Court File 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 EVANGELICAL FELLOWSHIP OF CANADA

Intervener

FACTUM OF THE INTERVENER, THE EVANGELICAL FELLOWSHIP OF CANADA

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PART I –OVERVIEW AND THE FACTS

1. Can a Christian who is trained at a Christian teacher's college and who, as a matter of faith believes that homosexual conduct is wrong, teach in the public schools of British Columbia without first going through a "cleansing" year at a public university? This is the narrow issue at stake in this appeal. But the fundamental issue is much larger, calling into question the legal position of religious belief, religious believers and religious institutions in Canadian society. If this appeal is granted, it will become permissible under Canadian law to deny religious institutions, and religious persons, public benefits, licences or privileges if their religious beliefs on issues of sexual morality do not conform to the prevailing popular views of the day. A successful appeal in this case would establish the

basis upon which to restrict the public profession and practice of religious belief in Canada.

2. The Evangelical Fellowship of Canada (the "EFC") is a national association of Protestant denominations, church-related organizations and educational institutions. There are approximately 2.5 million Protestant evangelicals in Canada, of which approximately 1.2 million are members or adherents of EFC member associations. There are more than 30 Christian colleges and schools associated with the EFC, many of which hold degree-granting status under provincial legislation. The EFC is very concerned about the potential implications of this case on its associated colleges because it appears to be a "back-door" attempt to apply the *Canadian Charter of Rights and Freedoms* (the "Charter") and provincial human codes to religious institutions which are not subject to their jurisdiction. The steps taken by the BCCT also appear designed to marginalize Christian colleges and their students from the mainstream of public life.

3. The EFC adopts the facts as set out in the Respondents' Factum.

PART II - POINTS IN ISSUE

4. While the specific legal issue disputed by the parties involves the accreditation power of the Appellant, the British Columbia College of Teachers (the "BCCT"), including the scope and meaning of the words "public interest" in section 4 of its constating statute, the *Teaching Profession Act*, R.S.B.C. 1996, c. 449, the EFC will focus its submissions on the larger context in which this issue arises. Specifically, the EFC will address the following issues:

   (1) The public dimension of constitutionally-protected religious freedom;

   (2) The identification of the "public interest" and the need for a pluralistic approach to competing "Charter values"; and,

   (3) The potential ramifications on religious institutions and persons of a successful appeal.

PART III - ARGUMENT

A. FREEDOM OF RELIGION: A PUBLIC, CIVIC RIGHT

(i) The Public Dimension of the Constitutional Right

5. The Appellant's argument and the minority decision of the British Columbia Court of Appeal (the "Minority Decision") share a common starting point. They both take a very narrow, almost ghetto-like, approach to religious freedom in Canada. In their view, students at a religious institution such as TWU may believe what they like within the confines of TWU, but they run the risk that their religious beliefs may disentitle them to a public benefit – in this case, certification as teachers.

6. The EFC submits that this is an impoverished and marginalizing view of freedom of religion and one which stands at odds with the meaning of freedom of religion in Canadian constitutional law. Freedom of religion in Canada is not a "private freedom"; on the contrary, it is a very public fundamental human right which has long been regarded under Canadian law as embracing within its protection the public expression and practice of religious belief. The EFC submits that it is important to review and recall the public dimension of religious freedom which exists under Canadian law because it provides a radically different starting point from which to analyse the issues in this appeal than that provided by the Appellant and the Minority Decision.

7. Pre-Charter cases clearly recognized the public nature of freedom of religion. In *Saumur v. City of Quebec* Justice Rand stated:

> "From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that *the untrammeled affirmations of religious belief and its propagation, personal or institutional,* remain as of the greatest constitutional significance throughout the Dominion is unquestionable."

He continued by stating that religious freedom is not a right conferred upon a citizen by a legislative act, but a foundational component of any political society:

> "Strictly speaking, civil rights arise from positive law; but *freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.* It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that positive law operates. What we realize is the residue inside that periphery."

