## PART III-ARGUMENT

### Introduction

46. The issues in this case are representative of many situations on Canadian University campuses that are reaching a boiling point. They are situations that are non-academic in nature, and go beyond the scope of existing academic policies currently in place at Universities.

47. Most of the cases never make it to trial as individual students initially try to grapple with: understanding *Charter* rights and values; and, notions of contractual responsibilities in attending a University as a fee-paying student. A recent example on:

    a. *Charter* rights and values on campus, particularly those related to religious beliefs, is *Gray et al v. The UBC Student's Union, Okanagan* (**Tab 4 Book of Authorities**) and,

    **b.** the "growing tide of" student lawsuits is found in *Hoziama v. Perry*, (**Book of Authorities Tab 5)**

48. Such cases pit individual students or loosely organized students against the extremely well resourced, organized, and highly credible institutions of Universities and their Faculty Associations and Unions who exist to advance their own interests and *Charter* rights and values.

49. The intense interest in ensuring the outcome of *Maughan v. UBC et al*, and the characterization of The Student, by these University and Faculty organizations is underscored in the respondents' most recent publications arising from the Sunday Class Abstention and Derrida-Holy Eucharist Paper:

    a. A Canadian Association of Universities and Colleges article interviewing the Canadian Association of University Solicitors, and UBC legal counsel in "When Students Sue", **(Vol. III, Tab 24, page 584)**; and,

    b. The Canadian Association of University Teachers most recent *Bulletin* and policy statement or standard asserting the trial Judge's justifications for The Assessment, in the article "BC Discrimination Lawsuit Dismissed" **(Vol. III, Tab 24, page 600)**

50. *The Civil Rights Protection Act* is unique in Canada. It provides relief for purposeful civil rights violations or discrimination requiring proof of purpose. It also provides for exemplary damages to be awarded to an organization at the Court's discretion, as it was advanced by the applicant. **(Vol. III, Tab 18, page 395)**

**51.** This applicant and her case are an example of the average Canadian citizen seeking to exercise her Canadian rights and freedoms guaranteed to her by the *Canadian Charter of Rights and Freedoms,* and now at risk for the loss of her home as a result. **(Affidavit of Cynthia Maughan, dated December 15, 2009)**

**Ground 1: *Charter* valued rights and freedoms on Canadian University Campuses**

52. The applicant's central submission is that at every stage of analysis the trial Judge and the Court of Appeal erred in law by failing to recognize, or at least give effect to:
    a. the equality value of Section 15 of the *Charter;* and,
    b. the nexus to religion of the "religious beliefs" and "faith" of a known "practicing Christian" student who abstained from a Sunday Class.
53. This failure affected their appreciation of the nature and extent of the infringement of both the expression and equality rights with other students, and a section 24 remedy calling for administrative correction, which is necessary to ensure the guarantees of a free and democratic society.
54. At issue in this case is whether The University of British Columbia as a private actor, but one which advances *Charter* interpretation of its external *University Act*, R.S.B.C. 1996, c. 468, may formulate polices under The *University Act* that:
    a. selects from the *Canadian Charter of Rights and Freedoms* or makes categories of grounds which will be protected; and,
    b. selects which position of person or campus organization's rights and freedoms will be protected from harm and reprisal

    in violation of the equality right and value of Sec. (15) of *The Charter.*
55. In *University of British Columbia and University of British Columbia Faculty Association and The Labour Relations Board*, 2006 BCSC 406, The University advanced that the *Charter* must protect its President's Sec. 2 (b) rights in relation to *The University Act*.(**Book of Authorities, Tab 10, Paras 27, 65-67, 75**.)
56. In *Faculty Association of the University of British Columbia v. University of British Columbia, and Canadian Union of Public Employees, Local 2278 and Canadian Association of University Teachers and Association of Universities and Colleges of Canada*, 2009 BCCA 69, Faculty argued that The *University Act* must be interpreted by The *Charter*. **(Book of Authorities, Tab 3, paras 6-7)**

57. However, in this student case based on religion, both The University and the Faculty reversed what was their position at trial and through the pre-appeal hearing stage, that the *Civil Rights Protection Act* must be interpreted by the *Charter*. On appeal, they said that the *Charter* has no applicability whatsoever to this case of *Maughan v. UBC et al*. (Court of Appeal *Reasons*, para 52).[1] This position was adopted by the BC Attorney General's Office at the hearing.

58. Without the same *Charter* rights and values protection of The University and Faculty, justifications can be made for University faculty to assess a student's performance, not based on academic merit, but based on faculty's speculation or opinion that "religious convictions" and "matters of faith" "impair their academic analysis and judgment," protected by Faculty's free speech rights. The trial Judge's decision was communicated by The Canadian Association of University Teachers to its Canadian faculty in an assertion that students may be assessed on their religious beliefs so long as the assessment does not exceed the threshold of hate speech. **(p. 602, first full paragraph)**

59. This policy or standard by The C.A.U.T. based on the trial Judge's *Reasons* substitutes the measurement for advancement in academia from one of merit to University faculty's opinions on a student's religious beliefs. This cannot be tolerated in a free and democratic society.

