COURT OF APPEAL OF ALBERTA

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STATUS ON APPEAL:	APPELLANT
DEFENDANTS/RESPONDENTS:	HIS MAJESTY THE KING IN RIGHT OF ALBERTA and THE LAW SOCIETY OF ALBERTA
STATUS ON APPEAL:	RESPONDENTS
INTERVENOR:	BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
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INTRODUCTION

1. Prabjot Singh Wirring appeals a decision of the Court of King's Bench[1] in which the Court found that the oath mandated by the *Legal Profession Act*[2] does not breach his freedom of religion (s 2(a)) or his non-discrimination (s 15) *Charter* rights.[3] The British Columbia Civil Liberties Association ("BCCLA") was granted leave to intervene in this matter on two issues, both of which address the manner in which s 2(a) should be interpreted.

2. It is the BCCLA's position that religious freedom under s 2(a) of the *Charter* has a collective element, such that group religious beliefs must be considered where claims engage with group beliefs. The failure to account for these group beliefs will, in certain cases, result in an improper limitation of individuals' religious freedom. BCCLA also argues that, where a s 2(a) claim raises issues of multiculturalism, s 27 of the *Charter* applies and should guide the court's assessment of the claim. A court hearing such a claim must construe that claim (and the evidence brought in support of it) generously, to further s 27's goal of preserving and enhancing multiculturalism.

PART I: FACTS

3. The BCCLA takes no position on the facts as between His Majesty the King in right of Alberta and Mr. Wirring's facta.

PART II: GROUNDS OF APPEAL

4. The BCCLA takes no position on the grounds of appeal as between His Majesty the King in right of Alberta and Mr. Wirring's facta.

PART III: STANDARD OF REVIEW

5. The BCCLA takes no position on the standard of review as between His Majesty the King in right of Alberta and Mr. Wirring's facta.

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[1] *Wirring v Law Society of Alberta*, 2023 ABKB 580 at paras 179 and 193 [Chambers Decision].
[2] *Legal Profession Act*, RSA 2000, c L-8.
[3] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

PART IV: ARGUMENT

ISSUES

6. The BCCLA was granted leave to intervene and make submissions on two grounds:

(1) The right to religious freedom under s 2(a) of the *Charter* has a collective dimension, which must be accounted for in the s 2(a) analysis; and

(2) The interplay between ss 27 and 2(a) of the *Charter*.

ARGUMENT

i. Courts must account for the collective dimensions of religious practice and belief in the section 2(a) analysis

7. Section 2(a) of the *Charter* enshrines individuals' right to freedom of religion. Courts have historically focused their s 2(a) inquiry at the level of the individual, and whether state action interferes with an individual's personal beliefs. However, religious practice (and beliefs) can be collective in nature, and there can exist group-level beliefs which may overlap or diverge from individual-level beliefs. In certain circumstances, if these group-level beliefs are not accounted for under the s 2(a) analysis, there is a risk that individuals' freedom of religion will be wrongly restricted.

8. The test for s 2(a) involves a two-part inquiry. A claimant must demonstrate "(1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief."[4] The analysis is focused on the individual. As described by the Chambers Justice below, s 2(a)'s "protection extends to an

[4] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 68.

individual's subjective belief that a particular practice or conviction is a part of their spiritual faith and their connection to the divine."[5]

9. However, individual beliefs are often held, and religious practices are often carried out, in the context of a larger religious group who share a set of collective beliefs that unite the community. Over the past two decades, the Supreme Court has increasingly recognized the communal aspect of religious practice. In *Hutterian Brethren*, Justice LeBel (in dissent, but not on this point) noted that "Religion is about religious beliefs, but also about religious relationships."[6] The Supreme Court elaborated on this point in *Loyola*, a case involving a Catholic school seeking Ministerial permission to teach a class about world religions from a Catholic perspective. In deciding that claim, the Court put emphasized the oftentimes communal nature of religious belief and practice. The majority affirmed that freedom of religion under s 2(a) "has both an individual and a collective dimension"[7] and that "[t]he individual and collective aspects of freedom of religion are indissolubly intertwined."[8] Accordingly, "[r]eligious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."[9]

10. Importantly, in recognizing that s 2(a) must account for the "socially embedded nature of religious belief" and its "communal" manifestations, the Supreme Court implicitly acknowledged that religious beliefs exist at two levels: the individual and the group. There can be no communal manifestation of belief by a single individual.