Saumur v. City of Quebec,[1953] 4 D.L.R. 641, at 668 and 670 (emphasis added)

8. Justice Rand thus identified not only the necessary public and institutional dimensions of religious belief and practice, but the centrality of religious belief to an individual's mode of human self-expression - religious belief stands at the centre of human existence and activity; not on the periphery. Justice Rand went one step further, however, in regarding freedom of religion as one of the primary conditions of community life within a legal order. This, the EFC submits, is a most important insight. The Appellant implies that as long as religious persons are allowed to practise in private their own beliefs, as out-of-step with modern culture the BCCT may consider them to be, then they enjoy religious freedom. In the *Saumur* case Justice Rand rejected this blinkered view of religious freedom, and squarely rested the health of Canadian community life on three original freedoms, one of which is freedom of religion.

9. The public dimension of religious freedom has been recognized with equal force by the *Charter of Rights and Freedoms*.. For example, the Preamble to the *Charter* refers to the "supremacy of God" as one of the foundational principles of the Canadian polity, thereby reflecting the centrality of religious experience in human existence. Section 2(a) of the *Charter* places freedom of religion within the set of "fundamental freedoms" enjoyed by all Canadians, and section 15(1) enumerates "religion" as one of the prohibited grounds of discrimination. The interests underlined in section 27 of the Charter reflect the integral part which religion forms in the multicultural heritage of Canada

> *Canadian Charter of Rights and Freedoms*, Preamble, sections 2(a), 15(1) and 27; See also the comments of Dickson C.J. on the values underlying section 27 of the Charter in *R. v. Big M Drug Mart*, (1985), 18 D.L.R. (4th) 325 at 355, and those of Justice L'Heureux-Dube in *Adler v. Ontario*, [1996] 3 S.C.R. 601, at 663.

10. The seminal articulation by this Court of the content of the guarantee of freedom of religion under section 2(a) of the *Charter* took place in the *Big M Drug Mart* case. In a passage which subsequent decisions of this Court described as expressing the "core" or "essence" of freedom of religion, Chief Justice Dickson summarized the content of religious freedom in the following words:

> "*A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.* A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. *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 fear of hindrance or reprisal, and the right to manifest 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…"*
>
> *R. v. Big M Drug Mart*, *supra.*, at 353-4, which was referred to as the "core" or "essence" of freedom of religion in *Jones v. The Queen*, [1986] 2 S.C.R. 284 at 310 and in *Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 (S.C.C.) at 28-29.

11. As this passage makes clear, Chief Justice Dickson did not regard the exercise of religious freedom as limited to the private sphere of a person's life. On the contrary, protection for religious freedom under the *Charter* encompasses the protection of codes of conduct as well as the public declaration and manifestations of one's religious beliefs, including teaching and dissemination.

12. The strong protection given to the public profession and practice of religion under Canadian law reflects similar protections found in international covenants and declarations. For example, the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* guarantees in Article 1:

> "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice or teaching."
>
> *The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, GA Res 36/55, 36 UN GAOR Supp. (No. 51) at 71, UN Doc. A/36/51 (1981). See also, *The Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc. A/810, Articles 2 and 18; the *International Covenant on Civil and Political Rights*, 21 UN GAOR Supp. 16, UN Doc. A/6316, at 52, Articles 2 and 18; *the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1955), 213 UNTS 22J, ETS 5, Articles 1 and 2.

13. Religion has attracted a high level of protection because it lies at the heart of personal identity. To violate a person's religious freedom violates the very core of that person's being. The *American Declaration on the Rights and Duties of Man* affirms the value of religion in ringing terms:

> In as much as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.

As stated in Article 3 of the *U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*: "Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity." The protection of human dignity is at the core of section 15 of the Charter.

> *American Declaration of the Rights and Duties of Man*, OAS Doc. OEA/Ser.L./V/II.23, Doc. 21, rev. 6; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras. 40-65; see also, *Granovsky v. Canada (Minister of Employment and Immigration)*, May 18, 2000, S.C.C., File No. 26615, at paras. 56-58.

