



Court File No. VLC-S-S-252688
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF A STATUTORY APPEAL

Pursuant to section 40 of the
Health Professions Act, RSBC 1996, c 183

BETWEEN:

Amy Hamm

PETITIONER

AND:

British Columbia College of Nurses and Midwives

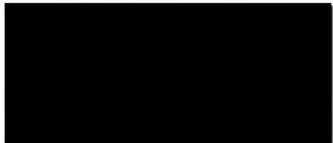
RESPONDENT

AND:

College of Physicians and Surgeons of British Columbia, West Coast LEAF,
Egale Canada, and Association for Reformed Political Action Canada

INTERVENORS

**WRITTEN SUBMISSIONS OF THE INTERVENOR
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION**

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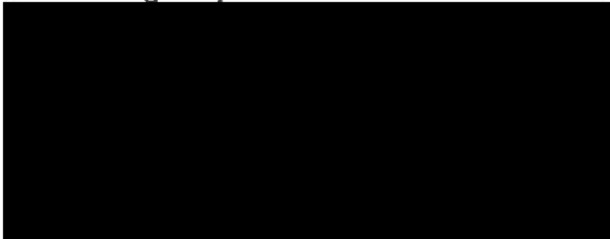
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PART I: OVERVIEW

1. West Coast Legal Education and Action Fund Association ("**West Coast LEAF**") provides the within submissions to assist the Court in its adjudication of the instant appeal.
2. West Coast LEAF makes three distinct submissions concerning:
 - i) The approach to a *Doré/Loyola* proportionality analysis, in the context of a limit imposed on expressive content protected by s. 2(b) of the *Charter*,¹ can draw upon extrapolable principles from *Oakes*' jurisprudence related to the relative valuing of expressive content, including a reduction of value for speech that lays far from the core values of s. 2(b), such as when the speech is denigrative to a marginalized community;
 - ii) Courts and administrative decision-makers (a "**Decision-Maker**") should exercise caution when asked to weigh an alleged "clash of rights" in the proportionality analysis. A Decision-Maker should, with attention to its statutory objectives, begin by clearly identifying which *Charter* rights-holders and *Charter* protections are impacted by the expressive content at issue; and
 - iii) To the extent this Court determines a need to engage with s. 28 of the *Charter*, the Court should employ a purposive approach to the interpretation of s. 28, consistent with the living tree doctrine.

PART II: STATEMENT OF ARGUMENT

A) The proper approach to the Doré/Loyola proportionality analysis where s. 2(b) expressive content is found to be harmful to a marginalized community

3. The *Doré/Loyola* analysis finds analytical harmony with the *Oakes*' analysis—specifically the minimal impairment and proportionality stages of the *Oakes*' test.² The Supreme Court of Canada ("SCC") has held that the *Doré/Loyola* balancing exercise is

¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24) [*Charter*].

² *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 [*Loyola*] at para 40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, at para 155.

as robust as the proportionality analysis under *Oakes*.³ The *Doré/Loyola* approach⁴ requires an Decision-Maker to first determine whether its statutory mandate engages a *Charter* right.⁵ Where it does, the Decision-Maker must then undertake a balancing exercise that weighs the impact on the individual *Charter* right on one hand against the importance of fulfilling the Decision-Maker's statutory mandate on the other. Provided the balancing is proportionate, the limit will be justified.⁶ This is because any limit on *Charter* guarantees must be "reasonable" and "demonstrably justified" in a "free and democratic society" pursuant to s. 1 of the *Charter*.⁷ Accordingly, because of the analytical harmony, the jurisprudence from *Oakes* may be instructive in *Doré/Loyola* balancing.⁸

4. In the instant case, the analysis takes place in the context of a Decision-Maker's balancing of the *Charter* value of freedom of expression, where the expressive content at issue was found to denigrate a marginalized community, against this statutory objective of preserving and protecting the public interest in the profession of nursing. There is extensive *Oakes*' jurisprudence that addresses the valuing of expressive content, including in the case of content found to denigrate marginalized communities. It follows, therefore, that on appeal of a Decision-Maker's findings regarding limiting the *Charter* value of free expression, in the context of statements found to denigrate the trans community, the Court can look to jurisprudence developed in the context of *Oakes*' minimal impairment and proportionate balancing of a law that limits s. 2(b) freedom of expression.

5. *Oakes*' jurisprudence identifies at least three interrelated principles:

- (i) that the value of the expressive content at issue must be assessed contextually with reference to the core values of s. 2(b) freedom of

³ *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 [*Beaudoin*] at para 258, citing *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*TWU*] at paras 79-82.

