File No.__________

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

CYNTHIA L. MAUGHAN

Applicant
(Appellant)

AND:

THE UNIVERSITY OF BRITISH COLUMBIA
LORRAINE WEIR, JUDY SEGAL, SUSANNA EGAN, ANNE SCOTT
AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
FILED BY THE APPLIANT, CYNTHIA MAUGHAN
(Pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c.S-26)
VOLUME II, pages 223-434

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PART I - STATEMENT OF FACTS

Respondents' Pre-trial Admissions of Truth and Authenticated Records on the Live Issues

1. At trial, the applicant led the respondents' pre-trial admissions of primary and material facts and authenticated records on the live Issues. **(Vol. III, Tab 21)**. The applicant appealed the trial Judge's dismissal of her case on a no evidence motion on the basis that the trial Judge had erred by "rejecting direct key evidence of admissions, interrogatories, examination for discovery, authenticated documents". **(Vol. III, Tab 25)** At the Court of Appeal, the applicant again led the primary, material fact evidence and records appealing that the trial Judge had not referred to them in his *Reasons for Decision.* **(Vol. III, Tab 22)**. The applicant's primary and material fact evidence at trial and on appeal were:

   a. formal "Admissions of Truth" **(Vol. III, Tab 22, page 512-522)** which were before the lower courts according to Supreme Court Rule 31 (**Vol. II, Tab 18, page 410**); and

   b. authenticated documents, all of which were admitted as exhibits on the live issues, and are found in **Volume III**. In particular:

      i. a written academic assessment based on religion ("The Assessment") which began the matter **(Tab 21, page 465 and Tab 22, pages 504-505);**

      ii. a research paper proving the use of a misquotation of the Bible in a class assigned essay. ("The Derrida-Holy Eucharist Paper") **(Tab 21, pages 478-489 and Tab 22, 523-525).**

      iii. relevant policies of The University of British Columbia. **(Tab 18, page 399-403)**;

      iv. exhibits of her efforts to "resolve the matter as close to the source as possible" and communications seeking intervention from The University's administration **(Vol. III, Tab 21 beginning pages 470 and Tab 22, p. 530)**; and,

   c. an interrogatory answer by all of the respondents ("The Collective or Group Interrogatory"). It was ruled into evidence by the trial Judge's "Oral Reasons on Group Interrogatory." **(Vol. I, Tab 8)**.

   d. The applicant is not seeking leave to appeal based on the other evidence she also advanced, such as examination for discovery questions and answers. This appeal is focused and limited to: the issue of admissions of truth, which are not open to discretionary exclusion by a trial Judge; the authenticated records; and, The Collective Interrogatory which the trial Judge explicitly accepted into evidence.

April, 2001: The Originating Event: The Academic Assessment:

Key *Charter* Claims: Statement of Claim: Vol. III, Tab 21, p. 441, and Reply: p. 453-454

2. At trial and on appeal the applicant, Cynthia Maughan ("The Student") advanced her claim against the respondent, Dr. Lorraine Weir ("The Faculty Instructor") and The University for The Assessment because it violated her civil right to religious freedom, and was negligent under The *University Act*. The concluding paragraph of the Assessment is re-produced at **Vol. III, Tab 22, p. 504.** The Student claimed that The Faculty Instructor had assessed her:
   a. "overall performance" as an
   b. "agenda of resistance" for:
      i. her "refusal to contribute" to a Sunday Class; ("The Sunday Class"); and for,
      ii. "stay[ing] in the seminar" and researching The Derrida-Holy Eucharist Paper.
3. The applicant went to trial with the formal "admissions of truth" by the Faculty Instructor (**Vol. III, Tab 22, p. 512-522**) regarding The Assessment. The applicant led those admissions as primary and material fact evidence to prove The Faculty Instructor's state of mind when she wrote The Assessment:
   a. The Faculty Instructor knew The Student was a "practicing Christian." **Vol. III, Tab 22, Admission No. 83, page 513.**
   b. The Faculty Instructor was an adjunct professor in the Faculty of Law at The University. **Admission No. 70 on page 522.**
   c. After the seminar began, The Faculty Instructor had announced a special and important class would be held on a Sunday. ("The Sunday Class"). **Admission No. 122, page 513.**
   d. The Faculty Instructor had twice refused The Student's requests to ask the other students if they would change the day from Sunday so that she could attend. **Admissions: 158, 160, p. 515.**
   e. The Student's requests to try and change the day from Sunday were made within (3) business days of the Faculty Instructor's formal announcement of The Sunday Class, and almost two months in advance of The Sunday Class. **Admissions: No.122, page 513; No. 126, page 514; No. 241, page 516.**
   f. There were only (12) students in the class at the time that The Student asked The Faculty Instructor if she would ask the other students if they would agree to change the day from Sunday. **Admission No.131, page 514**