(ii) The Minority Decision's Erroneous View of Religious Freedom

14. In the *Big M Drug Mart* case Chief Justice Dickson specifically rejected a "frozen rights" concept of freedom of religion under which the freedom would be limited to that existing prior to the enactment of the *Charter*:

> "[T]he *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore, the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*."

The Minority Decision ignored this principle. Madame Justice Rowles rejected the freedom of religion arguments of the respondent, Donna Lindquist, on the basis that: "[b]ecause 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 *Alder v. Ontario* [1996] 3 S.C.R. 609…" With due respect to the learned judge, she misapprehended the context in which the comments made by this Court in *Adler* were made, confused the elements of a section 93(1) analysis with those of one under section 2(a) of the *Charter*, and simply ignored this Court's rejection of a "frozen rights" approach to religious freedom in the *Big M Drug Mart* case.

> *Big M Drug Mart, supra*, at 359, and Minority Decision, *Appeal Book*, Vol. III, p. 572

(iii) The Public Dimension of Religious Freedom under Human Rights Laws

15. One can also see the public dimension of religious freedom in provincial human rights laws which prohibit discrimination in employment and access to services on the basis of creed. A series of cases by this Court has affirmed the obligation of public and private-sector employers to accommodate the religious practices of their employees as long as such accommodation does not impose undue hardship on the employer. In the *O'Malley v. Simpsons-Sears* case, Mr. Justice McIntyre considered the extent to which fellow employees or members "of the general public" could be asked to accommodate the religious practices of a person. Noting that religious freedom was a civic right, Justice McIntyre observed that a *"natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it."* In other words, where freedom of religion is recognized as a right, the public interest includes a duty to respect it and "to act within reason to protect it." If the public interest did not do so, religious freedom would be meaningless.

> *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, at 553-4 (emphasis added). See also: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.) and *Commission Scolaire Regionale de Chambly v. Syndicat de l'Enseignement de Champlain* (1994), 169 N.R. 281 (S.C.C.), at 299-300

16. Religious belief and practices by individuals most often are manifested within an institutional environment amongst a community of believers. As put by Professor Robert Wilken: "Religion, like culture, does not float free of institutions. Without the discipline of law and the structure of institutional life, our energies are dissipated and our lives impoverished…" Religious institutions such as TWU have the fundamental right to adopt policies governing the moral conduct of students, employees and faculty. The ability of religious institutions to adopt and maintain codes of conduct for their communities is integral to the exercise of their freedoms of conscience, religion and association. These freedoms are central to the exercise and preservation of all rights and freedoms embodied within the *Charter*. In the *Big M Drug Mart* case Dickson C.J. was unequivocal about the centrality of religious freedom to our constitutional democracy: "The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government."

> R. Wilken, "Gregory VII and the Politics of the Spirit" (1999), 89 *First Things*, at 32
>
> *Big M Drug Mart*, *supra.*, at 346

17. Provincial human rights codes acknowledge this communal or institutional dimension of religious practice by, for example, partially exempting religious institutions from the requirements of equal access and equal treatment in respect of employment. This Court upheld the application of such provisions in the *Caldwell v. Stuart* case noting, in the circumstances of that case, that religious conformity by Catholic teachers was reasonably necessary, objectively viewed, to ensure the accomplishment of "…the religious or doctrinal aspect of the school [which] lies at its very heart and colours all its activities and programs."

Caldwell v. Stuart, [1984] 2 S.C.R. 603, at 624-5

B. THE IDENTIFICATION OF THE "PUBLIC INTEREST"

18. The EFC adopts the submissions made by the Respondents of their Factum on the issue of the interpretation of the words "public interest" which appear in section 4 of the *Teaching Profession Act* (the "Act"). In the event that this Court finds that the term "public interest" in the Act authorizes the BCCT to take into account what have been loosely described as "Charter values" in the exercise of its power to accredit a teacher's training program, then the EFC submits that any analysis of the "public interest" must also take into account the public dimension of religious freedom.

