beliefs, values and principles.

5. The Intervener's members are primarily practising lawyers who are governed by the law society of their respective province. Like the British Columbia College of Teachers ("BCCT"), the respective law societies have significant authority and autonomy in the governance of their respective members.

6. The law societies of each province set out principles of professional and ethical conduct in their respective codes of conduct. Many of these codes require that the members not discriminate on the basis of sexual orientation and further state that the members are subject to a higher standard of dealing (both professionally and personally) than an ordinary citizen.

20 7. In British Columbia, these principles are stated in the Canons of Legal Ethics of the Professional Conduct Handbook as follows:

> A lawyer must not discriminate on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, marital or family status, disability or age. [emphasis added]

At chapter 2, para. 3.

II. ISSUES

Questions Presented

8. Must the BCCT take into account all sections of the Charter, and the fundamental freedoms in particular, when applying section 15(1) of the Charter?

9. May the BCCT presume bias or prejudice simply because of the religious beliefs of faculty and students at Trinity Western University ("TWU")?

10. How must the BCCT Council resolve conflicts between the fundamental beliefs of its members and TWU?

Brief Answers

10 11. The BCCT must take into account all sections of the Charter and must not create a hierarchy of rights. Furthermore, there is no apparent conflict between the rights of individuals to be free from discrimination on the basis of sexual orientation and the rights of individuals to be educated in a university where faculty and students make a commitment to a personal code of conduct.

12. The presumption of bias and prejudice inherent in the decision of the BCCT involves a return to the type of "McCarthyism" which ended the professional careers of many who refused to accept the majority's belief about communism. The BCCT may not presume prejudice in the absence of evidence. The Supreme Court of Canada should demand that evidence, and not fear, be the basis for decisions by governmental entities.

20 13. The BCCT must resolve differences of opinion in the spirit of academic freedom, which is the hallmark of universities in Canada. The BCCT may disagree with the religious beliefs of TWU, but it must uphold the right of TWU faculty and students to maintain and express those religious beliefs.

III. ARGUMENT

A. The Nature of This Appeal

14. This appeal brings into question issues of administrative law and CLF supports the submissions of the Respondent on these issues. This appeal is not, however, only or even primarily about administrative law. Rather, it is about the ability of government and governmental authorities to restrict the religious freedom of individuals solely based on unsubstantiated fears of discrimination.

B. Section 2(a) of the Charter

1. The BCCT Decision Infringes Freedom of Religion

10 15. One of the fundamental purposes of section 2 of the Charter is to protect the right of individuals to, inter alia, hold and express beliefs and to associate with like minded individuals. The interpretation of these rights in relation to religious education has been considered in Adler v. Ontario, [1996] 3 S.C.R. 609 ("Adler"). This Court in Adler determined that while there is a right to receive education in accordance with ones religious beliefs in a setting that supports such beliefs, there is no obligation on the part of the government to financially facilitate such form of education.

16. At the Court of Appeal level in this case, Justice Rowles, in dissent, did not understand the implications of this point. Justice Rowles made the mistake of keying on the actions of TWU, rather than on the actions of the governmental entity subject to the Charter in this case, the
20 BCCT:

> Section 2(a) does not require government to facilitate the practice of religion, beyond refraining from restricting existing rights based on religious belief. Because certification of TWU's proposed five-year teacher education program is not an existing right, a limitation upon it could not engage s. 2(a) of the Charter. Support for that opinion may be found in the separate concurring opinions of Sopinka J. (Major J concurring), L'Heureux-Dube J. and McLachlin J. in *Adler v. Ontario* [1996] 3 S.C.R. 609.

Appellant's Record ("AR") 527, para. 260.

17. The decision of the BCCT to deny accreditation because of the religious beliefs of TWU faculty and students is of the same nature as the decision of Parliament to enact the Lord's Day Act, which was under scrutiny in The Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295 ("Big M"). The only difference is that the Lord's Day Act was indirectly coercive, whereas the decision of the BCCT is directly coercive. Both actions fail the section 2(a) test, because both were intended to have religious consequences.