g. The Student did not object to the location of The Sunday Class at the home of another student. **Admissions No.: 121, page 513 and No.s: 137, 147 b., 149. 155, page 514.**

h. The Faculty Instructor "inadvertently" failed to fulfill her part of the accommodation agreement that she had given The Student as an accommodation agreement in substitution for the Sunday Class. **Admissions No. 254, 274, 275, 267, 255, 271, 272, 276, 279, pages 517- 518.**

i. The Faculty Instructor asserted in writing to The Student that "it was unfortunate" that The Student had not had the benefits of The Sunday Class, but The Faculty Instructor had inadvertently overlooked fulfilling her part of the accommodation agreement to accommodate this loss of benefit. **(Vol. III, Tab 22 Exhibit, page 505)**

j. The Faculty Instructor rated The Student's linguistic research in The Student's Derrida-Holy Eucharist Paper as an "A" which is "outstanding." **Vol. IIII, Tab Exhibit, p. 478, and 523-524)**

The Trial Judge and Court of Appeal's *Reasons for Decision*

4. Neither the trial Judge nor The Court of Appeal's *Reasons* refer to the above claims and evidence. They do not:

   a. refer to The Faculty Instructor's statements in The Assessment for "overall performance" as an "agenda of resistance" as claimed. The trial Judge did refer generally to "comments" on The Student's final paper.

   b. refer to any of the above "Admissions of Truth", with the exception that the trial Judge made reference to Admission No. 83, page 513. However, that admission was modified from an admission of The Faculty Instructor knowing The Student as a "practicing Christian" to knowing /The Student was a "Christian".[1]

   c. refer to the claims nor the evidence of the Derrida-Holy Eucharist Paper and Collective Interrogatory.

5. In dismissing the appeal, The Court of Appeal stated that:

> [W]e are not persuaded that the trial judge erred in any significant manner and [the Applicant's basis' of appeal are] not sufficiently meritorious to warrant a discussion[2].

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[1] *Reasons* para 54, page 129

[2] Court of Appeal, *Reasons for Decision*, para 69

The Trial Judge and Court of Appeal's Justifications For The Assessment as "Comments"

6. The trial Judge's *Reasons*, in a paragraph quoted in its entirety by the Court of Appeal[3], drew inferences from the circumstantial evidence to justify The Faculty Instructor's state of mind in writing "comments" i.e. The Assessment of The Student's "overall performance."

7. He justified the Faculty Instructor's "comments" based on The Student's religion by drawing inferences about The Student's religious beliefs and practices. He found that The Student did not have "religion" but rather "religiosity[4]" and "religious scruples[5]" for which The Faculty Instructor had grounds for finding The Student's "religious beliefs impaired her academic analysis and judgment".[6] The trial Judge's *Reasons* were stated as follows:

> During the course of this seminar and, particularly in her comments on [The Student]'s final paper [The Assessment for "overall performance" as an "agenda of resistance], [The Faculty Instructor] did refer to [The Student]'s religiosity in effect asserting that [The Student] allowed matters of faith to impair her academic analysis and judgment. It could not be said that there was no basis in the evidence justifying that conclusion.[7]
>
> [T]he effect of [The Faculty Instructor's] refusal to change the colloquium [and fulfill the Sunday Class Accommodation Agreement] affected [The Student because of] her religious scruples[8]
>
> [W]hile [The Assessment] may reflect [The Faculty Instructor]'s view (right or wrong) that [The Student]'s religious convictions impaired her willingness to fully participate in the seminar, that view does not equate to evidence of an intention...[9]

8. The trial Judge went on to draw the following inferences from the circumstantial evidence as to *The Student's* state of mind and conduct during the seminar. Again, the inferences were drawn to justify The Faculty Instructor's "comments". The trial Judge did so without referring to the primary, material fact evidence at Para 3 a-j above, referenced in the bold brackets.