11. Despite the recognition of the oftentimes collective nature of religious belief, the focus of the s 2(a) analysis nonetheless remains on the individual: whether the claimant in question has a sincerely held religious belief, with which state action interferes. The focus on individual

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[5] Chambers Decision, *supra* at para 153, emphasis added.
[6] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 182 [*Hutterian Brethren*]. See also Justice Abella's comments at para 130, also in dissent, but again, not on this point.
[7] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 613 at para 92 [*Loyola*].
[8] *Loyola, supra* at para 94.
[9] *Loyola, supra* at para 60.

beliefs, without accounting for group beliefs, can produce tension in the s 2(a) analysis. This tension can be illustrated through a simple example.

12. Imagine a situation in which an individual believes they are compelled by their religion to wear a specific article of clothing during a religious activity. The belief that the article of clothing is necessary is shared by the larger religious group the individual belongs to, and other members of their religious community will bar anyone who does not wear it from participating. In this example, the belief that the wearing of the article of clothing is necessary is held at both the level of the individual and at the level of the group. If there was state action that prohibited the wearing of this article of clothing, it appears obvious that a court would find a breach of s 2(a): there exists (1) a sincerely held religious belief, (2) with which state action interfered.

13. Now imagine the same situation as above, except in this example the individual does not believe that their religion actually requires the wearing of the specific article of clothing. However, the group to which this individual belongs (and whose beliefs the individual otherwise sincerely shares) believes that the article of clothing is necessary, and anyone not wearing it will not be permitted to participate in the group religious activity. Accordingly, despite lacking the subjective belief that the article of clothing is necessary, the individual wears it, so as to continue participating in the group religious activity. In other words, the individual is partaking in the communal manifestation of the religious belief, although the individual does not share the group belief.

14. In this second scenario, the mismatch between the two beliefs results in the group-level belief subordinating the individual-level belief: it effectively does not matter what the individual believes, because the ability for the individual to participate in the religious activity is dependent on complying with the group belief. It is a prime example of the intertwined nature of the individual and collective aspects of the practice of religion.

15. It is unclear whether state action which prohibits the individual from wearing the article of clothing would breach s 2(a) in the second scenario. The individual lacks the sincerely held religious belief that they must wear the article of clothing to participate in the religious activity. A court adopting the individual-level focus of s 2(a) would likely find that the first branch of the s

2(a) test was not met. Moreover, it is not state action that would directly prevent the individual from taking part in the group religious activity; instead, members of the larger religious community would bar the individual's participation based on the group belief. In both examples, however, the impact on the individual is the same: the individual cannot participate in a religious activity in which they have a sincerely held religious belief. As courts recognize, the ability of an individual to belong to, and worship within, their larger religious community is important.[10] The loss of the ability to participate in one's religious community can have significant negative effects on the individual. It would only be if a court accounted for collectively held beliefs, and the interaction of those beliefs with individually held beliefs, that would cause a court to find a breach of s 2(a).

16. While the above examples are hypothetical, BCCLA emphasizes that the issue of group-level beliefs is engaged in the matter on appeal. Mr. Wirring tendered affidavit evidence from both himself and from Dr. Harjeet Grewal, a professor whose area of expertise includes the Sikh faith. Both attested that Mr. Wirring would be excommunicated from his religious group if he were to swear the oath at issue in this appeal.[11] This appeal accordingly illustrates the tension that can exist between group-level beliefs and state action. The BCCLA emphasizes that it is not taking a position on the merits of this appeal, nor what (if anything) the Court should do with the affidavit evidence. The BCCLA simply wishes to show that the concept of group-level belief features in this appeal.

17. A court can resolve the tension between the individual and collective dimensions of religious practice and belief by accounting for group-level beliefs within the s 2(a) analysis. The current s 2(a) test can be readily adapted to do so. In appropriate cases, courts would simply need to consider whether (in addition to a sincerely held individual belief) there exists a sincerely held group belief under the first step of the s 2(a) analysis. In the second stage, courts would

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[10] See, for example, the comments in *Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59 at para 89 and *Bains v Khalsa Diwan Society of Abbotsford*, 2020 BCSC 181 at para 42 (var'd in *Bains v Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159, but affirmed regarding the potential importance of membership in a religious organization, see paras 35-36).