18. Contrary to the views of Justice Rowles, the decision of the BCCT does in fact restrict the free exercise of religion. A careful reading of what Justice Iacobucci said in Adler discloses that the Supreme Court of Canada did appreciate that actions such as those undertaken by the BCCT would violate section 2(a) of the Charter:

> Failure to act in order to facilitate the practice of religion cannot be considered state interference with freedom of religion. Not providing funding for private religious education does not infringe the freedom to educate children in accordance with religious beliefs where there is no restriction of religious schooling. [emphasis added]

Adler at 614.

19. In the present appeal there is a direct restriction on religious schooling. By not certifying the TWU teacher education program because of religious beliefs of the TWU community, the BCCT has imposed a restriction on schooling. Students interested in obtaining their education at an institution supportive of their religious beliefs are not permitted to do so. They must take their final year at an institution that does not actively or intentionally support those beliefs.

20. If the BCCT had not been given the right to accredit the teacher education programs of private universities, no issue may have arisen. However, once invested with that power, the BCCT cannot reasonably argue that refraining from discriminating on the basis of religion is facilitating the practice of religion. Nor can it maintain that it is free to arbitrarily withhold accreditation. It must accredit all qualified applicants, unless there are constitutional or legislative justifications for a refusal to do so.

21. The concurring opinions of Justice Sopinka and Justice McLachlin in Adler support TWU. Justice Sopinka wrote:

> The Appellants cannot complain that the Ontario Education Act prevents them from exercising this aspect of their freedom of religion since it allows for the provision of education within religious schools or at home. The statute does not compel in any way that infringes on freedom of religion. [emphasis added]

At 700.

22. In Adler, a satisfactory system of private religious education was permitted in Ontario. The same cannot be said about British Columbia after the BCCT decision against TWU. If the BCCT decision is upheld by this Court, students enrolled in TWU's program will not be able to teach in the public school system. The BCCT decision to deny certification effectively imposes compulsory secular post-secondary education – a concept that would have been rejected in Adler had it been before the court.

23. The opinion of Chief Justice Dickson in Big M set the standard for review of governmental impact on religion. At 336-37. Adler followed in the wake of Big M and was heavily influenced by the decision of this Court in Big M. Justice McLachlin distinguished Adler from Big M in this way: "What was at stake in Big M Drug Mart and Edwards Books was nothing less than a state prohibition that put members of minority religions at a disadvantage in gaining their livelihood." Adler at 713. In Big M, forced rest on Sunday was found to be a disadvantage in gaining a livelihood, notwithstanding the fact that those disadvantaged could still work the remaining six days of the week. In Adler, the impact was generally related to the receipt of government funding.

24. This appeal is not about government funding. Rather, it is the legal and moral equivalent of Big M. The main distinction is that the disadvantage in gaining a livelihood is even more apparent in the context of the BCCT decision. Students of TWU, as a result of the BCCT decision, will not be able to teach unless they attend Simon Fraser University for their final year. This is a direct and all encompassing attack on their ability to earn a livelihood. This attack is more serious and more blatant than that in Big M. The decision of the BCCT does in fact burden the religion of TWU students.

25. That students of sectarian institutions who intend to teach in independent or denominational schools can be certified by the Inspector pursuant to the Independent Schools

Act, R.S.B.C. 1996, c. 216, s. 5 is not an answer to the issue in this appeal, as those teachers certified by the Inspector are not qualified to teach at public schools.

26. TWU students will face two significant burdens on their freedom of religion, if the BCCT decision is upheld. First, students will be forced to choose between education at an institution which promotes views unsupportive of their own (and the discontinuity and imposition which would result from pursuing a degree at two different institutions) and a limitation on their post-graduate employment opportunities. Second, and just as importantly, student's will receive the message that their personal religious beliefs are not respected or even tolerated by the institution that governs their profession or occupation (the BCCT), or by society in general, thus marginalizing the students' belief system.

2. There is Not a Hierarchy of Charter Rights

27. The BCCT argues that it must withhold the public benefit of accreditation because the beliefs of students at TWU conflict with the beliefs of members of the BCCT Council regarding certain sexual practices. The BCCT takes the position that the right to be free from discrimination on the basis of sexual orientation under section 15(1) of the Charter is so important that the rights of TWU under section 2(a) of the Charter may be disregarded.