(i) The Limited Role of the Charter in ascertaining the Public Interest

19. The Appellant argues that it was entitled to look to "Canadian values", as expressed in the *Charter* and human rights codes, in identifying the public interest. The Minority Decision accepted this argument, holding that the BCCT had jurisdiction to consider "whether the certification of a teacher education program would create either the perception that the public school system condones discriminatory values or does not uphold Canadian values."

Minority Decision, *Appeal Book*, Vol. III, at 541 and 548

20. Great care must be taken when resorting to the *Charter* and provincial human rights legislation as aids for identifying "Canadian values" which inform any conception of the "public interest". First, any quest to identify "Canadian values" must take into account the limited character of both the *Charter* and provincial human rights codes. Each document

operates within legally defined spheres of activity. The *Charter* constitutes a legal check on governmental *conduct* by affording individuals protection from unlawful conduct by state institutions. Human rights codes ensure protection from discriminatory *conduct* by individuals or corporations relating to access to services, accommodation or employment.

21. Neither the *Charter* nor provincial human rights codes purport to set moral *beliefs* to which all Canadians must subscribe. Nor could they do so. Any effort by the state to rely on the *Charter* or human rights codes to impose moral beliefs would be internally inconsistent with the guarantees of freedom of conscience and religion upon which those documents rest. This Court has adopted a philosophical approach which prevents "Charter values" from containing any mandatory moral content. For example, in the *Big M Drug Mart* case, Chief Justice Dickson stated:

> "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."

In the *Morgentaler* decision Madame Justice Wilson stated:

> "These are all examples of the basic theory underlying the Charter, namely, that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."

If, as this Court has stated, the *Charter* does not prescribe "any one conception of the good life", then the *Charter* cannot be regarded as a national statement of virtues or the source of "Canadian values" on moral issues, including issues of sexual morality. While the *Charter* has a large role to play in identifying that conduct of governments against which individuals are protected, it does not have a role to play in identifying beliefs on sexual morality to which religious individuals or institutions must subscribe.

Big M Drug Mart, supra., at 353

R. v. Morgentaler (1988), 44 D.L.R. (4^{th}) 385, at 486

22. This limited role of the *Charter* is ignored by the Appellant in its argument, and implicitly was rejected by the Minority Decision. Both seek to transform the *Charter* from a shield which protects the individual from arbitrary state action into a sword by which the state may demand subscription to specific beliefs on sexual morality on pain of losing access to state benefits. This approach is most clearly seen in the following passage from the Minority Decision where Madam Justice Rowles stated:

> "I should add that…the argument…that Charter values require only tolerance of all people generally and not necessarily support for their conduct or behaviour depends on the acceptance of a distinction between homosexual behaviour and homosexual identity. While I agree that equality requires tolerance and not necessarily active support or encouragement, the kind of tolerance that is required is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people. *Although I think it is unnecessary to go further, I would add that the public interest in the public school system may also require something more than mere tolerance. As was stated in Ross…public school teachers and those who administer and regulate the public school system may have a positive duty to ensure non-discrimination in our public schools*."

The danger of this kind of language is that it provides judicial support for governmental action designed to compel only one viewpoint on an issue, leaving little room for conscientious or religious objection in the public forum. The *Charter*, the EFC submits, was not intended to enforce an orthodoxy of thought on matters of sexual morality, which are matters of personal conscience. Since there is no evidence that TWU students were taught to discriminate against homosexual persons, the actions of the BCCT only apply as against the individual conscience of TWU students.

Minority Decision, *Appeal Book*, Vol. III, at 553 and 556-7 (emphasis added)

23. Second, the *Charter* does not apply to non-governmental institutions, such as TWU, and provincial human rights codes exempt religious institutions from many of their requirements. The BCCT seeks to use the concept of the "public interest" as a "backdoor" through which to make TWU subject to the requirements of the *Charter* and the B.C. Human Rights Code. To accept this principle would be to open religious institutions to the jurisdiction of administrative bodies who otherwise would have no authority over them.