⁴ *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*]; *Loyola*, *supra* note 2.

⁵ *Loyola*, *supra* note 2 at para 49.

⁶ *Loyola*, *supra* note 2 at paras 35-42; *TWU*, *supra* note 3, McLachlin C.J., concurring, at paras 113-114.

⁷ *R v Oakes*, [1986] 1 SCR 103 [*Oakes*] at 138-140; *Canada (Attorney General) v Hislop*, 2007 SCC 10 [*Hislop*] at paras 43-44; *TWU*, *supra* note 2, McLachlin C.J., concurring at paras 112-114.

⁸ See, for example, *Groia v. Law Society of Upper Canada*, 2018 SCC 27.

expression;

- (ii) where expressive content lies far from the core values—including in contexts where the impugned speech is found to denigrate marginalized communities—the expressive content is ordinarily afforded less value; and
- (iii) a limit on less valuable expressive content will be easier to justify because the salutary benefits more easily overcome the deleterious effects.

6. The broader principle in *Whatcott* is instructive because it confirms that not all expressive content attracts the same value:

[...] different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.⁹

7. The *Oakes*' jurisprudence informs us that the relative *value* of the impugned expressive content is central to the minimal impairment and proportionality analysis. The value of expressive content is to be assessed contextually, with reference to the expressive content's relationship to the core purposes that undergird s. 2(b)—the search for truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment.¹⁰ Where expression contributes little to those purposes, the expressive content may attract reduced value, resulting in the impact on the impugned right being afforded less weight in the balancing exercise, and the benefits of the statutory objectives concomitantly gaining increased importance, thus making a limit easier to justify.¹¹

8. Notably, where expressive content is found to denigrate a marginalized community, its value is limited.¹² As McLachlin C.J. explained, in situations where s. 2(b) *Charter* guarantees and values are engaged, a Decision-Maker should, in its balancing exercise,

⁹ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*] at para 112.

¹⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976; *Ford v. Quebec*, [1988] 2 S.C.R. 712 at 765-66.

¹¹ *R. v. Lucas*, [1998] 1 S.C.R. 439 [*Lucas*] at paras. 88-90, 95-96; *Whatcott*, *supra* note 9 at para 112-114.

¹² *Whatcott*, *supra* note 9 at para 148.

consider the “expressive context” of the impugned expression. Where such expressive content “...falls far from the core values underlying s. 2(b)”, a limitation is easier to justify “...because the beneficial effects of the limitation more easily outweigh any negative effects flowing from the limitation.”¹³

9. An example of this approach is found in the Court’s approach to hate speech, which is of very limited value given its distance from the core values of expression. In balancing a limit on such expressive content, the benefits of suppressing the harmful speech easily outweigh the deleterious effects of restricting this speech.¹⁴ It follows that the relative value assigned to the material expressive content necessarily informs the *Doré/Loyola* proportionality analysis, which weighs the severity of the limit on the freedom of expression against the benefits of the decision in furthering the relevant statutory objectives.¹⁵ In assessing that interference, the Decision-Maker should consider the expressive content’s contribution to the purposes underlying s. 2(b).

10. Just as the Court cautioned in *Whatcott* that framing hate speech as arising in a “moral” context or “within a public policy debate” does not cure it of its harmful effects,¹⁶ neither does the framing of speech that denigrates a marginalized community but falls short of hate speech, as in the appeal at bar. The following principle is likewise apposite:

As argued by some interveners, history demonstrates that some of the most damaging hate rhetoric can be characterized as “moral”, “political” or “public policy” discourse.¹⁷

11. In our submission, to the extent that the nature of the expressive content at issue denigrates a marginalized community, the harmful effects of such content is not cured by characterizing the speech as “moral”, “political”, “public policy discourse”, or something other than what it is.

12. Further, not only does speech which denigrates marginalized communities lay far

¹³ *Lucas*, *supra* note 11, McLachlin J. dissenting but not on this point, at paras 117-119.

¹⁴ *Lucas*, *supra* note 11, McLachlin J. dissenting but not on this point, at para 121; *Whatcott*, *supra* note 9 at para 148.

¹⁵ *Doré*, *supra* note 4 at para 56; *Loyola*, *supra* note 2 at paras. 39-40; *TWU*, *supra* note 3 at para. 82.

¹⁶ *Whatcott*, *supra* note 9 at para 116.