> There is no evidence that [The Faculty Instructor's] refusal to change the colloquium or failure to provide feedback [fulfill the accommodation agreement]...were malicious or morally oblique actions. There is no clear evidence of what [The Faculty Instructor] knew the basis of [The Student's] objection to the [Sunday] colloquium to be **(Admission No. 83, page 513 re: "practicing Christian")**, given that she did not initially object to it being held on a Sunday, was indirect in raising the prospect of changing it in her two emails to [The Faculty Instructor], **(Admissions No. 122, 126, 131, 155, 158, 160 page 513- 515)**, and was unclear in her evidence as to what she told [The Faculty Instructor] on

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[3] Court of Appeal, *Reasons for Decision*, para 74-75
[4] Reasons, para 370
[5] Reasons, para 422
[6] Reasons para 354-355;[6] Reasons para 370
[7] *Reasons* of the trial Judge, para 370
[8] Reasons, para 352
[9] Reasons, para 354

February 8, 2001 concerning her previous interaction with Mildon. **(Admissions No.137, 147b and 149, page 514)**. It would in my view be impossible to conclude on the state of the evidence before me that [The Faculty Instructor]'s refusal to change the colloquium had "ill will" or "furtive design" towards [The Student] based on her religion as its animating force as opposed to the difficulty of rearranging the colloquium to another date, given the difficulty with which the first date was settled on.[10] **(Admission 131, page 514).**

...the only evidence of the foundation of [The Faculty Instructor]'s state of mind in making these comments was **(Admission No. 83, page 513 re: "practicing Christian")** [The Student]'s conduct in the seminar in relation to Derrida's portrayal of the holy Eucharist as cannibalism, **(Exhibit. p.523, and last page 524)** her withdrawal from further participation in the seminar, and the disparaging tone of her final paper **(appended to *Reasons*, page 288-293)** towards both [The Faculty Instructor] and the seminar. In those circumstances, there is no evidentiary basis to infer that [The Faculty Instructor]'s comments were a product of an intent to interfere with [The Student]'s civil rights.[11]

As to [The Faculty Instructor]'s [Assessment of her "overall performance" as an Agenda of Resistance"] comments on [The Student]'s final paper, they must of course be judged in light of the content of the paper itself, which could quite reasonably be interpreted by [The Faculty Instructor] as disparaging of her and of the quality of the seminar.[12] **(appended to *Reasons*, p.288-293)**

9. The trial Judge also found that The Student was properly advised by Faculty to not pursue research of The Derrida Holy Eucharist Paper because: the Derrida essay had also made a joke about the Holy Eucharist and cannibalism; and, Faculty speculated or knew The Student was originally inspired to do the research because of the "feelings that text invoked"[13]; and, therefore was "fueled" by "religious scruples" in writing The Derrida-Holy Eucharist Paper.[14]

May-June 2001: The Grade Appeal to The Faculty of Graduate Studies for The Assessment

10. The Faculty Instructor heard The Student was consulting about a grade appeal because of The Assessment**. (Tab 21, p.468)** The Faculty Instructor sent a series of emails to a key decision maker on The Student's academic future ("The June Emails"), and made an allegation that The Student was "anti-homosexual". The Student claimed these communications promoted her inferiority and contempt on the basis of religion. The University and The Faculty Instructor argued that the communications were justified on the basis that. The Student had made a serious "complaint" to which The Faculty Instructor was entitled to respond.