[11] Chambers Decision, *supra* at para 72 and Appellant's Extracts of Key Evidence at A29 [Affidavit of Prabjot Singh Wirring, sworn July 22, 2022 at para 6].

need to consider whether state conduct interferes with the ability of the individual to act in accordance with their individual-level beliefs because of how the impugned state conduct interacts with a religious group's group-level beliefs.

18. A consideration of group-level beliefs could raise questions about who would be permitted to give evidence on behalf of the group. BCCLA suggests that such evidence could be given by faith leaders or religious experts who are well placed to speak to beliefs held at a level beyond the individual claimant. In any event, potential evidentiary difficulties should not foreclose individuals from bringing evidence about these collective beliefs where needed to support their claims. Additionally, an inquiry into community-held beliefs will not transform the s 2(a) analysis into an objective test about whether a religion requires a certain religious activity or belief. The analysis BCCLA puts forward remains focused on subjective beliefs. However, rather than ask solely about the subjective beliefs of only the individual, it considers the ability of an individual to manifest those beliefs given the subjective beliefs of their religious community. Moreover, a court will only need to consider such group-level beliefs where a claimant specifically raises them and the group-level beliefs impact the ability of the individual to practice their own beliefs.

ii. Courts must account for section 27 in the section 2(a) analysis

19. Freedom of religion claims can touch on issues of multiculturalism,[12] and when they do, courts must construe the claim generously to further s 27's goal of preserving and enhancing multiculturalism. BCCLA submits that s 27 of the *Charter* must form part of the considerations courts account for when assessing s 2(a) claims that allege state action that has the effect of either (1) preventing the minority group from participating fully in Canadian society, or (2) weakening the bonds that unites the minority group. In such cases, courts will need to construe

[12] "Multiculturalism" in this factum refers to the notion that Canadian society is comprised of a plethora of minority cultural groups, including racial and religious cultural groups, whose beliefs and practices may diverge from the majority of Canadians. As the arguments in this section elaborate on, it is the BCCLA's position that s 27 directs courts to interpret *Charter* rights in a manner that protects these cultural groups, as well as to enhance these groups' role in the larger Canadian society.

the overall s 2(a) claim more broadly than they may otherwise, with an eye to either removing the alleged barrier to the minority group's participation in broader Canadian society or safeguarding the minority group's cultural interests.

20. Section 27 of the *Charter* directs:

> This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

21. The law around s 27 is underdeveloped. The Supreme Court relied on s 27 in the early days of *Charter* litigation as an interpretive tool to help define and set the overall scope of *Charter* rights, including the fundamental freedoms set out in s 2. For example, in *Edwards Books,* the Supreme Court relied on s 27 as part of its rationale to find that s 2(a) protects against indirect (as well as direct) state-imposed burdens on religious practices.[13] In *Keegstra*, the Supreme Court refused to accede to arguments that s 27 worked to exclude hate speech from being protected speech under s 2(b) of the *Charter*. The Court did, however, find it was appropriate to take s 27 and the need to preserve and enhance multiculturalism in its s 1 analysis.[14] Additionally, courts established that s 27 does not itself create any substantive rights,[15] but instead impacts how *Charter* rights are construed. Beyond these general points, however, the precise interpretive work s 27 performs remains uncertain.

22. It is the BCCLA's position that s 27 has an active (albeit minor) role to play in appropriate s 2(a) claims:[16] where a claimant alleges that there is a state-imposed barrier that prevents a minority group (or members of that minority group) from participating fully in Canadian society,

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[13] *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC) at para 96, [1986] 2 SCR 713 [*Edwards Books*].
[14] *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 at 733-734 [*Keegstra*].
[15] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship) (C.A.)*, 1994 CanLII 3453 (FCA), [1994] 2 FC 406.
[16] The BCCLA notes that s 27 may well be expected to apply more broadly than just to s 2(a). However, the BCCLA's submissions are restricted specifically to s 2(a), per its intervention application.

s 27 requires a court to interpret the right to freedom of religion broadly, with an eye to removing that barrier.

23. The BCCLA's argument on the role that s 27 plays flows from two basic principles of statutory interpretation.

24. First, s 27 must mean something. It is trite law that every word in an enactment is presumed to have meaning. By including s 27 in the *Charter*, the drafters intended the section to do some manner of interpretive work. Moreover, s 27 is contained in the *Charter*, a foundational document of Canada's legal order. The section is not simply gloss or a rhetorical flourish.

