No. S-226203
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, C. 241

BETWEEN:

JOHN VABOULAS, PAUL SIDHU, GRAND FORKS CONGREGATION OF JEHOVAH'S WITNESSES, COLDSTREAM CONGREGATION OF JEHOVAH'S WITNESSES AND WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA

PETITIONERS

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, GABRIEL-LIBERTY-WALL AND GREGORY WESTGARDE

RESPONDENTS

AND:

THE BRITISH COLUMBIA HUMANIST ASSOCIATION AND THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA

INTERVENERS

SUBMISSIONS OF THE BRITISH COLUMBIA HUMANIST ASSOCIATION

Counsel for the Intervener
The British Columbia Humanist
Association

WES McMILLAN / JOHN TRUEMAN

Allen / McMillan Litigation Counsel
1625 – 1185 West Georgia Street
Vancouver BC V6E 4E6
Tel: 604.282.3980 / 778.819.1813
Email: wes@amlc.ca / john@amlc.ca

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WRITTEN SUBMISSIONS OF THE INTERVENER,
THE BRITISH COLUMBIA HUMANIST ASSOCIATION

1. Most *Charter* claims of religious freedom involve religious practices that are known or at least knowable. Rather uniquely, this case involves a claim to secrecy over records about two individuals (the "**applicants**") who have exercised their own freedom of religion and disassociated themselves from the petitioners. Moreover, the petitioners claim secrecy not only against the applicants but against the statutory officer empowered to determine the applicants' quasi-constitutional informational rights, the Information and Privacy Commissioner of British Columbia (the "**Commissioner**").

2. As an intervener, the British Columbia Humanist Association (the "**BC Humanists**") takes no position on the merits of this case. Rather, the BC Humanists seek to assist the Court with submissions in three key areas:

    (a) claims of religious freedom in the investigatory context;

    (b) assessing religious freedom claims grounded in secrecy; and

    (c) considering the rights of others.

I. OVERVIEW

3. As a starting point, it is helpful to recall the purpose of freedom of religion under our constitutional framework. Beginning with its seminal decision in *Big M Drug Mart*, the Supreme Court of Canada has defined religious freedom primarily as an individual right: "that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own." It is an individual right grounded in the absence of coercion, whether by the state or by other individuals.

R. v. Big M Drug Mart, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 ("***Big M***") at 346.

4. In Canada, freedom of religion does not require the accommodation by the state of separate legal traditions or bodies of canon law, nor the subordination of the rights of non-believers to the asserted "rights" of a religious official or organization. Indeed, the state and its actors must remain scrupulously neutral as to matters of religion, and must "neither favour nor hinder any particular belief, and the same holds true for non-belief."

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 72.

5. For this reason, Canadian courts have been loathe to exempt religious organizations or individuals from laws of general application. As McLachlin CJ pointed out in *Hutterian Brethren*, "[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs... to the overall detriment of the community."

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 36.

6. This case invites the Court to clarify how a claim to religious freedom should be considered when the information over which the claim is made is said to be secret. Further complicating the analysis is the fact that the applicants seek to exercise privacy rights that are quasi-constitutional in nature. The BC Humanists say that any such claim to secrecy — particularly at the investigative stage — must yield to the interests of justice. This higher interest requires ensuring that only those claims that are properly captured within s. 2(a) of the *Charter*, and not limited under s. 1, are given *Charter* protection. Ultimately, the interests of justice require information: information about the records at issue, information about the petitioners' asserted beliefs, and information about the impacts on the rights of others. Only with information can the Commissioner and this Court conduct an informed adjudication.

II. RELIGIOUS FREEDOM IS ATTENUATED IN THE INVESTIGATORY CONTEXT

7. The investigatory stage nearly always involves a different balancing of rights than at the final determination of a legal issue. With few exceptions, claims of prejudice and even most claims of privilege are not normally determined at the time a warrant is issued or an investigation authorized. Rather, these arguments are available to a respondent or defendant — and sometimes even a third party — when and if a formal proceeding is commenced.