60. The decision by the trial Judge also justified the University and its faculty to designate certain students' religious beliefs and practices as "religious scruples" and "religiosity", not protected by any right or value of freedom of "religion", because the Faculty Instructor did not receive what she thought was a clear religious objection based on orthodox religious practices to a Sunday Class. (**Vol. II, Tab 19, page 413)** This is contrary to The Supreme Court of Canada in *Syndicat Northcrest* 2004 SCC 47 (CanLII), 2004 SCC 47; and, in many cases before The Federal Court.

> As such, a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion….The State is in no position to be, nor should it become, the arbiter of religious dogma…Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions. It is also inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held.

[1] The applicant did also seek in her New Evidence Motion that her case be deferred until the outcome of that decision in the BC Court of Appeal, (Vol. III, Tab 24, p. 583).

61. As was before the lower courts, The University and Faculty's intentions are exactly contrary to the above rulings. They assert it is their very right to design questions to quiz students on their religious beliefs to establish whether they will be protected from harm and reprisal based on religion; or whether they have "religiosity" and "religious scruples", which will not protect them from harm and reprisal.
62. Where the unconstitutional conduct and communications and negligent bad faith error does not a provide a remedy that will ensure that the unconstitutional behavior and or negligent conduct is corrected, it is an endorsement of tolerance for the maladministration of the religious freedom and freedom of thought belief and expression of individual students of faith at Canadian Universities.
63. Through the trial Judge's *Reasons*, The University is also able to permit University faculty to be the censors of impassioned speech of the religious kind, by directing and assessing research based on the student's religious beliefs; and, causing students harm and reprisal for having done so, as being "impaired" academically.
64. Moreover, the appellant submits that the evidence before the trial Judge was that her "outstanding" linguistic research said nothing about hurt religious feelings; however, she has been continuously falsely reported in the small community of English scholars, and in national and international academic publications, as a threat to academic freedom.
65. The applicant submits that what will inevitably follow from the trial Judge's ruling and the C.A.U.T.'s communication is future prohibition of expression by a student of faith. It is a legal and constitutional error to fail to provide a remedy that will ensure that these unjustified infringements of rights or values will not be repeated.
66. The suggestion that a student's privately held religious beliefs and practices are subject to academic assessment and questioning must be reconsidered. At the very minimum the remedy should have been the issuance of an injunction enjoining the administration of the impugned provisions until The University can satisfy the Court that the systemic problems have been addressed and permanently resolved.
67. The privately or publically held religious beliefs of individual students must be free from radical perspectives that seek to remove religion, or certain religions, from academic culture.

**Ground 2: Vitiating the Duty of Care in a <u>Student Grade Appeal</u>**

68. At issue in this case is whether Canadian Universities may vitiate the duty of care of faculty to students: in ad hoc policy decisions on individual student appeals; be protected by those ad hoc

decisions in the Courts; and, protect any "officious bystander" faculty member with absolute immunity, in a power imbalanced student grade appeal proceeding.

69. The unchallengeable context of this case is that faculty are required as a matter of law to act in good faith in their duties of assessing students and administrating their courses in a power imbalanced relationship with students, and to assist and consult with students if they disagree with the advice and decisions of an instructor.
70. The Court of Appeal erred in finding that faculty's duty of care to "get their facts straight" (*Young v. Bella*) and refrain from speculative reports to harm a fee-paying student's academic future can be vitiated if: a student appeals a grade (following grade appeal procedures); but The University makes an ad hoc, undisclosed decision that the grade appeal amounts to a serious complaint. This basis for vitiating faculty's duty of care defeats a student from seeking relief for bad faith under Sec. 69 of *The University Act*.
71. The Court of Appeal erred by agreeing with the trial Judge's decision that absolute immunity protects malicious, dishonest, unsolicited, unsworn letters from any faculty member offering any opinion about a Student (Oral Reasons in a Voir Dire, para 31-35, 42). Moreover, the trial Judge did so by erring in the facts: the Other Faculty at issue were not participants, nor witnesses nor potential witnesses, nor were their letters sought or used by the person with the responsibility for developing a response to The Student's grade appeal. **(Vol. I, Tab 6, Oral Reasons in a Voir Dire paras 43-47)**
72. Moreover, this decision was made without a requirement that the University: notify students that bystander faculty may involve themselves in their grade appeal; have an enforceable confidentiality policy; and, a policy to remedy harm to the student. The trial Judge was of the view that there was a remedy available within the University. There is simply no basis in the record for the trial Judge's confidence in this regard.
73. The University was furthermore negligent in not informing the student of what they knew or ought to have known would be an "attack" on the student for mental and emotional stability and for religious tolerance, particularly when she had specifically sought intervention from The V-P Academic. **(Vol. III, Tab 21 p. 470-477)** This precedent defeats: the principal of power imbalance between faculty and students; the unfettered right of a student to appeal a grade; and, an action under Sec. 69 of The *University Act* for the bad faith conduct of faculty.
74. By placing confidence in a University Administration that it will remedy "attacks on a student for mental and emotional stability and for religious tolerance", whose very position is that it

had no reason to provide a remedy, puts the appellant student in an impossible position. Here The University may or may not change anything. Hence, failing to require a remedy from The University for the Senate Records cannot be a basis for dismissing allegations.