28. It is ironic that BCCT relies on the decision of the United States Supreme Court in Reynolds v. United States, 98 U.S. 145 (1878) (bigamy laws upheld in face of free exercise of religion challenge). The BCCT argues that a United States Supreme Court decision which upheld the right of government to limit the institution of marriage to one man and one woman is authority for the right of BCCT to withhold accreditation because the students of TWU believe that marriage should be limited to one man and one woman.

29. TWU has the right under section 2(a) of the Charter to teach at a post-secondary level their religious beliefs, subject only to the requirement that the TWU program meets all secular education standards. Full enjoyment of the right to freedom of religion does not and need not conflict with full enjoyment of equality rights under section 15 of the Charter. Furthermore, the right to freedom from discrimination on the basis of sexual orientation should not be granted a

higher level of constitutional importance than the right to freedom of religion and the right to be free from discrimination on the basis of religion.

30. Failure to take into account the constitutional guarantee of freedom of religion is sufficient grounds for setting aside a decision of an administrative body such as the BCCT. See Lalonde v. Ontario, 181 D.L.R., 4th 263, 299 (Ont. Div. Ct. 1999) (the constitutional mandate to protect minority rights required the Ontario Health Services Restructuring Commission to take minority cultural/linguistic rights into account in making its decision).

31. Religious beliefs and guarantees of religious liberty in the Charter may never be accorded less than equal status with other rights and freedoms in the Charter. The guarantee of freedom of religion in section 2(a) and equality among religious beliefs in section 15 may be no less supreme than any other freedom or right. See Jacobi v. County of Newell, [1994] 5 W.W.R. 93, 110 (Alta Q.B.) (constitutional guarantee of separate school funding interpreted so as not to infringe section 2(a) and 15(1) of the Charter); Re: An Act to Amend the Education Act, [1987] 1 S.C.R. 1148, 1196-99 ("Bill 30 Reference") (the Charter can not be used to abrogate or derogate from other rights or privileges guaranteed by or under the Constitution); Dagenais v. CBC, [1994] 3 S.C.R. 835, 877 ("A hierarchical approach to rights, which places some over others, must be avoided when interpreting the Charter and when developing the common law"); I. Benson, "Notes Towards a (Re)Definition of the Secular," U.B.C.L. Rev. 519, 543 (2000) (Conscience beliefs of one person may well run head-on into the beliefs of others. Nothing is gained by categorizing one set of beliefs as superior to the others.); and B. Miller, Case Comments, Brillienger v. Brockie, U.B.C.L. Rev. 836, 839 (2000) (the respect owed to lesbians and gay men as persons can be achieved without over-riding the legitimate exercise of the religions beliefs of those who do not agree with the morality of homosexual acts).

3. The Principle of Free Thought

32. Thomas Jefferson did not believe that the social duties of citizens to each other were opposed to the natural rights which are preserved in constitutional guarantees:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the

> government reach actions only, and not opinions, I contemplate with sovereign reverence that act of whole American people which declared that their Legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof", thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the Nation in behalf of the rights of conscience. I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Quoted in Reynolds v. United States, 98 U.S. 145, 164 (1878).

33. The ramifications of upholding the BCCT decision are not restricted to the teaching profession. The application of the same standard (that the religious beliefs of members of an institution may disqualify the graduates of that institution from professional licensure because of governmental fear of how those beliefs may be manifested in society) could no doubt be extended to the medical, nursing, pharmacological, legal and other professions. Is easy to conceive of repercussions in some of these professions which could extend to individual professionals who have membership in religious organizations. Membership in a particular religious organization may at times indicate adherence to views which differ from a professional governing body's stated (or unstated) principles. Professionals with unpopular beliefs or religious affiliations could risk losing status and the ability to earn a livelihood, if such beliefs and affiliations are allowed to influence administrative decision making.

34. But what should a decision maker do when faced with beliefs which are regarded by the majority as inimical to the state and subversive of our free society ?