¹⁷ *Whatcott*, *supra* note 9 at para 116.

from the core values of freedom of expression, but the speech may actually undermine the targeted community's participation in these core values by restricting the targeted community's participation in social and political decision-making and the opportunity for the self-fulfillment of marginalized persons.¹⁸

B) The proper approach to the Doré/Loyola proportionality analysis where the material expressive content is said to engage a conflict of equality rights

13. In undertaking a *Doré/Loyola* balancing of a limit on the expressive rights of an individual versus the importance of fulfilling the statutory objectives at bar, the Decision-Maker should determine whether the expressive content at issue impacts the *Charter* protections of other persons or groups connected to its statutory objectives. Where, as here, the impugned expressive content impacts the inherent equality of a marginalized community, a Decision-Maker should recognize that fulfilment of its statutory objectives may require protecting and promoting equality values under the *Charter*. This consideration does not create a conflict or hierarchy of rights, but instead reflects "a considered balancing" of the fundamental values protected by the *Charter*.¹⁹

14. To be clear, in the instant case, section 15 is not independently engaged as a *Charter* right. The Decision-Maker therefore need not engage in a *Doré/Loyola* balancing of the Petitioner's section 15 rights vis-à-vis the section 15 rights of trans people. Instead, the equality values that emanate from section 15 are considered within the section 2(b) balancing exercise, particularly the way in which the Decision-Maker's fulfilment of its statutory mandate—to protect the public interest in the nursing profession—protects and promotes respect for and inclusion of trans communities, in furtherance of the equality values of the *Charter*. The equality values that emanate from s. 15 entail the promotion of a society in which all can be secure in the knowledge of their inherent equal worth as human beings deserving of concern, respect, and consideration and likewise protected from the imposition of disadvantage, stereotyping, or political/social prejudice.²⁰

¹⁸ *Whatcott*, *supra* note 9 at paras 75-76, 112-116, and 147-148.

¹⁹ *Kisilowsky v Her Majesty the Queen in Right of the Province of Manitoba*, 2018 MBCA 10 at paras 90-91.

²⁰ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*] at 171; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 529.

15. Further, when faced with an allegation of a conflict of rights, Decision-Makers must ensure their analysis reflects a correct construction of the *Charter's* equality provisions. West Coast LEAF respectfully submits that the Petitioner's argument about an alleged "clash of rights" between "an implied or analogous protection of gender identity against an explicit protection of sex, and the female sex in particular"²¹ is premised on erroneous interpretations of ss. 15(1) and 28 of the *Charter*. The Petitioner's argument does not accord with the Supreme Court of Canada's purposive methodology of *Charter* interpretation as applied to its equality guarantee. It is also inconsistent with the jurisprudence on the equality rights of trans people and communities.

16. West Coast LEAF submits that s. 15(1) of the *Charter* protects the substantive equality of trans people under the enumerated ground of sex and the analogous ground of gender identity and/or expression.

17. The s. 15(1) jurisprudence is clear: substantive equality is the philosophical premise and animating norm of s. 15(1).²² Substantive equality requires a s. 15(1) analysis to look past the apparent neutrality of a law to consider the *actual* impact of an impugned law on a protected group.²³ Such an inquiry must consider the protected group's social, political, economic, and historical context, including patterns of disadvantage.²⁴ It must also consider the ways in which the impugned law affects people *within* the protected group *differently* because of the intersecting identities and realities that exist among the group's constituents.²⁵ While the Supreme Court of Canada has recently become more explicit in its articulation of the intersectional approach the Court takes to substantive equality,²⁶ intersectional considerations have long been embedded in the s. 15(1) jurisprudence.²⁷

²¹ Written Submissions of the Petitioner, filed September 9, 2026 [Petitioner's Submissions] at para 95.

²² *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7 [Kanyinda] at para 36; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 [Fraser] at paras 40-42.

²³ *Kanyinda*, *supra* note 22 at para 36.

²⁴ *Ibid.*

²⁵ *Kanyinda*, *supra* note 22 at paras 39-40.

²⁶ *Kanyinda*, *supra* note 22 at para 40, citing *Ontario (Attorney General) v. G*, 2020 SCC 38 [Ontario v G] at para 43; *Ontario v G* at para 47.

²⁷ *Andrews*, *supra* note 20; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para 81; *Fraser*, *supra* note 22 at para 116; and *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), at para 85.

18. An interpretation of s. 15(1) that protects trans people under the grounds of sex, gender identity, and gender expression is consistent with the Supreme Court of Canada's intersectional vision of substantive equality and avoids a misapprehension of sex discrimination that excludes trans people's realities. Within the ground of sex, overlapping group membership can amplify discriminatory effects or create unique discriminatory effects. For example, trans women may experience the compounding effects of negative societal attitudes toward women (misogyny) and trans people (transphobia).