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[10] Reasons, para 423
[11] Reasons, para 355
[12] Reasons, para 426
[13] Reasons, para 448-9
[14] Reasons para 373-374

11. In response to the Faculty Instructor's argument, The Student led University policy evidence that she did not file a "complaint" to which The Faculty Instructor was a party. Rather, she had taken steps toward a "grade appeal" following University grade appeal procedures: she confidentially sought the support of the department graduate student advisor, **(Tab 21, p. 468)** in taking steps toward an appeal to her Faculty of Graduate Studies. **(Tab 18, p. 401)**
12. The department did divert the matter to a departmental equity committee, but the trial Judge, citing the Department Handbook, found it was "an attempt through consultation to resolve the issue without the necessity of engaging the appeal process function."[15] It was not a committee at which parties appeared in a complaint hearing. It exists for students to consult.
13. The Student also led evidence that:
    a. "complaints" of "discrimination or bias" can only be made at The UBC Equity Office, and are distinct from grade appeal procedures. **(Vol. II, Tab 18, Page 401-405)**
    b. the only places that she sought counsel were either forums for confidential consultations **(Vol. III, Tab 21, p. 468)**; or, were the proper procedure for a grade appeal that are in place for students to seek relief and consultation. **(Vol. II. p. 402, 468-469C; *Reasons*, para 461)**

The Trial Judge and Court of Appeal's *Reasons for Decision*

14. The trial Judge drew inferences from the circumstantial evidence, without referring to the above direct University policy evidence, and his finding at para 461 above, that The Student's consultation on the grade appeal was an unfounded "complaint" of "discrimination or bias". This inference was the basis on which all of the allegations against the respondents were dismissed.
15. Specifically, the trial judge inferred that The Student had framed an "adversarial relationship" in a "vigorous pursuit" of a "complaint" of "serious allegations" of "serious misconduct" and "discrimination or bias."[16] The trial Judge found that, therefore:

> [W]hatever duty and standard of care may have governed [The Faculty Instructor]'s relationship with [The Student] before [The Student] launched her allegations of religious bias did not prevail thereafter, as a person in the position of [The Faculty Instructor] has the right and the duty to address allegations made against her in a way quite different from addressing issues arising in a non-adversarial professor/student relationship.[17]

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[15] *Reasons*, para 461
[16] *Reasons* para 367 and Para 358-359 and para 372 and para 434-437 and p.357, para 482 and para 437
[17] *Reasons* para 438

16. The trial Judge further justified the June Email and Anti-Homosexual allegations based on findings that the "practicing Christian" Student's religious beliefs and practices, were not protected on the ground of religion. The trial Judge did so without referring to the above Admissions of Truth[18]:

> None of the flashpoints in the June emails evidences bias against [The Student] as a Christian. Rather, the flashpoints relate to [The Student]'s conduct in the seminar (abstaining from the Sunday Class) **(Admissions No. 122, 126, 131, 155, 158, 160 page 513-515)**, her attitudes towards Derrida and his writing (The Derrida-Holy Eucharist Paper, **page 478-484**) her views on the early experience of Christians with First Nations people, **(*Reasons*, para 364, last line)** her relations with her classmates **(*Reasons*, para 73-74)** and her undiplomatic assessment of [The Faculty Instructor]'s course and [The Faculty Instructor] in her final paper. **(appended to *Reasons*, p.288-293).**There is no evidence that [The Faculty Instructor] regarded the shortcomings she ascribed to [The Student] as intrinsic to her Christian religion. [19]

17. The Court of Appeal upheld the trial Judge's finding that the Faculty Instructor's duty of care was vitiated because of the trial Judge's inference that The Student had made a "complaint" of "discrimination or bias," distinguishing the facts from *Young v. Bella.* [20] It did so without referring to the applicant's basis of appeal that the trial Judge had failed to refer to the above direct evidence in deciding what the trial Judge found to be the "core of the lawsuit" **(Tab 22, p. 494).**

November, 2001-April, 2002: The Student's Grade Appeal to the Senate Committee for Appeals on Academic Standing

18. Both at trial and on appeal The Student led direct evidence to support her claims of on-going civil rights violations and negligence that after The University, Faculty Instructor and the respondent Dr. Egan ("The Department Administrator") had refused her efforts to "resolve the matter as close to the source as possible"**(Tab 21, p. 470;Tab 22 p. 530),** and she was losing: the "heart to even go on in academia", and time from her M.A. thesis and part-time work, she made her appeal to The University's Senate Committee for Appeals on Academic Standing.
19. The Student appealed on the principal of "Holy Day Observance without Penalty". She appealed that the accommodation agreement was not fulfilled by The Faculty Instructor who

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[18] The Applicant relies on the trial Judge's failure to refer to the primary facts of the admissions. The Applicant does not refer to the other evidence advanced at trial in this appeal which is based on the primary fact evidence of admissions of truth.