**Ground 3: Repeated Failure To Refer To Material Fact Evidence In The Lower Courts**

75. The trial Judge failed to refer to, nor take into account, virtually any of the applicant's material fact evidence and the live issues. That evidence directly related to the *Charter* rights and values claims at issue, and the standards set by the trial Judge for bad faith (*Reasons*, para 424). This evidence would have made a difference to the outcome of the no evidence motion.
76. At issue in this case are failures in the lower courts to refer to direct evidence of primary facts in "admissions of truth" by the respondents (as outlined in Part 1) under *The Supreme Court Act* [RSBC 1996] Chapter 443; and its Rules of Evidence, in particular Rule 31 – Admissions. These facts are raw facts of dates and documented statements that foreclosed an inference drawing process.
77. For example, the admissions of truth that a "practicing Christian" Student who did not seek to have the location changed from the other student's home, but only sought to have the day changed from Sunday, foreclosed the inference that the student did not want to attend the Sunday Class because of a disagreement with the other student, and concluding the abstention was not based on religion.
78. The applicant appreciates that a trial Judge "is not obliged to discuss all of the evidence on any given point". The applicant does rely on The Supreme Court of Canada's proviso that so long as

> the reasons show that he or she grappled with the substance of the live issues on the trial.

*R. v. R.E.M.* [2008] 3 S.C.R. 3, 2008 SCC 51, paragraph 64

79. The applicant submits that the trial judge did not grapple with the live issues as outlined in Part 1, and he erred by failing to refer to over 50 pieces of evidence and "admissions of truth" on those live issues. It was on this basis that the case was dismissed.

> Rule 31 does not limit itself to admissions of primary fact. Usually, however, for one party to seek an admission of a material fact, which is not also a primary fact, is a waste of time and will simply bring forth a denial.

*Bank of Montreal v. Quality Feeds Alberta Ltd*., 1995 CA019813

80. The Court of Appeal's reasons for dismissing this basis of appeal as not meritorious enough for discussion fails to ensure that justice is done and is seen to have been done.

81. In excluding this evidence from reference, both the trial Judge's and the Court of Appeal's *Reasons for Decision* fail to: "provide public accountability and to permit effective appellate review." (*R. v. R.E.M.*) Moreover, while there was a failure to refer to this primary evidence and the live issues, there are extensive reasons given on issues advanced by the respondents' which were not advanced by the appellant at the hearing., **(Vol. III, Tab 22, p.492-496)**

82. The Court of Appeal also erred by failing to refer to and admit the undisputed new and fresh evidence of the respondents' post-trial, pre-appeal hearing publications about the appellant and the case.. (*Reasons*, para 122-123)

**In Conclusion**

**83.** The applicant respectfully submits that *Charter* rights and/or values for Canadian students on campuses, that equate to many of the largest cities in Canada, must not be left to University administrators, their legal counsel and faculty association activists to select which rights and freedoms, and which persons will be protected from harm and reprisal. There must be an appellate review available to the trial Judge's decision. *Charter* rights and values must be equally and consistently applied within a Canadian democracy.

84. Policies and procedures at Universities must be clear, transparent, consistent, and they must be informed by *Charter* rights and/or values. If The University intends to have a Senate Committee for Appeals on Academic Standing that hears complaints and resolves disputes in an adversarial forum in which the principal of power imbalance and duty of care is vitiated, it must be published so that students can make informed decisions.

85. There has yet to be a decision, or an appellate review of this case based on the admissions of truth and the key exhibits. The applicant has "put everything on the line" to advance this case, and she seeks leave to appeal that she need not risk losing her home because the lower courts failed to refer and consider the primary evidence and the key exhibits on the live issues.

86. The applicant has come forward to exercise her *Charter* rights and values as a Canadian against the extremely well resourced University and Faculty after all of her efforts to amicably resolve the matter with them were refused. The applicant is seeking leave to have these issues of national and public importance heard by the Supreme Court of Canada.

## PART IV COSTS

87. The Applicant seeks cost sufficient to ensure that if leave to appeal is granted, she has the funds necessary to proceed with the appeal.

## PART V – ORDER SOUGHT

88. The applicant requests that this application for leave to appeal from the Judgment of the Court of Appeal of British Columbia, dated October 20, 2009, be granted.

**ALL OF WHICH is respectfully submitted this 21st day of December, 2009**.Amended December 29, 2009.

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