19. Further, and as recognized in the Decision on Verdict, a person's sex is neither one-dimensional nor immutable.²⁸ Rather, sex encompasses physical and physiological characteristics that can change over a person's life course, including when a trans person accesses gender affirming health care.²⁹ These sex characteristics can, in turn, lead to discrimination and violence regardless of the person's sex assigned at birth. Such an interpretation of s. 15(1) is also supported by human rights jurisprudence, which has long recognized that prohibitions against sex-based discrimination apply to trans people.³⁰

20. In 2006, the Ontario Human Rights Tribunal held:

...the construction of the terms sex and gender are flexible enough to enable [the majority] to conclude that [trans people] and [intersex people] fall within the ground of sex to recognize the Code's special nature and purpose of the enactment, and to give it an interpretation that advances its broad purposes to protect every person from unlawful discrimination on the ground of sex.³¹

21. One of the purposes of adding gender identity and expression as grounds of discrimination was to raise the profile of transpeople's existing protection under human

²⁸ Decision on Verdict at paras 44-45 and 250.

²⁹ *Ibid.*

³⁰ *Commission des droits de la personne et des droits de la jeunesse (ML) c Maison des jeunes*, 1998 CanLII 28 (QC TDP) at paras 110-115; *Sheridan v Sanctuary Investments Ltd. (No. 3)*, 1999 CanLII 35172 (BC HRT) at para 93; *Vancouver Rape Relief Society v British Columbia (Human Rights Commission)*, 2000 BCSC 889 at para 42; *Kavanagh v Canada (Attorney General)*, 2001 CanLII 8496 (CHRT) at para 141; *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601 at paras 1-2, 9, 42; *Hogan v Ontario (Minister of Health and Long-Term Care)*, 2006 HRTO 32 [*Hogan*] at para 127; *Forrester v Peel Regional Police Services Board*, 2006 HRTO 13 at paras 404-415; *Finan v Cosmetic Surgicentre (Toronto)*, 2008 HRTO 47 at para 38; *XY v Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726 at paras 88-89; *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 at paras 36-39.

³¹ *Hogan*, *supra* note 30 at para 127.

rights law.³² Since the legislative amendments, human rights jurisprudence in BC and across Canada has confirmed that trans people can seek remedies under the intersecting grounds of sex, gender identity, and/or gender expression.³³

22. West Coast LEAF submits that in engaging with allegations of a so-called "clash of rights" under the *Charter's* equality provisions—including in the context of a *Doré/Loyola* proportionality analysis—Courts and Decision-Makers must exercise caution in adjudication of such claims. Indeed, as set out above, a mere allegation of a "clash of rights" does not on its own mean that there is an actual conflict of rights warranting an adjudication of the purported conflict.

23. If the Court does in fact determine that the equality rights of more than one group are engaged, the Court must then determine whether there is an actual conflict between the rights in issue. This requires examination of the respective rights in relation to one another and in a contextual manner. The Court must determine whether there is a reasonable basis—not just unsupported assumptions or hypothetical possibilities—to conclude that upholding one right will have a detrimental impact on the other.³⁴ The Court must also seek to delineate the rights in a manner that avoids the conflict in the context of the particular case before it, which requires engaging in an accommodation or reconciliation analysis.³⁵

24. West Coast LEAF submits that the rights of all women, inclusive of trans women, are equally important under the *Charter* and there is no conflict between these rights. While the Petitioner argues that the College favoured one marginalized group over another³⁶, expressions that deny the existence of trans people or denigrate their inherent worth, dignity, and equality, do not advance the equality rights of cisgender women. Relatedly, there is no evidence that a limit on such expressions has a detrimental impact on

³² *Oger v Whatcott* (No. 7), 2019 BCHRT 58 [Oger] at para 63.

³³ See, for example, *EN v Gallagher's Bar and Lounge*, 2021 HRT0 240 at paras 27-28; *SR v DLPH Hambleton Group Inc. (aka Burger King Franchise 3566)*, 2024 HRT0 1491 at para 30; *KW v BC Ministry of Health*, 2024 BCHRT 144 at para 25.

³⁴ *Reference re Same-Sex Marriage*, 2004 SCC 79 [Marriage Equality Reference] at paras 46 and 50-51.

³⁵ *R v N.S.*, 2012 SCC 72 at paras 9 and 31-32; *Marriage Equality Reference*, *supra* note 34 at para 50.