25. Second, s 27 must have a role to play in some, but not all, *Charter* cases. Obviously, not every *Charter* claim will raise issues relating to the "preservation and enhancement of the multicultural heritage of Canadians." For example, it is difficult to see how such issues would arise in a s 15 claim alleging age-based discrimination. Similarly, one would not expect s 27 considerations to come into play in a s 2(a) case involving individualized religious beliefs that are not shared by a broader faith community: for a belief to be "cultural" in nature, it would necessarily need to be shared across the larger group. In these examples, s 27 has no work to do. If s 27 does not apply in every case, it necessarily follows that the effect of s 27 will only arise in certain cases.

26. The question is then what impact s 27 will have in cases where it does apply. Reference to the wording of the provision explains the intended effect. Again, the text of s 27 directs that the "*Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Simply given its plain wording, s 27 is meant to apply where a claim engages multiculturalism considerations, and requires a court to prioritize protecting and enhancing the multicultural nature of Canadian society, i.e., safeguarding minority groups' interests, as well as working to remove state-imposed barriers to these groups' full participation in Canadian society.

27. Where an individual member of a minority group alleges that state action violates their religious freedoms in a manner that prevents them from participating fully in society, s 27

compels the Court to construe the claim (and evidence brought in support of the claim) more broadly and favourably than the Court may otherwise. The exact impact of s 27 in a given claim will vary based on the nature of the claim and the evidence produced. BCCLA emphasizes that s 27 will not work to rewrite the test for finding a *Charter* breach under s 2(a), nor operate to save an otherwise weak claim. In close cases, however, s 27 may work to tip the scales in favour of a claimant, so as to preserve and enhance multiculturalism in Canada.

28. Guidance for how s 27 should be understood to apply is seen in *Prus-Czarnecka*,[17] a case from the Alberta Court of Queen's Bench (as it was then). The Court there found that s 27, and the general requirement to preserve and protect multiculturalism, created a requirement to interpret the claim at issue generously. The claimants in *Prus-Czarnecka* wanted to name their daughter according to the Polish naming tradition, in which the spelling of the last name depends on the gender of the child. The Director of Vital Statistics refused to register the child's name on the basis that the name was not shared with either parent, a requirement under the legislation. The claimants applied under the relevant legislation for a court order requiring the proposed name be registered. Among the evidence the claimants provided to the Director (and then relied on in Court) was evidence relating to how naming worked in the Polish tradition.

29. The Court granted the application, ordering that the child's name be registered. Notably, the Court found that the Director should have been willing to register the name without a court order because, while the proposed name was technically not shared with either parent, there was a need to interpret the relevant legislation in light of s 27 and multiculturalism considerations. When s 27 was taken into account, it was evident that the proposed name met the statutory requirements. As the Court stated, "[E]ven if the evidence on language presented here left any room for doubt that the name requested by the parents is the same name as the husband's name, that doubt should have been resolved by applying the multicultural sensitivity constitutionalized by Parliament."[18]

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[17] *Prus-Czarnecka v. Alberta*, 2003 ABQB 698 [*Prus-Czarnecka*].
[18] *Prus-Czarnecka, supra* at para 30.

30. *Prus-Czarnecka* thus presents one example of the manner in which s 27 should apply: in appropriate cases, it requires courts to take a more expansive and permissive view of the evidence than they would otherwise. Again, the BCCLA emphasizes that the manner in which s 27 will apply will be context-specific and would not be limited solely to evidentiary matters. In any event, s 27 must be given some effect in appropriate cases, and the BCCLA's proposed interpretation gives effect to the provision's requirement of preserving and enhancing multiculturalism in Canada.

PART V: RELIEF SOUGHT

31. For the above reasons, the BCCLA submits that the Court should find that (1) freedom of religion under s 2(a) has a collective dimension, which must be accounted for in appropriate cases, and (2) s 27 of the *Charter* has an active role to play in appropriate cases.

32. BCCLA does not seek costs and asks that costs not be awarded against it.

SUBMITTED THIS 2nd DAY OF JULY, 2024.

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LIST OF AUTHORITIES

AUTHORITY
Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37
Bains v Khalsa Diwan Society of Abbotsford, 2020 BCSC 181
Bains v Khalsa Diwan Society of Abbotsford, 2021 BCCA 159
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54
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Roach v. Canada (Minister of State for Multiculturalism and Citizenship) (C.A.), 1994 CanLII 3453 (FCA), [1994] 2 FC 406
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