[19] *Reasons*, para 365

[20] *Reasons for Decision*, Court of Appeal , paras 96-98

had advised her that she had suffered a loss of benefit as a result. The Student appealed that this was contrary to Policy #65.**(Vol. 1 Tab 3, p. 5 and Vol. III, Tab 22, page 533)**

20. The Student led evidence that The Senate Committee, based on published University policy:
    a. only hears student appeals **(Tab 18, page 406 and Oral Reasons, Tab 6, para 36-38).**
    b. The Senate Committee for Student Grade Appeals found The Student's Appeal for "Holy Day Observance without Penalty" was a narrow appeal that:

        > The relief [The Student] sought might not seem significant, as [The Student] only sought to raise your mark from 73% to 79%, but [The Student] felt [she] w[as] bringing forward a test case on a point of principle regarding Sunday observance. **(Vol. I, Tab 3, p. 5).**

    c. The Senate Committee has no jurisdiction to remedy harm. It can only return the matter of a grade for reconsideration to the Faculty of Graduate Studies ("The F.G.S."). **(Tab 6, p. 408, Sec. 2.03).**
    d. Its procedures do not require confidentiality for anyone other than the Committee Members **(Vol. II, Tab 18, page 409, Sec. 206).**

"Officious Bystander" Faculty

21. The Student led evidence through exhibits and testimony at trial, and on appeal to the Court of Appeal, that two other faculty members, Dr Segal and Dr. Scott ("The Other Faculty") wrote unsolicited letters to Associate Dean Rose of The F.G.S. on department letterhead when they heard about The Student's grade appeal to the Senate Committee from The Faculty Instructor. In those letters they made unsworn statements of opinion about The Student.
22. Associate Dean Rose was a decision maker on the student's academic future and the person responsible for preparing the response to the Student's Appeal. Dr. Rose rejected the two unsolicited letters sent to her by the Other Faculty by not including them in her submission. **(Tab 22, Page 551).** The Other Faculty were never considered potential witnesses by Dr. Rose, nor were they witnesses at the hearing. **(Vol. III, Tab 22, Page 535 and 542).**
23. In response to a question asked by Dr. Rose on behalf of The Faculty Instructor, The Senate Office advised Dr. Rose that only witnesses who can speak directly to the specific issues on The Student's appeal should be called. **(Vol. III, Tab 22, Page 535)**
24. Dr. Rose did not call The Other Faculty as witnesses and advised The Faculty Instructor she would not be calling them. (Vol. III, page 535). She did call The Faculty Instructor as a witness. Dr. Rose did also attach to her submission The Faculty Instructor's written report. The

Faculty Instructor's report attached The Other Faculty Member's Letters **(Vol. III, Tab 22, Page 548),** all of which was circulated to the Senate Committee, and The Student.

25. Dr. Segal had taught The Student in one course two years previously. She did not know The Faculty Instructor at all. She stated various opinions about the "mental and emotional stability" of The Student in a two page letter. She made no comments about The Faculty Instructor, either generally or specifically. **(Vol. III, Tab 22, beginning page 540)**
26. Dr. Scott is from the French Department and did not know The Student at all except for one brief phone call on the translation of the Bible in The Student's research for the Derrida Holy-Eucharist Paper. Dr. Scott had known The Faculty Instructor for 25 years. Except for one paragraph, Dr. Scott's 2.5 page letter states her opinions about The Student's religion as legitimately characterized as "liturgical cannibalism" and "grotesque in its imagery"; and, that The Student and/or her appeal are "threats and terrorism" to academia. **(Page 537)**
27. The Senate Committee "unanimously concluded" that "The Department" (i.e. The Faculty Instructor, Other Faculty and The Faculty Administrator)