> See, for example, *Re Lubell and The Queen*, 1973 CanLII 1488 (ONSC), 11 CCC (2d) 188 at 189; *R. v. Johnson & Franklin Wholesale Distributors Ltd.*, 1971 CanLII 1177 (BCCA), 3 CCC (2d) 484 at 488.

8. Much of the law in this area has developed in the criminal context, which is hardly surprising considering that is where the majority of investigations take place. However, the same principle also finds expression in administrative law where procedural fairness rights are generally more limited in the early stages of an investigation and more robust when the rights of the parties are to be determined.

> See, for example, *Irvine v. Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), [1987] 1 S.C.R. 181 at 231.

9. Courts have applied this principle to claims of religious freedom since the earliest days of the *Charter*. In *Scientology No. 6*, the Church of Scientology of Toronto applied to quash a search warrant on the grounds that any investigation into the Church constituted a constitutionally impermissible attack on its religious beliefs. The Ontario Court of Appeal disagreed. While the Court acknowledged that "it is not a function of the court to pass on the validity of religious beliefs sincerely held by any organization," religious organizations nonetheless were subject to the law. "When, as in the case at bar, the prosecution is at the stage where it has obtained a search warrant, it is not appropriate to call upon the court to rule that the proposed counts are non-justiciable and to quash what is essentially an investigative tool."

> *Church of Scientology and The Queen (No. 6), Re,* 1987 CanLII 122 (ONCA) ("***Scientology No. 6***").

10. The Ontario Court of Appeal was not insensitive to the argument that religious freedom might be in play when searching records of a religious institution; it merely held that such arguments were not properly made at the investigative phase: “It should be a matter of concern to a trial court to determine whether a prosecution is an attack on religious beliefs. However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.”

Scientology No. 6.

11. This Court adopted the same approach in *Jones*, a case involving Jehovah’s Witnesses’ documents claimed to be confidential. Police had obtained a warrant authorizing the seizure of a letter detailing a confession made by the accused, J.D., of sexual abuse of a young child by a person in a position of trust. The Elder from whom the letter was seized, David Jones, applied to quash the search warrant, claiming infringement of his religious freedom.

Jones v. British Columbia (Attorney General), 2007 BCSC 1455 (“***Jones***”) at paras. 3-13 and 95.

12. Applying the four-part Wigmore criteria, Justice Romilly held that the truth-seeking function in investigating and prosecuting child abuse outweighed the injury from disclosure of the confidential religious communication. The Court acknowledged that it might have been desirable to hold a *voir dire* on the claim of religious privilege before issuing the warrant, but this was not necessary. Likewise, while the authorizing judge could have attached conditions to the warrant to protect the claimed privilege, it was not necessary to have done so and the lack of conditions did not invalidate the warrant.

Jones at paras. 69, 74, 100-101.

13. Notably, in *Jones*, the seizure was authorized by law, in accordance with a valid warrant, and conducted reasonably. The police officer did not interrupt a religious service. Instead, he telephoned Elder Jones and arranged to attend at the Kingdom Hall where the Elder handed him the requested documents in a sealed

envelope. At no point did Elder Jones claim that his religious freedom exempted him from compliance with a validly-issued search warrant.

Jones at para. 106.

14. Similarly, in *Beam*, the Manitoba Court of Queen's Bench declined to quash a production order issued against a Jehovah's Witness Elder that sought records of an Elder's meeting to discuss an allegation of sexual assault of a 14 year old girl. The Court acknowledged that "the existence of a crime in and of itself does not vitiate a claim of religious privilege," but considered that "the seriousness of the crime under investigation is a factor to be considered."

Beam v. Attorney General of Canada, 2021 MBQB 7 at para 44.

15. These cases, and those that follow them, illustrate how freedom of religion — like many other important rights — is attenuated in the preliminary or investigative stage of legal proceedings.

16. Even after the investigative stage, however, the confidentiality of a religious communication it not absolute. It can give way to an important state interest. In *Gruenke*, the Supreme Court of Canada considered a claim of class privilege over religious communications. The majority, speaking through Lamer C.J., acknowledged that "while the value of freedom of religion, embodied in s. 2(a), will become significant in particular cases," the *Charter* did not require recognition of a blanket privilege over all religious communications. Rather, "the extent (if any) to which disclosure of communications will infringe on an individual's freedom of religion will depend on the particular circumstances involved." The Court listed relevant factors including the nature and purpose of the communication, the manner in which it was made, and the parties to it.