35. In Martin v. Law Society of British Columbia, [1950] 3 D.L.R. 173, 187 ("Martin") the British Columbia Court of Appeal concluded that "the debauching by Communist influences of Canadian public servants occupying positions of public trust, despite oaths of allegiance ... created in the public mind an utter distrust of that philosophy as well as of its adherents." This justified, for a unanimous Court of Appeal, the decision by the Benchers that Mr. Martin, who believed in Communism, was not a person of good character and repute. The entire panel rejected the argument of counsel for Mr. Martin that:

> [I]n the absence of evidence of subversive conduct by Martin mere membership in a Communist party ... and adherence to Communist philosophies do not warrant the conclusion that he is not a person of good character and repute, or that he cannot conscientiously take the barrister's oath.

At 198.

36. The Court of Appeal opined that "freedom of expression cannot be given to Communists to permit them to use it to destroy our constitutional liberties, by first poisoning the minds of the young, the impressionable, and the irresponsible." At 183.

10 37. In arriving at this conclusion, the Court of Appeal criticized the views of Justice Oliver Wendell Holmes of the United States Supreme Court in his dissent in U.S. v. Schwimmer (1929), 279 U.S. 644, 654-55 (a 6-3 decision), where he celebrated "the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate" and in his dissent (in which Mr. Justice Brandeis joined) in Abrams v. U.S. (1919), 250 U.S. 616, 630 where Justice Holmes adopted as a formula, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." See Martin at 182.

38. Justice O'Halloran expressed the Court of Appeal's opinion of Justice Holmes in this way:

> The Holmesian reduction of the test of truth to the power of
20 thought to get itself accepted in the competition of "the market" (*Abrams v. U.S., supra*) cannot fail to impress itself as the thinking of the huckster and not of the philosopher.

At 185.

39. In 1950, mere belief in a philosophy contrary to the public interest was enough to justify exclusion from the legal profession. Fifty years later, the Charter has changed Canadian society. Few would argue that membership in the Communist Party or Marxist Leninist Party would justify withholding a public licence or accreditation. Yet the BCCT continues to maintain that mere membership in a group which holds beliefs which the BCCT finds abhorrent and contrary to the public interest justifies exclusion from certain public benefits and professions.

40. This new "McCarthyism" is just as reprehensible as the witch hunt which took place a generation ago. It should be exposed and condemned by this Court. This Court should give no comfort or aid to those who would stifle democratic debate or infringe fundamental freedoms.

C. Section 15(1) of the Charter

1. The BCCT has Violated the Equality Rights of Donna Lindquist

41. Religion is an enumerated ground under section 15(1) of the Charter. As such, the state cannot use religious belief as a basis for denying equal protection and equal benefit of the law. Adler at 716-17.

42. Discrimination exists where there is an imposition of a burden on an individual not imposed on others and which is imposed by reason of the individual's possession of an enumerated or analogous section 15 characteristic. Andrews v. Law Society, [1989] 1 S.C.R. 143.

43. The BCCT argues that the burden imposed by the decision under review in this appeal is the same for every teacher seeking certification. However, this analysis confuses the terms "requirement" and "burden". The true "burden" in this case is the restriction on the right to be schooled in an environment consistent with a particular religious value system and the right to thereafter seek employment within the public education system. This burden upon Donna Lindquist and others at TWU may infringe upon their Charter right to equality.

44. If the requirement were merely that teachers, and teacher education programs, serve the goals of the public school system and provide a supportive environment for all students, this would not be an issue. TWU and its students meet this standard. Unfortunately, the BCCT focused on one aspect of the TWU Community Standards Code in isolation and missed the full impact of the Code.

2. Objective of TWU Community Standards Code

45. The TWU Community Standards Code is much broader in focus and impact than acknowledged by the BCCT. The document instructs TWU students to:

> OBEY JESUS' COMMANDMENT TO HIS DISCIPLES (Jn. 13:34-35) ECHOED BY THE APOSTLE PAUL (Rom. 14; 1 Cor. 18, 13) TO LOVE ONE ANOTHER. In general, this involves showing respect for all people...

AR 52.

46. If acceptance of and respect toward all human beings, regardless of characteristics and beliefs, was the goal of BCCT, there is compelling evidence to show that TWU goes at least as far as any other educational institution to foster acceptance and respect among its graduates.