> in responding to (The Student's) appeal, mounted an irrelevant and unseemly attack upon (The Student's) character for mental and emotional stability and for religious tolerance. You had ample grounds for your objections at the hearing to the admissibility of the passages in various documents. The Senate Committee felt that such an attack upon (The Student's) character embarrassed the university and descended well beneath the current standards of *Charter* values. **(Volume I, Tab 3, page 15)**

The trial Judge and Court of Appeal's *Reasons for Decision*

28. The trial Judge inferred, without referring to the above primary fact evidence at para 20, a-d:
    a. The Student Senate Appeals Committee is a forum for resolving "dispute[s] and issues" at which a "defendant" defends their rights **(Vol. I, Oral Reasons, Tab 6, para 48 last line).** The trial Judge found the facts consistent with those of the *Cimolai* case which was a faculty-faculty dispute before a Committee for Discrimination and Harassment.[21]
    b. The trial Judge found that:

> It is evident that the underlying facts [The Student] was asserting and relying on were significant in scope and controversy and in context likely to engage a substantial and vigorous response **(Vol. I, Oral Reasons, Tab 6, para 48).**

[21] Vol. 1, Tab 6, p. 149, para 33

c. As to remedy for harm, the trial Judge found that "The Senate Committee [could have] fufill[ed] its mandate by acting judicially in dealing with overly vigorous or inappropriate responsive evidence" **(Vol. I, Tab 6, para 48)**

d. in the absence of any proof, the trial Judge inferred that confidentiality was not and would not have been broken. **(Vol. I, Tab 6, Para 46)**

29. The Court of Appeal upheld the trial Judge's decision that the Other Faculty were protected by absolute immunity because:

> It was Dr. Rose [as a University employee] who put forward the materials in answer to [The Student's] appeal and she was entitled to respond as representative of the body whose decision was being appealed. It was up to the Senate Committee to determine what materials were necessary to their disposition of the case, and the trial judge was not sitting in judicial review of their decision.[22]

The Application of *Charter* Rights and/or Values at Trial and on Appeal

30. The applicant "raised" the *Charter* extensively at trial and on appeal that the *Charter* applied to her claims against the respondents. The Court of Appeal rules informed the appellant to file a Notice of Constitutional Questions Act if applicable, which she did. **(Vol. III, Tab 19; Vol. III, Tab 24, p. 579-583, and Tab. 25, beginning page 604)**

31. Just prior to the Court of Appeal hearing, the respondents reversed the position they had advanced at trial, and which they continued to hold up to the pre-hearing stage on appeal, that the *Charter* must inform the *Civil Rights Protection Act*. They further took the position that the applicant had not "raised" the *Charter* at trial. The BC Attorney General adopted the position of The University.

32. The applicant responded that she, the respondents, and the trial Judge had indeed advanced or "raised" the *Charter* at the trial from the outset. At the appeal hearing, the Court agreed she had "relied on" and "referred to" the *Charter* at trial. **(Vol.III, Tab 23, beginning p. 557-568).**

33. However, in the *Reasons for Decision*, The Court of Appeal found that she had not technically "raised" the *Charter*, and found that, "in any event, the *Charter* had no application in these circumstances", nor were the "claims based on the *Charter* or on *Charter* values."[23]

34. The Court of Appeal's *Reasons* also state that the appellant had not advanced The University's own arguments in another proceeding that the *Charter* applied to The *University Act*[24] **(Book**

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[22] Court of Appeal, *Reasons*, para 38

[23] *Reasons*, para 53 and 58

of Authorities, Tab 10). However, in the transcripts of The Court of Appeal beginning **p. 567 line 2-5**, the appellant specifically argues that she is relying on, and argues, the Universities own arguments in support of her appeal that the *Charter* applies to The *University Act*.