R. v. Gruenke, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263 ("***Gruenke***") at 289.

17. Notably, however, the majority acknowledged that religious communication privilege — where it exists — is not limited to "confessional"-type communications

between a parishioner and an ordained minister. The broader case-by-case approach is more consistent with Canada's multicultural heritage, which recognizes a variety of religious practices and beliefs. At the same time, that multicultural heritage and duty of state neutrality means that significant weight is afforded to the legitimate uses for which the information is sought.

Gruenke at 291.

18. This rejection of a blanket or class-based protection of religious communications reflected the valid state interest in the detection and suppression of crime. It is consistent with the overall Canadian approach to s. 2(a) of the *Charter*, which recognizes that "freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others."

Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256, at para 26.
See also *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 ("***Trinity Western***") at para 101.

19. This is not to say that principles developed in the criminal context can be imported wholesale to the present case. However, the petitioners in this case essentially acknowledge that the impugned order to produce the records to the Commissioner is akin to a search warrant or production order. This is seen most clearly in the petitioners' attack on s. 38 of the *Personal Information Protection Act* and their arguments based on s. 8 of the *Charter*.

Written argument of the petitioners, paras. 63-83.

20. Accordingly, this Court should assess the impact of the Commissioner's order according to the principles governing the collection of information for investigative purposes, and not the principles that might apply to a final determination of the petitioners' rights. In any event, the statutory scheme of the *Personal Information Protection Act* designates the Commissioner, not this Court, as the body to determine the petitioners' rights at first instance.

21. Notably, the Commissioner's inquiry procedure under the *Personal Information Protection Act* provides a higher degree of due process to persons in the petitioners' position. Unlike many investigative processes in other contexts, the Commissioner gave notice to the petitioners and invited written submissions before ordering production of the records. The petitioners were able to seek judicial review of the production order and have that order automatically stayed pending the outcome of this proceeding. This stands in marked contrast to cases such as *Jones*, where the allegedly secret records were already in the hands of law enforcement before any *inter partes* process was available to the rights claimants.

III. ADDITIONAL SCRUTINY IS NEEDED WHEN RELIGIOUS FREEDOM CLAIMS ARE GROUNDED IN SECRECY

22. One of the reasons why religious freedom — and, indeed, many freedoms — is attenuated in the investigative phase is because courts require information to be able to balance claims of religious freedom against the other interests that might justify limiting that freedom.

23. In most such cases, the religious beliefs or practices at issue are plainly seen. In *Amselem*, for example, the Court had ample information about the Jewish religious practice of erecting and living in "succahs." This included the information necessary for the court to consider the interests of others, such as the size and appearance of the succahs, as well as the fact that they would not block any doors, obstruct fire lanes, or pose any threat to safety or security. Indeed, it was in the interest of the rights claimants to lead this evidence, which demonstrated that their religious practices caused little detriment to their neighbours. These facts were critical to the result.

Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551 ("***Amselem***") at paras. 5-7 and 15.

24. Other significant religious freedom cases have involved equally fulsome records. In *Trinity Western*, the text and context of the impugned "Community Covenant" was before the court, along with evidence of its effects on students and prospective students. In *Loyola*, the private Catholic high school presented the full details of

its proposed religious alternative to the government's strictly secular and cultural Ethics and Religious Culture Program. Likewise, the claim in *Whatcott* of the right to distribute, on religious freedom grounds, material which would otherwise constitute hate publications was determined with full knowledge of what those publications said. (Indeed, *Whatcott* might be the first illustrated edition of the Supreme Court Reports.)

Trinity Western at paras. 6-8;
Loyola High School v. Quebec (Attorney General), 2015 SCC 12, [2015] 1 S.C.R. 613 at paras. 24-28;
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467 at para. 8 and Appendix B.