³⁶ Petitioner's Submissions at para 94.

cisgender women's equality rights or engages those rights at all.

C) The Correct Approach to the Interpretation of s. 28 of the Charter

25. The Petitioner suggests that s. 28 of the *Charter* explicitly protects the "female sex". Alongside s. 15(1) of the *Charter*, s. 28 forms part of the *Charter*'s equality guarantee. It provides: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." To the extent the Court engages with s. 28 in the instant case, West Coast LEAF submits that the language of "guaranteed equally to male and female persons" must be interpreted purposively and generously, to reflect a modern understanding of gender diversity and gender-based discrimination.

26. The Supreme Court of Canada has repeatedly affirmed that the proper approach to interpreting the *Charter* is purposive and generous.³⁷ A court can only interpret the meaning of a particular provision by considering the interests it is meant to protect, and the underlying values it embodies.³⁸ If there is more than one possible interpretation, courts should choose the interpretation that provides "the most generous protection [the provision] can support to safeguard its interests."³⁹

27. A purposive interpretation of a *Charter* right likewise includes consideration of the *Charter*'s character and overall purposes; the text of the provision as informed by the *Charter*'s overall purposes, the historical origins of the right as those origins relate to the philosophy underlying the development of the right; the bilingual interpretation of *Charter* rights; and other rights and provisions of the *Charter*.⁴⁰ The *Charter* was drafted with an "eye to the future."⁴¹ It must be capable, like a living tree, of "growth and expansion within its natural limits."⁴² This allows the *Charter* to be responsive to new social, political, and

³⁷ *Taylor v. Newfoundland and Labrador*, 2026 SCC 5 [*Taylor*] at paras. 70-85; *Kanyinda*, *supra* note 22 at paras 33-34.

³⁸ *Taylor*, *supra* note 37 at para 73.

³⁹ *Taylor*, *supra* note 37 at para 85.

⁴⁰ *Taylor*, *supra* note 37 at paras 77-81, 86-101; See also *Kayinda*, *supra* note 22 at para 33.

⁴¹ *Taylor*, *supra* note 37 at para 70, citing *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC) [*Hunter*] at 155; *Kanyinda*, *supra* note 22 at para 33.

⁴² *Taylor*, *supra* note 37 at para 70, citing *Hunter*, *supra* note 41 at 155-156, quoting *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC) at 136; See also *Kanyinda*, *supra* note 22 at para 33.

historical realities as they emerge.⁴³

28. While s. 28 employs binary terms that reflect its historical context, its core value is substantive gender equality.⁴⁴ Section 28 should be interpreted with substantive equality as its animating norm. It should therefore be read as encompassing a modern understanding of gender equality that demands an inclusive understanding of gender-based discrimination.. This is consistent with the living tree doctrine and Canadian discrimination jurisprudence. Such an interpretation would also be harmonious with the judicial development of s. 15(1), uniting the underlying values of each provision, maintaining their internal coherence, and ensuring a consistent analytical approach to the *Charter's* equality guarantees. It would contribute to the *Charter's* "broader vision" of a free and democratic society premised on substantive equality and the inherent dignity and worth of all people.⁴⁵

29. Courts must exercise caution to avoid narrowly interpreting s. 28, contrary to the proper methodology of *Charter* interpretation. Given that trans people "remain among the most marginalized in our society",⁴⁶ a narrow construction of s. 28 that excludes trans and gender diverse people from its protection would only perpetuate ongoing marginalization.

30. The Supreme Court of Canada may engage with such generous and purposive interpretation of s. 28 in the *English Montreal School Board* case, which is currently on reserve.

⁴³ *Kanyinda*, *supra* note 22 at para 33.

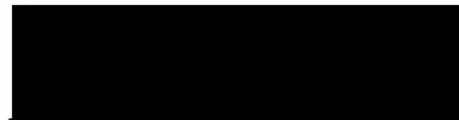
⁴⁴ Canada, Royal Commission on Equality in Employment, *Report of the Commission on Equality in Employment*, by Rosalie Silberman Abella, Commissioner (Ottawa: Human Resources and Skills Development Canada, 1984) at 13; as early as 1984, Rosalie Silberman Abella, Commissioner, stated that "[s]ection 28 reinforces gender equality".

⁴⁵ *Kanyinda*, *supra* note 22 at paras 32 and 34.

⁴⁶ *Hansman*, *supra* note 2 at para 89, citing *Oger*, *supra* note 32 at para 62.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, on this 14th day of October 2026.



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Humera Jabir

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