35. Neither did The Court of Appeal address the applicant's seeking constitutional relief, for which she advanced evidence that the University and Faculty's false reports based on religion in national and international publications will continue[25]. (Vol.III, p.571-574) Vol. II, p..419)

Regarding Costs

36. The applicant led evidence that the trial Judge had failed to permit submissions on costs. **(Vol. III, Tab 23, p. 569).** The applicant led evidence that she was not given the opportunity to advance the direct evidence that:
    a. in 2004 she made a pre-trial offer to resolve the case in favour of a 350 word rebuttal to the false reports being published about her at a co-hosted national academic conference co-hosted by The University and co-organized by The Faulty Instructor. She also wrote a letter to the respondents confirming her understanding that they were going to trial on the basis that the defendants had refused to publish her rebuttal. **(Vol. II, Tab 20)**
    b. in 2005 The Student sought an early settlement meeting with the respondents at the BC Human Rights Tribunal. The respondents refused the early settlement meeting, and instead filed applications deferring her BC HRT complaint until the outcome of the trial in the Supreme Court. **(Vol. II, Tab 20, beginning page 431)**

37. The Court of Appeal found, without referring to the above evidence, with qualified privilege waived by the appellant on her letters to the respondents, that:

> The respondents...have been forced to participate in this litigation, not of their choosing, for seven years. We can see no basis for finding that any of them should be required to fund the litigation by compelling them to pay their own costs. [26]

The New Evidence of the respondents' post-trial, internet and print publications

38. The Court of Appeal did not refer to the new and/or fresh evidence before it that after the trial The University and Faculty Respondents' each published articles which the appellant claimed continued their civil rights violations and bad faith **(Tab 24, beginning pages 584 and 600).**

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[24] Court of Appeal, Reasons for Decision para 120
[25] Court of Appeal, Reasons para 50
[26] Court of Appeal, Reasons for Decision, para 126

PART II – QUESTIONS

39. **Question 1:** Are the *University Act* and its University policies; and *The Civil Rights Protection Act,* unconstitutional in violating the right and value of Section 15 of the *Charter*, if they are interpreted so as to hold that:
    a. The University may advance the application of *Charter* 2(b) rights to The *University Act* for its president, but exclude the application of Charter 2 (a) and (b) rights and values to The *University Act* for students based on religion?
    b. the academic achievement of students of religion, in comparison to other students, can be assessed based on:
        i. faculty's subjective speculation or knowledge that a student's privately held religious beliefs and religious convictions "impair their academic analysis and judgment"?
        ii. faculty's subjective assessment that they are offended by the "tone" of religion or religious practices in the student's academic work?
    c. students may be directed away from legitimate research such as linguistic research of misquotations of the Bible, because the student is, or is perceived to be, inspired by religious beliefs and knowledge of the Bible.
40. **Question 2:** Is an abstention from a Sunday Class by a "practicing Christian" student whose sincerity of religious beliefs is not at issue, "religious conduct" of "religious scruples' and "religiosity", but not "religion" and therefore not protected from, but subject to, harm and reprisal?
41. **Question 3:** Is The University, who has a contract with fee-paying students, vicariously liable for its employees under Section 69(1) of *The University Act* if it:
    a. purports *Charter* values to all students, but academically assesses a practicing Christian student as insubordinately "refus[ing] to contribute" to a Sunday Class;
    b. makes undisclosed, ad hoc policy decisions changing the nature and the rules applicable to an individual student grade appeal resulting in harm to the student, in a power imbalanced relationship with faculty?
    c. permits harmful reports against a student to be advanced and circulated, and does not have a policy to remedy harm for students?

42. **Question 4:** Is the defence of absolute immunity available to "officious bystander" faculty to a student grade appeal, who are in a power-imbalanced relationship with students, at a quasi-judicial grade appeal hearing?
43. **Question 5:** Is the University vicariously liable for an employee, who is responsible for preparing a response to a student grade appeal, but who permits harmful materials to be circulated to the student and Senate Committee; and does so without a requirement for confidentiality?
44. **Question 6:** Does a trial Judge have the discretion to fail to refer to, and fail to consider, "Admissions of Truth" from formal Notices to Admit in his *Reasons for Decision*?
45. **Question 7**: Can appellate Courts, where leave is not required, dismiss appeals without giving reasons because of its opinion that basis' of appeal are not meritorious enough for discussion?

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).[27] 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.

[27] 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).

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.

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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