25. In all of these leading cases, the religious beliefs and practices at issue were not hidden, but rather revealed for all to see. The evidence illuminated, rather than obscured, the essential balance that the rights claimants were asking the Court to make.

26. When all the relevant information is available to the Court, it is often straightforward to accept that a sincerely-held religious belief is in play and move to the proportionality analysis required by s. 1 of the *Charter*. However, where the Court is left in the dark, greater scrutiny of the asserted religious belief is warranted. The jurisprudence provides the necessary guidance.

27. The starting point is the purpose of the s. 2(a) guarantee. Dickson C.J., writing for the majority in *Edwards Books*, explained that this purpose is "to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices." This purposive approach to s. 2(a) does not protect every possible religious practice from state interference, no matter how trivial or insubstantial. Rather, "[t]he Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened."

R. v. Edwards Books and Art Ltd.,
1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713 at 759.

28. Second, *Amselem* confirms that the asserted belief must be religious in nature, "since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion." The Court adopted the broad definition that "religion typically involved a particular and comprehensive system of faith and worship."

Amselem at para. 39.

29. A related principle is the requirement that the asserted religious practice be connected to a larger system or set of beliefs. In *Kharaghani*, the Ontario Superior Cour of Justice explained that "freedom of religion does not exist to protect the spiritual experience or practice because the experience or practice, in itself, is worthy of protection. Rather, the practice is protected because it is part of something larger that is worth protecting." This means that "the practice in question [must have] a larger meaning in that it relates to the individual's system or set of beliefs." Such a system should "help provide the individual with a sense of meaning, purpose and spiritual fulfillment."

R. v. Kharaghani, [2011] O.J. No. 479 (ONSC) at paras. 187-188.

30. Freedom of religion protects everyone's freedom to hold religious beliefs and to manifest them in worship and practice or by teaching of dissemination. But it does not protect the object of beliefs.

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54 at para 71.

31. Religious freedom claims are also subject to the principle of remoteness. This has been invoked most often in situations where individuals seek to escape the operation of taxation laws on the grounds that the purposes to which the government will put their tax dollars offends their religious beliefs, such as beliefs about abortion or military spending. Courts have held that paying taxes is not

equivalent to being required to personally engage in the activities that their religious beliefs find abhorrent. Eventually, the state action becomes too remote from the rights claimant to interfere with their religious freedom.

R. v. Little, 2009 NBCA 53 at para. 17;
Petrini (M.) v. Canada, 1994 CanLII 19359 (FCA);
Prior v. Canada, 1988 CanLII 9347 (FC), [1988] 2 F.C. 371 at 381.

32. Finally, it is necessary for the court to examine the motivations underlying the religious freedom claim. There have been cases where religious freedom is asserted for an improper purpose. In *Bruker*, the Court found that the respondent's refusal to give his wife a "get" (a Jewish divorce) was motivated not by religion but by anger toward his wife. In *Bothwell*, the applicant's objection to having his photograph stored on a government database was motivated by secular privacy concerns rather than religious belief.

Bruker v. Marcovitz, 2007 SCC 54, [2007] 3 S.C.R. 607 at paras. 68-69;
Bothwell v. Ontario (Minister of Transportation), 2005 CanLII 1066 (ON SCDC).

33. Putting all of these pieces together, this Court will want to consider the connection between the asserted record-keeping practices and the claimed religious beliefs. It may need to distinguish religious beliefs from social or conscientious practices. The Court might consider whether the records themselves are the "object" of religious beliefs. It will need to consider whether disclosure of the requested records to the Commissioner would be more than a trivial or insubstantial infringement upon any religious beliefs. The degree of remoteness between the petitioners' religious beliefs and the compelled disclosure may be relevant. Finally, the Court will need to examine the motivations behind the petitioners' request.

34. None of this will be easy to do — or perhaps even possible — without examining the records at issue. If the Court accepts that the petitioners' traditions of secrecy are a religious belief protected by s. 2(a), then an infringement of those rights seems inevitable. It would hardly be the first time that an important *Charter* right was infringed in furtherance of the truth-seeking function of the Court. However,

the alternative is far less desirable: a statutory officer would be deprived of its ability to adjudicate the quasi-constitutional privacy rights of others, who do not share in the petitioners' beliefs.