Charter, section 32; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229

24. Third, the *Charter* does not establish a "pecking order" of values under which some *Charter* freedoms or rights enjoy more weight than others. The Appellant's argument suggests that equality guarantees, especially those based on sexual orientation, enjoy a certain primacy under the *Charter* and "trump" all other *Charter* rights, or at least trump the guarantees of religious freedom. This approach is fundamentally flawed. Just as no one section of the Constitution can override or derogate from other sections of the Constitution, no one section of the *Charter* enjoys a privileged or dominating place over

any other. Moreover, in *Dagenais v. C.B.C.* this Court cautioned against a hierarchical approach to *Charter* rights and refused to favour the rights protected under section 15(1) of the *Charter* over other *Charter* rights. Instead, this Court counselled a balancing of competing *Charter* values. As put by Chief Justice Lamer:

> "A hierarchical approach to rights, which places some over others, must be avoided both when interpreting the *Charter* and when developing the common law when the protected rights of two individuals come into conflict, as can occur in the case of publication bans. *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Thus, to the extent that any practical legal resort can be made to a concept of "Canadian values" informed by "Charter values", the concept must embrace all rights and freedoms guaranteed under the *Charter*, including freedom of religion.

Reference Re Bill 30, An Act to Amend the Education Act, [1987] 1 S.C.R. 1148, per Wilson, J. at 1197-8 Reference; and *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835, at 878.

(ii) The Religious Dimension of the Public Interest

25. As submitted in paragraphs 4 to 17 above, the *Charter* and provincial human rights codes protect and guarantee freedom of religion, including its public manifestation, profession, dissemination and teaching and its institutional dimension. They do so because religious belief and practice are fundamental aspects of the human experience and a defining element of personal dignity. As put by Chief Justice Dickson in the *Big M Drug Mart* case, religious belief and practice are, "historically proto-typical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations…" Simply put, the *Charter* affirms that religious belief is a "public good" and its enjoyment is in the "public interest". Any examination of the content of the "public interest" in this case therefore must take into account the inescapable fact that the *Charter*, through its protection of freedom of conscience and religion, does not permit the state, or its agencies, to require a person to subscribe to a view of sexual morality which contradicts his or her religiously-held beliefs as a condition of obtaining a public benefit. To do so would be contrary to the "public interest" of protecting freedom of conscience and religion. The Appellant's argument completely ignores this dimension of the "public interest".

Big M Drug Mart, supra., at 361-2.

26. What matters of religious belief has the BCCT called into question? TWU's Community Standards ask TWU students to agree to refrain from practices which are biblically condemned, including "homosexual behaviour". The Community Standards locate the basis for this responsibility in two passages from the Bible. At the same time, TWU makes it clear that adherence by TWU students to the Community Standards:

> "is simply one aspect of a larger commitment by students, staff and faculty to live together as responsible citizens, to pursue biblical holiness, and *to follow an ethic of mutual support, Christian love in relationships, and to serve the best interests of each other and the entire community*."

That is to say, the Community Standards operate in a two-fold way: a student agrees that he or she will not engage in certain practices, while at the same time agreeing to follow an ethic of mutual love and support when dealing with any other person. Thus, the Community Standards, when read as a whole, do not condemn any particular person, but they do identify conduct from which students agree to refrain. Even Madame Justice Rowles recognized this distinction and the sincerity with which the belief is held by TWU and its students:

> "…I have considered TWU's argument, supported by intervenors, that the Community Standards only condemn homosexual behaviour while at TWU, and do not condemn homosexual persons generally, and therefore do not discriminate or promote discrimination against homosexual persons. *While the submissions of TWU and the intervenors convince me that the Free Church and the Catholic Church distinguish between the condemnation of homosexual behaviour and the condemnation of homosexual persons*, I am not convinced that such a distinction is supportable within human rights law."