47. The BCCT says that it is concerned that TWU teachers may not be equipped to deal with the issues relating to homosexuality and homophobia that may arise in the school, but this concern is based on the assumption that one cannot have personal views that differ from others and still be effective at conflict resolution and at fostering tolerance. There is no reason to believe this to be true.

48. The TWU Community Standards Code recognizes the danger of intolerance and specifically proscribes such conduct. The fact that the Code recognizes the potential for intolerance and directs positive non discriminatory action, should give the BCCT and this Court sufficient comfort to avoid any unsubstantiated fear of harmful discrimination. See also C. Goldstein, "The Logic of Hate", Liberty, March/April 1999, at p. 30-31 ("There is, however, one way around intolerance as an analytic predicate of religious faith – and that is if (and only if) *inherent in that faith is the fundamental acceptance of those who hold contrary religious beliefs*.").

D. Employment Division v. Smith

49. The BCCT has suggested that Employment Division v. Smith, 494 U.S. 872 (1990) ("Smith") may be of some relevance to this appeal. There are a number of reasons for this Court to conclude that Smith is not helpful in the interpretation of the Constitution of Canada:

1. The U.S. Bill of Rights does not contain a clause similar to section 1 of the Charter;

2. The U.S. Supreme Court refused to apply a flexible "compelling interest" test for fear of watering down the vigor of the test in other constitutional applications;

3. The U.S. Supreme Court refused to engage in a section 1-like balancing exercise in which the social importance of all laws is weighed against the centrality of all religious beliefs;

4. The U.S. Supreme Court concluded that because of the diversity of religious belief in America, the United States could not afford the luxury of testing all legislation against a constitutional standard

1. No Section 1 Test in the U.S.

50. In Smith, Justice Scalia was steadfast in his rejection of a requirement in U.S. constitutional theory similar to that in section 1 of the Charter. He did not think that government should be required to demonstrate the reasonableness of a facially neutral legislative limitation on freedom of religion. On behalf of the majority in Smith, he rejected a "compelling interest" test in freedom of religion cases, with this explanation:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

At 885.

51. To permit an exception when the effect of a law unintentionally burdens religion would, in Justice Scalia's words, contradict "both constitutional tradition and common sense." At 885. He was afraid it would create a private right to ignore generally applicable laws. At 886.

52. Section 1 of the Charter does not permit Justice Scalia's approach in Canada. In Big M, Chief Justice Dickson made it clear that in both purpose and effect legislation in Canada may not limit freedom of religion. Big M at 331.

2. Flexible Test Rejected by Justice Scalia

53. Justice Scalia did not think that the "compelling interest" test was appropriate for religious freedom cases because he was afraid that "watering it down here would subvert its rigor in the other fields where it is applied." Smith at 888.

54. This fear would not be relevant in Canada, because section 1 of the Charter has been applied in a flexible manner, depending on the nature of the governmental interest at stake. The Queen v. Edward's Books, [1986] 2. S.C.R. 713, 768-69.

3. Balancing Exercise Rejected by Justice Scalia

55. The balancing of interests engaged in on a regular basis under section 1 of the Charter was not attractive to Justice Scalia. Even though he acknowledged that this approach would have a disproportionate negative impact on religions minorities, he refused to accept a "compelling interest" test:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious belief.

At 890.

56. On a daily basis, judges of the Supreme Court of Canada and the other jurists in Canada engage in the kind of balancing exercise rejected by Justice Scalia. The reason they do so is because they are not willing to sacrifice the rights of minorities as unaffordable luxuries. The tradition in Canada, both before and after the Charter, has been to accommodate diversity and religious minorities. In Big M, Chief Justice Dickson stressed the importance of the guarantee of

freedom of religions to all Canadians, and in particular those who belong to a non-majoritarian religion:

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny or the majority". [emphasis added]

At 337.

4. Constitutionally Required Religious Exemptions Rejected by Justice Scalia

57. Justice Scalia was also afraid that if the Constitution required exemptions for every religious belief, "anarchy" would reign. Smith at 888. He was of the view that this would be an expensive exercise and would amount to a "luxury" which the United States could not "afford". Smith at 888. He listed a litany of laws which would require modification, "ranging from compulsory military service . . . to the payment of taxes . . . to health and safety regulation such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . . child labour laws, . . . animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races." At 888-89.