IV. THE RIGHTS OF OTHERS MUST BE CONSIDERED

35. Concern for the rights of others is woven throughout the Canadian jurisprudence on religious freedom. Since the earliest days of the *Charter*, the law has recognized that the freedom is "subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Big M at 337.

36. The case at bar presents two unique considerations in this area. First, the applicants are individuals who have ceased to associate with the Jehovah's Witness faith. Second, the records themselves may contain matters of public interest.

a. The religious freedom of the applicants

37. The BC Humanists count among their members some persons who have left organized religion. They, like the applicants in this case, are individuals who have exercised their own freedom of religion and chosen to disassociate from a religious organization. Their perspective is important, because the petitioners are not the only parties whose religious freedom is at issue.

38. This case might carry a different complexion if, for example, the applicants were members of the petitioners' organization seeking to use the *Personal Information Protection Act* to somehow circumvent an established religious decision-making process. For example, one might imagine a candidate for the priesthood seeking records of decisions by church officials about their candidacy for ordination. In such a case, an argument might be made that disclosure of such records was an intolerable interference with internal religious administration.

39. Such a hypothetical case might be contrasted with a situation where, for example, a minister had been dismissed for cause because of alleged sexual abuse. In the context of a civil claim for wrongful dismissal, the minister would ordinarily be entitled to discovery of the employer's relevant investigation reports. Unlike the ordination example, these rights are situated in the civil justice system.

40. In short, the more the asserted religious practice interfaces with the outside world, the more limited the claim to a zone of unimpeded religious freedom becomes.

b. The public interest in the records

41. Finally, the records themselves may have public importance, although it is impossible to know this until the Commissioner and/or the Court is able to examine them.

42. Events in recent decades have underscored the importance of religious organization records in understanding such tragedies as Indian Residential Schools, the Mount Cashel Orphanage, and the events described by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse. Judicial notice can be taken of the fact that religious, sports, and other organizations sometimes become aware of wrongdoing, and sometimes receive or produce records containing relevant and important information.

See, for example, Truth and Reconciliation Commission of Canada, "Canada's residential schools: the final report of the Truth and Reconciliation Commission of Canada" (2015), online; Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints, "Volume One; Report" (1991), online; Royal Commission into Institutional Responses to Child Sexual Abuse, "Final Report" (2017), online.

43. At the same time, rapid technological developments have underscored the need for organizations of all types to be mindful of the ways in which they collect, use, and disclose information about others. Even seemingly innocuous activity, such as collecting social media postings made by critics of the organization, can infringe the statutory privacy rights of third parties.

See, for example, Office of the Privacy Commissioner of Canada, "Aboriginal Affairs and Northern Development Canada wrongly collects information from First Nations activist's personal Facebook page" (29 October 2013), online.

44. There is nothing in the record before this Court to suggest that the records at issue contain anything improper. It is possible, perhaps even probable, that the records are quite banal. However, because the records themselves are not available for review, both the Commissioner and this Court are left to speculate as to their contents.

V. CONCLUSION

45. This case presents several unique challenges. The petitioners seek a sweeping order that would exclude them entirely from the operation of a statute of general application because the statute may, depending on how it is applied in a particular case, infringe their asserted s. 2(a) rights. They assert that their religious freedom would be impaired if a statutory officer examined the records that are the central issue in the litigation. The asserted religious belief is based in a tradition of secrecy. And the impact of that belief is felt by the applicants, individuals who have disassociated themselves from the petitioners.

46. However, addressing these challenges does not require breaking new legal ground. The well-established legal principles discussed above, including principles around religious freedom at the investigative stage, evaluation of asserted religious beliefs and practices, and consideration of the rights of others, can assist in determining these issues.

47. Determining these issues need not involve disrespect for the petitioners' religious beliefs. It simply reflects the reality that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." Putting those principles into practice requires that the processes of law be able to function.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 11, 2023

Signature of lawyers for the intervener
Wes McMillan / John Trueman

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