Minority Decision, *Appeal Book*, Vol. III, at 505 and 555 (emphasis added)

27. It is common knowledge that for 2,000 years Christian teaching has regarded homosexual conduct as sinful and has called on its faithful to refrain from engaging in it, (and until recently Canadian criminal law reflected this approach). For two millenia Christians have believed that there is an order, or purpose, to sexual conduct which has been revealed by God and which they must strive to follow. Their consciences apply their religious beliefs to the situations of daily life so that they may engage in conduct which will bring them closer to God. In this respect, the TWU Community Standards are simply a practical manifestation of one community of Christians exercising their consciences in a way which they believe will bring them closer to God.

28. By the same token, in recent times a portion of the Canadian population has adopted a sexual morality which sees no difference between heterosexual conduct and homosexual conduct. In political and legal terms, such persons have simply exercised their

consciences in a manner different from that of the members of the TWU community. Where different segments of the Canadian population hold, as a matter of conscience, opposite views on issues of sexual morality, can the *Charter* operate to select and impose a "Canadian orthodoxy", or "Canadian value" to which all Canadians must by law subscribe, even against their conscience? It cannot, for to do so would be to violate the fundamental freedom of conscience and religion guaranteed by section 2(a) of the *Charter* as well as the equality guarantees under section 15(1). As a result, any consideration of the "public interest" must take into account and respect the constitutional freedom which Canadians enjoy on matters of conscience, including sexual morality.

29. The BCCT and Minority Decision, however, point to this Court's decisions in *M. v. H.* and *Vriend* as proof that this Court in fact has decided a matter of conscience for all Canadians. In so doing the BCCT and Minority Decision misconstrue the actual results of those decisions. In the *M. v. H.* and *Vriend* cases this Court struck down under section 15(1) legislation which it held denied certain public, legal benefits to same-sex couples or homosexual persons; those decisions effectively directed two provincial governments to rectify laws which discriminated against homosexuals. Those decisions did not require any person to change his or her conscientiously-held beliefs on the issue of homosexual conduct, nor did those decisions suggest that in the future public benefits could only be extended to those who see no moral wrong in homosexual conduct Both decisions were silent on what any individual may believe about homosexual conduct as a matter of conscience.

M. v. H., [1999] 2 S.C.R. 3.

Vriend v. Alberta [1998] 1 S.C.R. 493.

30. The purpose and effect of the BCCT's decision, however, is to bring pressure on the religiously-held beliefs of TWU students on a matter of sexual morality. In a far from subtle way, a public agency is exerting pressure on religious individuals and their institutions to change their beliefs to obtain a public benefit. This Court has expressly condemned such coercive conduct by government agencies. In the *Big M Drug Mart* case Chief Justice Dickson stated:

> "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled 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 be said to be truly free. *One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such 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."

The concept of the "public interest" adopted by the BCCT violates the guarantees of freedom of conscience and religion contained in the *Charter* and operates to exert on TWU and its students those "indirect forms of control" expressly condemned by this Court in the *Big M Drug Mart* case.

Big M Drug Mart, supra., at 353-4 (emphasis added)

(iii) A Pluralistic Approach to the Public Interest

31. What principles, then, should the BCCT follow in identifying and applying the "public interest" to the exercise of its statutory powers? First, it must take into account all "Charter values", giving equal weight and respect to the guarantees of freedom of conscience and religion found in sections 2(a), 15 and 27 of the *Charter*. Second, it must not construe the meaning of the "public interest" in a way which would coerce religious individuals and institutions to alter their beliefs and teachings on matters of conscience. Third, the BCCT cannot adopt a definition of the "public interest" which would violate the equality rights of TWU and its students not to be denied the equal benefit of the law on the basis of their religion, or religious beliefs. In sum, the BCCT cannot develop or apply a definition of the "public interest" which will require religious institutions and their members to change a religiously-held belief on a matter of sexual morality to obtain accreditation or certification by the BCCT.