58. The courts in Canada have not been overwhelmed with the duty to measure Canadian laws which impact religion against the section 1 standard. The presence of the section 1 requirement that government justify its actions has not opened the flood gates. Religious freedom claims are raised to no greater extent than are other claims under the Charter.

5. Section 1 Enhances Democratic Values

59. Justice Scalia was confident that a society which protected religious belief in its constitution could "be expected to be solicitous of that value in its legislation as well." Smith at 890. While this may be true as a general rule, the history of nations, including that of the United States of America, shows that this is not always a reality for unpopular religions.

60. Adherents of the Mormon faith found that they could not rely on legislators to protect their religious beliefs in 19th century America. This unfortunate reality is outlined in some detail

in the amicus curiae brief filed by The Church of Jesus Christ of Latter-Day Saints in the City of Boerne v. Flores, 521 U.S. 507 (1997) appeal to the United States Supreme Court ("From the 1850's until shortly before Utah achieved statehood in 1896, the federal government engaged in a protracted and steadily intensifying conflict with the LDS Church that nearly ended in the Church's destruction. In addition to directly outlawing the practice of certain fundamental doctrines of the Church, the federal government passed a series of facially neutral laws that operated to increase federal pressure on the Church."). At 13.

61. In Canada, as in the United States, Jehovah's Witnesses faced flag salute and literature sales laws which were facially neutral and generally applicable. Yet the laws had a disproportionate impact on Jehovah's Witnesses because of their religious beliefs. While the laws may not have been intended to infringe the religious freedom of Jehovah's Witnesses, in application the laws had just that effect. See Saumer v. Quebec (City), [1953] 2 S.C.R. 299, 365-71 (literature sales) and Donald v. Hamilton Board of Education, [1945] 3 D.L.R. 424 (Ont. C.A.) (flag salute).

6. Human Impact of Smith

62. Quite apart from the theory of constitutional law is the impact constitutional litigation has on real people. In Smith, two drug rehabilitation counsellors lost their jobs because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their church, the Native American Church (one might wonder whether the result would have been the same had the drug been communion wine).

63. Canadian legislatures have consistently placed the value of pluralism ahead of concerns about the affordability of religious freedom. When the Charter was enacted, section 1 was included. Governments across Canada accepted the constitutional duty to justify the religious burden of every facially neutral law. As well, when enacting human rights legislation, Canadian legislators have invariably included a duty to accommodate the religious beliefs of employees.

64. This reflects a desire among Canadians to make welcome a diversity of beliefs within society. Canadian governments have expressed a commitment to ensuring that individuals do not have to choose between their religious beliefs and their occupation. If reasonably achievable,

employers must accommodate employees who put their commitment to God first. Renaud v. Central Okanagan School District, [1992] 2 S.C.R. 970, 982-85 ("Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.").

65. The approach in Smith does not contemplate accommodation for religious convictions. This is fully explored in an article by Jennifer Miller: "Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?", 13 Geo. J. Legal Ethics, p. 61 ( ). In her article, Miller criticizes Smith for depriving religious lawyers of constitutional protection for their religious beliefs. She concludes:

> Normatively, society should aim to avoid the clash of legal ethics and Free Exercise rights. Forcing the religious lawyer to contravene his religious principles or commit a sin compromises both his professional and personal integrity. In order to promote competence and zealous advocacy, the religious lawyer should have the right to recuse himself from the problematic case. Allowing the religious lawyer to find substitute representation solves all the problems at issue in this discussion—the unharmed client retains a zealous, loyal, and competent advocate who can guide her through the legal process, and the religious lawyer can rest on religious principle. In turn, the legal profession will gain lawyers who strive to be the very best advocates possible in all circumstances.

At 182.

66. Lawyers and teachers are not the only professionals who may face issues which create conflict between personal beliefs and professional duties. Increasingly in Canada health care professionals are facing these conflicts. A number of legislators have recognized the need and have initiated the process of creating legislative exemptions which would enshrine in law the principle that health care professionals should not have to give up their religious convictions in order to serve the public. See C. Perring Walker and T. Morgan-Cole, "Code Blue", Liberty, July/August 2000, at p. 17 (review of conscience legislation in the Alberta legislature (Bill 212) and in the Parliament of Canada).

67. While it is generally understood in Canada that there should be a separation of church and state, this does not and should not imply that citizens separate themselves from their beliefs in order to participate fully in occupations regulated by government.

E. Section 1 of the Charter

68. Any violation of Donna Lindquist's section 2(a) or section 15(1) rights is not justified under section 1 of the Charter.

1. The BCCT Objective is Not Pressing and Substantial

69. The Intervener concedes that if the objective of the BCCT's decision was to uphold values of non-discrimination in the public school system, then such an objective would be pressing and substantial. AR at 577. However, the actions of the BCCT belie this conclusion. The BCCT has not studied or analyzed the experience of Christian teachers in the public school system. Instead, it has analyzed what students and faculty at TWU believe and express about religious life on the campus of TWU. The objective or goal of a decision may best be determined by considering the conduct which must be modified in order to receive a positive decision from the BCCT.

70. Absent judicial intervention, TWU will not receive accreditation from the BCCT until it changes its religious beliefs and the expression of those beliefs by faculty and students on the campus of TWU. There is nothing that TWU students may do within the public school system to change the decision of the BCCT regarding TWU accreditation. Therefore, it is not rational for BCCT to argue that it is concerned about the public school system, when the private religious education program at TWU is the target of its condemnation.

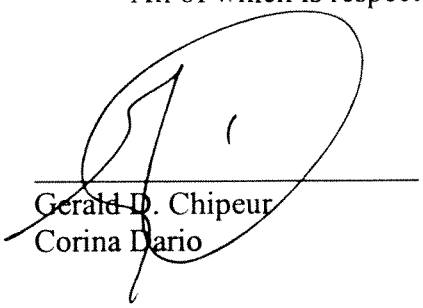
2. Oakes Test Not Satisfied

71. The test established by the Supreme Court of Canada in The Queen v. Oakes, [1986] 1 S.C.R. 103, 137-39 for section 1 analysis demands that where the objective of a law is not pressing and substantial, the law may not interfere with a Charter right or freedom. As the BCCT cannot establish a pressing and substantial objective, the section 1 inquiry must come to an end and the decision of the BCCT must be declared unconstitutional.

IV. NATURE OF ORDER SOUGHT

72. The Intervener requests Leave to make 20 minutes of oral argument and that the within appeal be dismissed.

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



Gerald D. Chipeur
Corina Dario

V. TABLE OF AUTHORITIES

Caselaw Page Cited

Statutory Authorities

Secondary Sources

[caldocs|CDARIO|242234.5]

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;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

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.

Canons of Legal Ethics of the Professional Conduct Handbook (B.C.)

Chapter 2, paragraph 3

A lawyer must not discriminate on the basis of race, national or ethnic origin, colour, religion, sec, sexual orientation, marital or family status, disability or age.

Independent Schools Act, R.S.B.C. 1996, c. 216

5(1). The minister may, for the purposes of subsection (2),
(a) constitute an independent school teacher certification committee,
(b) name the persons to be members of the committee, and
(c) provide for remuneration of and payment of expenses to members of the committee.

5(2). Subject to the regulations, the inspector may do any of the following:
(a) issue certification to a person if the applicant meets guidelines developed by the independent school teacher certification committee and approved by the inspector;

(b) issue certification to a person on the recommendation of the independent school teacher certification committee;
(c) issue a letter of permission to an authority permitting the authority to utilize the services of a person as a teacher for that authority for a specified period of time;
(d) issue subject to conditions or refuse to issue
(i) a certification under paragraph (a),
(ii) a certification under paragraph (b), or
(iii) a letter of permission under paragraph (c).

5(3). The inspector may suspend or revoke for cause
(a) the certification of a teacher on the recommendation of the independent school teacher certification committee, or
(b) a letter of permission issued to an authority.

5(4). If the inspector has refused to issue certification to a teacher or has suspended or revoked a teacher's certification, the teacher may appeal, within 60 calendar days, to the minister whose decision is final.

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

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