32. That is not to say that the BCCT cannot consider whether the *actual conduct* of a teacher contravenes existing laws. Any teacher who teaches in a public school must comply with the laws which govern those schools. In British Columbia that means that a teacher cannot discriminate against a student in the provision of a public service on the basis of the student's sexual orientation. If the teacher does, then the teacher may be subject to a human rights complaint or some sanction from the BCCT. However, the compliance by any teacher with the requirements of the law is measured by the teacher's *actual conduct*, and not by the teacher's beliefs on matters of conscience. On this point both the Appellant and the Respondent appear to agree that there is no evidence in the record that any graduate of TWU has discriminated against a student in the public schools on the basis of the student's sexual orientation. That being the case, there is no basis for the BCCT to

suggest that the TWU programme, or its students, have acted in a way contrary to the "public interest" as it relates to public education in British Columbia.

C. THE CONSEQUENCES OF ADOPTING THE APPELLANT'S VIEW OF THE "PUBLIC INTEREST"

33. If the Appellant's appeal is allowed, this Court will have established the principle that one's religiously-held beliefs about the morality of homosexual conduct may disentitle one to certification as a public school teacher in British Columbia. The requirement for TWU students to take their fifth year at Simon Fraser University would not mitigate this result. The BCCT's demand that TWU students take a final year at a public university either represents a cynical view of the strength of the religious convictions held by TWU students, or a direct effort to attempt to disabuse those students of their beliefs. What if the fifth year at Simon Fraser University does not "work", and the former TWU students remain of the view that homosexual conduct is wrong, or biblically condemned? Does it then lie in the power of the BCCT to require every former TWU student, before receiving certification, to submit proof that they no longer hold such a view? If the BCCT responds by saying that such an inquiry would not be necessary, then wherein lies any good faith basis for their current refusal to accredit TWU's programme?

34. And why limit such an inquiry to TWU students? Conceivably some students who take all years of their education degree at a public university may believe that homosexual conduct is wrong. Should the BCCT now administer a test to all graduating education students to inquire into their views on the morality of homosexual conduct? This would be the logical result of the principle which the BCCT advocates in this case. If it is against the "public interest" to certify teachers who graduate from a religious college where they have agreed to refrain from homosexual conduct, the same concern should apply to any prospective teacher attending a public university who, as a matter of conscience, refrains from homosexual conduct because it is biblically condemned or morally wrong.

35. In a sense the BCCT is trying to establish a modern variation of a "religion test" for access to public privileges. Section 3 of Article VI of the *United States Constitution* provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." With its guarantee of equal benefit of the law without discrimination on the basis of religion, section 15(1) of the *Charter* achieves a similar result. The BCCT has ignored this prohibition by establishing its own "rejection of

religious belief" test which TWU students must satisfy by attending a fifth year at a public university.

36. The principles advocated by the BCCT, if accepted by this Court, would also have ramifications beyond the immediate issue of the accreditation of university education programs and teacher certification. For example:

    (i) would the public funding for Roman Catholic schools in some provinces now withstand scrutiny? The teaching of the Roman Catholic Church on the issue of homosexual conduct does not differ from that found at TWU. Should the equality guarantees of section 15(a) relating to sexual orientation now "trump" the guarantees of section 93(1) of the *Constitution Act, 1867*?

    (ii) in the *Adler* case, this Court held that provincial governments could extend funding to private schools, if they so decided. Many private schools are religious in character. Would it now be against some concept of the "public interest" for provinces, such as British Columbia and Alberta, to continue to provide funding to private elementary and secondary schools (many of which are religiously-based) which teach that homosexual conduct is morally wrong?;

    (iii) the *British Columbia Legal Profession Act*, S.B.C. 1998, c. 9, provides that one of the objects of the Law Society of British Columbia is "to uphold and protect the public interest in the administration of justice" by establishing standards of professional responsibility for its members and applicants to membership. Would it now be against the "public interest" to admit members to the Bar who, for reasons of religious belief, consider homosexual conduct to be wrong?

None of these fact situations has yet arisen, but they lie right on the horizon of the present case. The principles which this Court adopts on this appeal will directly influence how those questions are answered.

PART IV - ORDER REQUESTED

37. The Intervener the Evangelical Fellowship of Canada respectfully requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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PART V - AUTHORITIES

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

Respondent(Petitioners)

- and -

The Evangelical Fellowship of Canada

Intervener

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